OPEN DIALOG

REPORT

International expertise on draft law of Ukraine "On Purification of Government"

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1. Introduction

Lustration otherwise called vetting is one of the forms of "transitional justice"[1]. When one, especially totalitarian or corrupted, regime falls down via revolutionary process new authorities face the challenge of securing territorial integrity, possible disloyalty of the public service to the state and crimes of the past.

Lustration -vetting process - is aimed at screening public employees or candidates for public employment to determine if their prior professional conduct warrants their exclusion from public service. "Exclusion" here includes both terminating employment and restricting access to employment either permanently or for a determined period of time

The set of opinions, recommendations and legal expertise presented in this publication was prepared upon request of the Open Dialog Foundation by the team of lawyers and experts from institutions that are performing actively or performed verification process of the state authorities in other European states in the past, as well as those whose scientific focus contains vetting and verification problematics.

These recommendations were directly given to the Lustration Committee of Mr Yehor Sobolev with whom the Open Dialog Foundation cooperates in this regard.

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.

Recommendations from experts have been taken into account in redrafting the proposal that resulted in the updated bill.

Scope of review

This set of opinions analyses two draft laws of Ukraine on "Purification of Government" presented by the Lustration Committee of Ukraine[2] and another one with code „4359a"[3].

This work was based on unofficial translations ordered on request of the Open Dialog Foundation. The Open Dialog Foundation holds no prejudice towards opinions mentioned in the following document having in regard that they may be subjected to change in future.

Executive Summary

Expert community welcomes the aim of the Law on Purification of Government to secure transparent and honest conditions for appointing public officials and blocking access to rule of those who have been involved in corruption or other unlawful practices during the regime of Viktor Yanukovych. At the same time though experts commonly say that this law needs improvements especially in respect of procedural transparency and standards of the international law that apply to lustration.

[1] Term used in legal sciences and international relations to describe processes applied to deal with the past by the states going through the process of revolutionary political transformation.

[2] http://en.odfoundation.eu/i/fmfiles/pdf/yd1306144-proekt-12-06-14-eng-done.pdf

[3] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51795

Therefore the first part of this publication includes the analysis of the European Court of Human Rights Jurisprudence regarding lustration procedures being adopted by the states going through system transition. The second part combines opinions and analysis on the laws mentioned above.

Overall regarding the first draft law experts pinpointed the following issues:

- The law did not assure individual responsibility for committed crimes and violations,
- The law did not guarantee an appeal from the negative verification verdict to the court of law,
- The procedural aspect was insufficiently defined,
- It is unclear who will verify members of verification commissions,
- The verification timeframe is very short.

Taking into consideration expertise delivered by members of the working group combined of lawyers and representatives of the civil society with inclusion of Open Dialog Foundation representative who presented collected remarks from the foreign experts the law has been updated in several sections. The draft law 4359a voted in the First Vote by the Supreme Council of Ukraine contained following improvements:

- Appeal to the administrative court was granted,
- The controversial polygraph method of verification was cancelled.

However still the unclear procedural aspect remained and specific corrections have been only taken into account in the working format of the individual amendments by deputies who initiated the process. The procedure of lustration of public officials has been clarified to great extent but it remains unclear who and how is going to perform the check-up on cases of collaboration or employment at former security services of USSR.

Since March there has been at least 6 different lustration initiatives. Four draft laws were registered in Verhovna Rada by April 9, 2014: # 4570 by leader of Svoboda Oleh Tiagnybok; # 4570-1 by Volodymyr Ariev; #4570-2 by Valeriy Patzkan, chief of the Parliamentary Commission on Human Rights; and # 4570-3 by Roman Chernega from UDAR. All the introduced bills varied in terms of adopted strategies but all were controversial and not free from the technical flaws. On Aril 9 deputies decided not to include in agenda, reject and withdraw from consideration all the introduced bills[4].

In February 2014 Yehor Sobolev, a leading Ukrainian opposition journalist and activist was selected to be the head of the Lustration Committee under the Cabinet of Ministers. The tasks of Lustration Committee aimed to review the steps undertaken by committee towards its initial goals, as well as critiques of recently introduced “lustration” bills. The work of the Committee focused on creating one comprehensive bill proposal that would unify all political actors.

Despite questionable technical aspects and sections that are subject of concern of the experts, political consensus of deputies who had previously clashing visions, over one project, is nevertheless a success of Ukraine.

[4] See more in: http://voxukraine.blogspot.com/2014/04/lustration-in-ukraine-is-work-is-ever.html opened 27th August 2014

2. Vetting process in the scope of European Law

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Council of Europe standards on lustration – including jurisprudence of the European Court of Human Rights – and its implications

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Author of numerous publications regarding lustration process and access to the archives of the state security service.

Introduction

Beyond a reasonable doubt each state in a period of transition is authorised to take necessary legal steps to protect and secure the ongoing process. At the beginning of the process of transformation the state has a unique chance to start the lustration process in the best moment. In fact, the earlier lustration is started, the better results could be achieved by the state.

In Poland serious problems with implementation of lustration instruments appeared after the collapse of the communist system in 1989. The Lustration process was started practically in 1999, i.e. almost 10 years after the first partially free Parliamentary Elections that took place on 4 June 1989. The first lustration Act was adopted on 11 April 1997[5].

Nevertheless, whenever the state decides to implement the lustration instruments – or even wider, transition instruments – it must remember about the state`s obligations resulting from the fundamental human rights and freedoms.

Ukraine is the Member state of the Council of Europe and ratified the European Convention on Human Rights in 1997. When the state starts works aimed to create instruments of settlements with the past, it should be conscious of obligations resulting from the Membership of the Council of Europe.

The European Court of Human Rights has issued a series of judgments regarding the lustration instruments. Important part of them referred to the Polish lustration instruments. The Court has noted different attitudes and different solutions implemented by the Member states, indicating that there is no uniform approach among High Contracting Parties as to the measures to dismantle

[5] The Act of 11 April 1997 on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons exercising public functions (*ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne*).

the heritage of former communist totalitarian systems[6]. Nevertheless, the Court has never created and presented a list of requirements and obligations imposed on the state at the area of the lustration instruments. Judgments of the European Court of Human Rights do not give full, closed and systematic guidelines how to deal with the lustration. Judgements refer to specific instruments adopted in different countries and only on this occasion they give some general comments on rights and obligations of the state.

Resolutions of the Parliamentary Assembly of the Council of Europe

The basic and the most important rules and guidelines how to deal with the transition process with respect for fundamental human rights declared in the European Convention on Human Rights[7] are presented on the Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe on Measures to dismantle the heritage of former communist totalitarian systems[8] The Resolution was adopted by the Assembly on 27 June 1996.

The Resolution refers to the issue of dealing with the heritage of the communist past by the countries of the Central and Eastern Europe at the end of the 20th Century. However, this document provides with a set of a universal rules and directions, that are found to be up to date from the perspective of other countries in the transition period which have to deal with a similar issues and problems. In consequence, it is highly recommended to analyse and rely on guidelines provided by the Resolution during the process of creating the own way of dealing with the transition instruments.

The Resolution is an act which formally does not have a legally binding character. As a soft law act, it presents only some good practices, directions and guidelines. Nonetheless, on several occasions the European Court of Human Rights in its judgments referred to the Resolution when examining cases regarding lustration instruments[9]. The Resolution recommends in § 15 to verify whether domestic laws, regulations and procedures comply with the principles contained in the Resolution, and revise them, if necessary, to avoid complaints lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights.

State in the period of transition, while relying on the general guidelines expressed in the Resolution, has to find its own way of dealing with the past. Solutions adopted in other countries may constitute inspiration, but the most important idea – expressed in the Resolution – is that the key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge. This general rule applies to all type of transitional instruments.

6

Decision on admissibility of 30 May 2006 in the case of Matyjek v. Poland (*Application no. 38184/03*).

7

Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950 in Rome; also called European Convention on Human Rights.

8

http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=16507&Language=EN

9

e.g.: judgment of 30 March 2010 in the case of Petrenco v. Moldova (*Application no. 20928/05*); judgment of 14 February 2006 in the case of Turek v. Slovakia (*Application no. 57986/00*), judgment of 17 July 2007 in the case of Bobek v. Poland (*Application no. 68761/01*); judgment of 12 June 2014 in the case of Berger-Krall and Others v. Slovenia (*Application no. 14717/04*).

The Resolution provides with the following more detailed rudimental rules and guidelines regarding dismantling heritage of the previous regime in a democratic state based on the rule of law:

A democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state.

A democratic state based on the rule of law cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled.

A democratic state based on the rule of law has sufficient means at its disposal, to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, satisfy the desire for revenge instead of justice.

A democratic state based on the rule of law must respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves.

A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian threat, since it has at its disposal means which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

Within framework of transition instruments there are at least two important areas: criminal liability and lustration instruments. They should be implemented and executed simultaneously and do not concur or exclude each other.

At the area of a **criminal liability**, the Resolution recommends that criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended. Passing and applying retroactive criminal laws is, however, not permitted. According to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. On the same time, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

On the other hand, the Resolution indicates, that the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Such recommendation corresponds with Article 7 of the Convention, which states that its § 1 shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

The Resolution reminds also, that where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt. In consequence, criminally responsible is a person, that gives orders, as well as a person that follow and carry out orders.

As to **the lustration instruments**, the Resolution indicates that concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with above presented rules, but who nonetheless held high positions in the former totalitarian communist regimes and supported them, some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power, if they cannot be trusted to exercise it in

compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.

Some more detailed suggestions on lustration instruments were presented in the Doc. 7568[10], that had been prepared before the Resolution were drafted. – e.g. that lustration should be focused on threats to fundamental human rights and the democratisation process; its aim is to protect the newly-emerged democracy.

The Resolution stresses that, in general, lustration or even decommunisation measures can be compatible with a democratic state under the rule of law, if several criteria are met:

- guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws,
- the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed at least,
- 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.

The Resolution strongly emphasises that revenge must never be a goal of such measures, nor any political or social misuse of the resulting lustration process should be allowed. Lustration laws and similar administrative measures should be focused on threats to fundamental human rights and the democratisation process.

From perspective of human rights, the aim of lustration measure justifies possibility of implementation restrictions in the right to protect the private life or the right to access to the public offices, including even the right to be elected (political rights). Nevertheless, restrictions have to be proportional to the aims of lustration instruments. On the other hand, there are never grounds for restrictions in procedural rights, e.g. the right to a court, the right to a fair trial (based on the rule of equality of arms), the right to defence and the presumption of innocence.

The Resolution refers also to **other measures of transitional process**.

The Resolution recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of “crimes” which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

The Resolution welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advised all countries concerned to enable every affected person to examine, upon his/her request, the files concerning them collected by the former secret services.

Furthermore, the Resolution recommended that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, those pension rights should be reduced to the ordinary level.

10

Report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembley of 3 June 1996 on Measures to dismantle the heritage of former communist totalitarian systems (Doc. 7568); http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=7506&Language=en#_ftn1

The Parliamentary Assembly of the Council of Europe in 2006 adopted one more resolution regarding the heritage of communist past. The Parliamentary Assembly Resolution 1481 (2006) on Need for international condemnation of crimes of totalitarian communist regimes, adopted on 25 January 2006[11] is rather of an ideological character and it does not provide with more detailed guidelines.

The European Court of Human Rights' jurisprudence on obligations imposed on states that take decision to implement lustration instruments.

The European Court of Human Rights noticed in its jurisprudence, that there is no uniform approach among Member States of the Council of Europe as to the measures to dismantle the heritage of former communist totalitarian systems[12]. In many post-communist countries restrictions have been imposed with a view to screening the employment of former security agents or active collaborators in the former regimes. In Lithuania, persons who have been given the statutory status of "former KGB officers" have been precluded from employment in the public sector and from some private-sector jobs. In Latvia the Statutory Acts prohibit the employment of persons who worked for or with the Soviet security services. In Slovakia persons who collaborated with the Czechoslovak communist State Security Agency and were issued with a negative security clearance could be prohibited from exercising some public functions for a certain period of time.

The Court noted, that in Poland the purpose of lustration proceedings is not to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State, since admitting to such collaboration – in so-called lustration declaration – does not entail any negative effects. The purpose is to punish those who have failed to comply with the obligation to disclose to the public their past collaboration with those services.

The Polish Lustration Act introduced an obligation to inform the general public, in the form of a lustration declaration, of any collaboration with, as well as work or service for, the secret services between 1944 and 1990. Among the most important reasons for such regulation the Polish Constitutional Court pointed to transparency of public life and information about the past of those who carry out public functions.

The Lustration Act provides sanctions, if the lustration court finds that the submitted declaration was false. Having been considered a "lustration liar" entails dismissal from public functions exercised by lustrated person and prevents the person concerned from applying for the posts in question for a period of 10 years (presently it is a period of 3 to 10 years). The public functions, which the person who has lied in the lustration declaration cannot exercise, include legal professions such as those of barrister, judge, prosecutor and public servant and political ones such as those of Member of Parliament or President of the Republic of Poland.

As it was already mentioned above, lustration gives the state legal possibility to implement restrictions on exercising the right to protect the private life (declared by Article 8 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms) or the right to access to the public offices, including even the right to be elected (political rights). Nevertheless, the restrictions have to be proportional to the aims of lustration instruments. According to Article 8 of the Convention, everyone has the right to respect for his private life. Section 2 of Article 8 of the

11 http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/Eres1481.htm

12 Decision of the European Court of Human Rights of 30 May 2006 on the admissibility of application in the case of Matyjek v. Poland (*Application no. 38184/03*).

Convention provides, that the right to respect for private life can be restricted exceptionally, in accordance with the law if it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The issue of proportionality was emphasised by the Court especially in the Lithuanian cases[13].

The Court stated, that the applicants' dismissal from their jobs as private-sector lawyers and their current employment restrictions pursuant to the Act constituted a statutory distinction of their status on the basis of their KGB past, affecting directly their right to respect for private life. Further on, the Court emphasised that the State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service. Moreover, the very belated nature of the Act, imposing the impugned employment restrictions on the applicants a decade after the Lithuanian independence had been re-established and the applicants' KGB employment had been terminated, counts strongly in favour of a finding that the application of the Act vis-à-vis the applicants amounted to a discriminatory measure.

The Court came to the conclusion, that the respondent Government have thus failed to disprove that the applicants' inability to pursue their former professions as, respectively, a lawyer in a private telecommunications company and barrister, and their continuing inability to find private-sector employment on the basis of their "former KGB officer" status under the Act, constitutes a disproportionate and thus discriminatory measure, even having regard to the legitimacy of the aims sought after.

On the other hand, on each occasion the Court indicated, that – when implementing lustration measures – there are no grounds for restrictions in procedural rights toward persons subjected to the lustration instruments.

Article 6 of the Convention – declaring the right to a fair trial – states that in the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

According to Article 6 § 2 and § 3 of the Convention, in the proceedings of a criminal nature, everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Such person must be provided also with the following minimum rights: (a) to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her; (b) to have adequate time and facilities for the preparation of his/her defence; (c) to defend himself/herself in person or through legal assistance of his/her own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her; (e) to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.

13

Judgement of 27 July 2004 in the case of Sidabras and Džiautas v. Lithuania (*Applications nos. 55480/00 and 59330/00*); judgment of 7 April 2005 in the case of Rainys and Gasparavičius v. Lithuania (*Applications nos. 70665/01 and 74345/01*).

In the Polish cases[14], the Court recognised that at the end of the 1990s, as well as at the beginning of the 21st Century, the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, if a State decides to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures.

The Court held that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes[15]. The reason for this is that lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely reduced.

The Court accepted that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. However, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case since what is accepted as an exception must not become a norm. The Court considered that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as secret and the decision to maintain the confidentiality was left within the powers of the current secret services, created a situation in which the lustrated person's position was put at a clear disadvantage.

The Court recalls in the Polish lustration cases – where criminal trial standards established in Article 6 § 3 of the Convention are applied – that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

The Court emphasizes additionally that also within framework of the lustration proceedings requirement of "reasonable time" has to be fulfilled. When the length of the proceedings is excessive, Article 6 § 1 of the Convention is violated in consequence. In the case of Turek v. Slovakia, the Court found proceedings lasting 7 years to be excessive length.

As to a procedural requirements, it has to be emphasized additionally that the judicial body authorized to examine the lustration cases has to fulfil the requirements of an independent and impartial court as well as being established by law.

Conclusions

State in a period of transition is authorized and even should implement the lustration measures, as well as prosecute against perpetrators who committed acts that constitute crimes. However, if a

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Judgment of 24 April 2007 in the case of Matyjek v. Poland (*Application no. 38184/03*) and the following ones.

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The same opinion the Court expressed earlier in the judgment of 14 February 2006 in the case of Turek v. Slovakia (*Application no. 57986/00*).

state decides to adopt lustration instruments it has to provide with procedural safeguards persons subjected to such measures. At the same time state should construct them in a way proportional to their aims. The restrictions in exercising human rights imposed by the lustration instruments have to be proportional to their aims.

A democratic state based on the rule of law must apply the procedural means of such a state when dismantling the heritage of the previous regime. Such state must at the same time respect human rights and fundamental freedoms.

3. Expert commentary on the first draft law of Ukraine "On Purification of government" presented to general public by Lustration Committee of Yehor Sobolev on 12th June 2014 and to the law of Ukraine 4359a voted in the first vote by Supreme Council of Ukraine on 14th August 2014.

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Short commentary on draft law of Ukraine "On Purification of government"

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The following commentary is only a brief analysis indicating the most important issues in aythor's opinion.

- Article 10. Conclusion on audit results

Auditees shall be entitled to review the conclusion of the audit results and, in the event of disagreement with the audit results, may submit their concerns in writing to the specified agencies.

In the event of commentary from the auditee regarding the audit results, the agencies (departments) which carried out the special audit shall issue a response in writing to the auditee within ten days of receipt of the commentary, a copy of which was received by the auditing agency. - It is not clear , how to appeal decisions of lustration commission.

Article 129 of the Constitution of Ukraine provides for the right of every citizen to appeal and cassation.

- Article 11. Consequences of Audit

A finding on the audit results of judges of courts of general jurisdiction containing information of the auditees which does not meet the requirements established herein for continued presence in the position shall be sent by the auditing agency to the High Council of Justice and High Qualification Commission of Judges of Ukraine within 3 days of its signing by the director of the auditing agency. The High Council of Justice and High Qualification Commission of Judges of Ukraine shall consider the report within a three-month period.

The creation of the High Council of Justice is established by the Constitution (article 131-3). It consists of twenty members. It is formed by the Parliament of Ukraine, President of Ukraine, congress of judges of Ukraine, congress of lawyers of Ukraine, congress of representatives of higher educational and scientific establishments. Each of them appoints three members of the High Council of Justice. So, there are only three judges out of the 20 members of the High Council of Justice, who are elected by the judges. Thus, it violates the European standard: at least half of that organ should be composed of judges who were elected by the judges in order to be considered as independent - case "Alexander Volkov" c. Ukraine (January 9, 2013 European Court of Human Rights).

In order to approach European standards in terms of the current Constitution, in 2010, the legislator has provided that the President, Parliament, lawyers, prosecutors, academics appoint the part of "their" members of the judges. But the European Court of Human Rights has recognized these changes as insufficient, because there are not judges who are elected by the judges.

Thus, the order of dismissal of a judge does not correspond to European standards (the European Court of Human Rights and the conclusions of the Venice Commission).

- Article 16. Grounds for failure of audit

In accordance with the article 24 of the Constitution of Ukraine, "citizens have equal constitutional rights and freedoms and are equal before the law. It can not be privileges or limitations after the signs of race, color of skin, political, religious and other persuasions, sex, ethnic and social origin, property state, place of residence, linguistic or other characteristics."

Also according to the article 14 of the European Convention on Human Rights : "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Here, the tenure of positions listed in this article could show signs of discrimination. A qualifying sign of lustration (in this case "dismissal") is the mere existence of notation in the personal documents of a worker (workbook) that the person held certain position at one time or another. It is without proof of their guilt. Such dismissal is even against the article 7 of the European Convention on Human Rights - "No punishment without law" - which states that all persons are equal before the law and all are entitled to equal protection against any discrimination and against any incitement to such discrimination.

So, this article might not correspond to the Constitution of Ukraine and to international human rights standards. A dismissal is not like the kind of individual responsibility for a particular fault, but because of mistrust. Lustration violates the principles of civil rights: the right to profession, the right to declaration of will, the right to non-discrimination.

Opinion on the draft law of Ukraine "On Purging State Public Authorities"

***Dr Pavel Žáček**, Czech Republic*

About the Author:

A Czech academic and government official. He was the first Director (2008–2010) of the Institute for the Study of Totalitarian Regimes, the Czech government agency and research institute tasked with investigation of the crimes of the Communist regime of Czechoslovakia that was declared to be criminal in 1993. He holds an M.A. (1992) and a Ph.D. (2001) in Mass Communication from Charles University of Prague. He worked for the Office for the Documentation and the Investigation of the Crimes of Communism from 1993, where he was appointed Deputy Director in 1998. From 1999 to 2006, he was Senior Researcher at the Institute of Contemporary History, Academy of Sciences of the Czech Republic.

The draft Law "On Purification of government" 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.

Comments on the Draft Law of Ukraine "On Purification of Governement"

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The Open Dialog Foundation asked me for my opinion on the bill "On Purification of Government" 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.

Comments on draft law of Ukraine “On Purging State Public Authorities”

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It seems that the aim of this law is not lustration/vetting as such but a bill which aims to perform complete cleansing of the contemporary state administration which is understandable in a given situation. I can gladly say that I am not aware of any other equivalent of any similar law in any other post-communist state which brings a lot of respect to this project. The scope of suggested verification is very impressive, but we should keep in mind that it is a project and question remains what changes will be brought by the deputies or wether this will be accepted at all [16].

To comment on particular articles or suggestions from „outside” won't make much sense without comprehensive knowledge of domestic criminal and administrative code – and I think it is not needed cause I believe that Ukraine has human capacity of lawyers who would be able to remove any possible discrepancies.

After a very thorough analysis of the project I must say that timeframe of verification seems to me rather short and besides not in each case they have been precisely defined – although this is what deputies can nevertheless amend.

In Czech Republic (and before that Czechoslovakia) vetting decisions have been subjected to court proceedings, due that there have been lots of problems: courts rely on oral statements therefore if a former secret operative of former communist State Security Service („Státní bezpečnost”, „STB”) calls his ex „managing authorities” to state verbally in the court of law that he was not cooperating with them, the judges usually base their decisions more on such statements than on any material written evidence from communist times.

In this bill proposal I did not find precise information as to who verifies decisions of verification bodies, in other words wether a person who is eliminated due to verification process has got the chance to protect oneself. I am afraid that the parliament where not every deputy favors verification, will expect that the verification decisions will be subjected to appeal (probably to an independent court). And here is where is the trap – primary because oral statements precedent any other evidence, and secondly because judges do not specialise in these problematics and they are replaced due to generational change (except for those who would be negatively verified)

[16] Petruska Sustrova has writen these coments for the first version of the draft law before it was amended and sent to Verkhovna Rada.

hence it takes time. Maybe it is good to create extraordinary tribunal whose members would go through special training and be properly verified to be able to understand the cases they have to decide about properly.

Participation of the society in the verification process I consider as a plus. In Czech Republic the society is informed about lustration conflicts only via media and I am sorry to state that very often this information is inaccurate to say the least and represents private views of a journalist or his editorial board. It is understandable but has poor consequences to popular understanding of the issues. Public access to verification process is a very strong side of this proposal. It would be however good to check what the Ukrainian law says about protection of personal data (however consent of a verified person is enough to my understanding).

And during the stage of preparations of this bill it would be already good to differentiate two different things: one is so-called „big lustration" to be done right after implementation of this proposal, another one is a systematic work during years after it's implementation.

I would also suggest more narrow definition of an „advisor" in the state administration. In Czech Republic plenty of ministers and other top government officials employ them. They do not have precisely defined role or function. Due that when verification was negative and the minister had to cancel the contract with his vice-minister he renamed him as an advisor and it was a very popular practise. It would be good to check if the Ukrainian administration has got any such not precisely defined positions in its scope. If it does not exist now, it is possible it will be created right after verification and it does not have to be named precisely „advisor".

Generally though I wish a lot of success to Ukrainian friends – moreover I wish them not to give up if this bill won't be accepted in the current, very radical version. There is not a bill that can cahnge habits, at least not from the very start, but each success, even partial, is very meaningful. And I remind you again – verification has to be supported by big information campaign in the media to which good argumentation has to be prepared- without support of the general public the bill won't be ever implemented for real and people will try to avoid it's requirements.

Another step which may seem not very meaningful to our colleagues is the fast and complete opening of the archives and wide discussion about the past. Without understanding of the past the society won't get any further which I am sure Institute of National remembrance knows very well.

The opinion on the draft Law 'On Purification of Government' presented on 12 June, 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 organizational 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 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 defense, the right to confront and 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 familiarized with the charges brought against him and respond to them. An impartial process must be conducted by two separates 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 unfavorable 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 Purification of Government'.

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 OHCR 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 decentralized 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.

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 fulfills 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 organization 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 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.

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 in1998 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 emphasizes the need for applying 'lustration' laws individually, rather than collectively. Secondly, the right to defense, 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 fundaments 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 emphasizes 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 organized 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 democracy. In that worst case, the new undemocratic regime of a bigger country can also present as a danger to its weaker neighboring 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."

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

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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 offenses 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 behaviors which favor 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 favor their application. The author of this opinion is not aware of either plans or ideas President Poroshenko has about how to stabilize 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 analyze 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 organizations 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 organizations – defined in the text of the law in a manner typical of the former Eastern Bloc as

community organizations – 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 minimize 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 criminalizing 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 polarization of Ukraine's society which is already strong. Furthermore, this catalogue stigmatizes 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.

Comments on the Ukrainian Draft Law on Lustration

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The following publication was first published at the VoxUkraine and was shared with the ODF upon the courtesy of the editorial board.

VoxUkraine is an independent association of Ukrainian economists—academics and practitioners— working in Ukraine and in the West. The goals of VoxUkraine are to promote research-based policy analysis and commentary on economic developments in Ukraine, to formulate a systemic approach to reforms, to provide high-quality discussion platforms, and to integrate Ukraine into the global network of economists and public policy leaders. Members of the association are at the top of the Forbes ranking of Ukrainian economists. You can find VoxUkraine here: http://voxukraine.blogspot.com.

A bad law on lustration law is worse than no law on lustration. In its present form, the Ukrainian draft law on lustration prompts many serious reservations. These reservations arise mainly because the draft law violates key provisions contained in Council of Europe recommendations relating to laws on lustration; because the draft law is in important respects altogether impractical; and because perhaps what Ukraine needs now, as reflected by all surveys of public opinion, is a significant reduction in levels of corruption rather than a post-communist style lustration.

Historical Background

In Eastern Europe, lustration laws that were adopted and that withstood constitutional challenges were passed in Czechoslovakia in 1991, in Hungary in 1994 and in Poland in 1997. Countries that adopted laws—again, all were adopted in the 1990s—that had at least some lustration effects included Albania, Bulgaria, Rumania, Latvia, Lithuania and Estonia. All of these laws had a comparatively narrow and specific focus: all focused on exposing and banning from certain public positions individuals who had been members of communist secret police services or their collaborators or informants; some of these laws also sought to ban functionaries of the Communist Party and related institutions from office.

There were multiple arguments advanced in support of laws on lustration, but perhaps the following were the three most important ones. First was the prophylactic argument, i.e., the argument that because post-communist democracies were extremely fragile and because the

public was uneasy about the covert continuation of old communist networks, lustration was a needed means of safeguarding the state and democracy by compelling candidates for office and officials to disclose their personal histories or by creating a discreet bureaucratic procedure to filter out people involved with the secret police or Communist Party structures. Second was the blackmail argument. Proponents of lustration argued that individuals with past associations with the secret police who now held important offices were open to blackmail, thus lustration was presented as a necessary means to protect public safety and democracy by safeguarding public officials against blackmail. The third argument was the public empowerment argument, i.e., the argument that by making public institutions more transparent, lustration would empower citizens and increase public confidence in the new, democratic political institutions.

All of these laws were, to a greater or lesser extent, controversial. Perhaps in part because of this controversy, the Council of Europe decided to confront lustration and to develop standards for laws that imposed lustration.

Council of Europe Standards

In 1996 the Parliamentary Assembly of the Council of Europe considered and articulated both the guiding principles that any law on lustration in a post-communist, Eastern European country should reflect as well as a set of specific "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law." Parliamentary Assembly, Doc. 7568, 3 June 1996 (hereafter "Doc. 7568").

In its Resolution 1096 adopted on 27 June 1996 titled "Resolution on measures to dismantle the heritage of former communist totalitarian systems," the Parliamentary Assembly of the Council of Europe explicitly addressed administrative measures such as lustration and stated that lustration should only be performed consistently with the guidelines set forth in its Doc. 7568. These guidelines are important enough to be quoted at some length:

"To be compatible with a state based on rule of law, lustration laws must fulfill certain requirements. Above all, the focus of lustration should be on threats to fundamental human rights and the democratization process; revenge may never be a goal of such laws, not should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumably guilty—this is the task of prosecutors using criminal law—but to protect the newly emerged democracy." Doc. 7568, p. 4.

Consistent with the notion that the aim of lustration is to protect the newly emerged, post-communist democracies, guideline (g) states that "lustration measures should preferably end no later than 31 December 1999, because the new democratic system should be consolidated by that time in all former communist totalitarian countries," and guideline (j) states that "Lustration shall be imposed only with respect to acts, employment or membership occurring from 1 January 1980 until the fall of the communist dictatorship [in the case of Ukraine, 1991]."

Although one can obviously argue that post-totalitarian transition in Ukraine has been slower than anticipated by Europe or that it was set back by unanticipated interruptions, the Council of Europe guidelines nevertheless prompt a fundamental question, is a law on lustration really the appropriate remedy for what ails Ukraine today? Even if, however, it is decided that Ukraine needs a law on lustration, then any such law must comply with Council of Europe guidelines, some of the most relevant of which are:

"(a) Lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament;

. . . .

(c) Lustration may not be used for punishment, retribution or revenge; punishment may be imposed only for past criminal activity on the basis of the regular Criminal Code and in accordance with all the procedures and safeguards of a criminal prosecution;

(d) Lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights or democracy, that is to say appointed state offices involving significant responsibility for making or executing governmental policies and practices relating to internal security, or appointed state offices where human policies and practices relating to internal security, or appointed state offices where human rights abuses may be ordered and/or perpetrated, such as law enforcement, security and intelligence services, the judiciary and the prosecutor's office;

(e) Lustration shall not apply to elective offices, unless the candidate for election so requests—voters are entitled to elect whomever they wish. . . ;

. . . .

(g) Disqualification for office based on lustration should not be longer than five years. . . ;

. . . .

(m) In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal." Doc. 7568 (emphasis supplied).

The Ukrainian Draft Law on Lustration

The Ukrainian draft law on lustration is being proposed about two decades after such laws were adopted by Czechoslovakia, Hungary and Poland. The scope of the Ukrainian draft law is very much broader than any of its neighbors. And, despite the draft law's statement in its preamble that it seeks to help "create conditions for the development of a new state government in conformity with European standards," the draft in numerous ways violates the Council of Europe's standards on lustration. The most important ways in which the two diverge may be summarized as follows.

Instead of being administered by a specifically created independent commission of distinguished citizens, as directed by the Council of Europe, the Ukrainian draft law envisions in Article 5 that lustration would be conducted by the head of each agency. This raises all kinds of concerns about possible arbitrariness, selective enforcement, cronyism etc.

The Council of Europe directs that lustration shall not apply to elected offices. The Ukrainian draft law envisions that it shall, and that this vetting will be conducted by the Central Election Commission.

The Council of Europe directs that "In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to council (assigned if the subject cannot afford to pay), to confront and challenge the evidence against him,

to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it. . . .” The Ukrainian draft law envisions little of any of these protections insofar as it envisions an administrative rather than a judicial-style proceeding.

The Council of Europe directs that disqualification from office as a result of lustration be for no longer than five years. The Ukrainian draft law envisions disqualification for ten years.

The Council of Europe directs that lustration only be used to exclude from public office individuals who pose a significant danger to democracy or human rights. The lustration laws of Poland, Czechoslovakia and Hungary were limited to trying to exclude members of the secret police and their informers and some laws also excluded members of the communist hierarchy. The Ukrainian draft law seeks to exclude a huge number of categories of individuals. These include anyone who occupied any number of offices between February 2010 and February 2014 ranging from the former president to judges, prosecutors and others; anyone who occupied any number of offices between December 2013 to February 2014, including ministers and officials in various security services; a large category of individuals ranging from law enforcement officers who helped repressed protests to “public officials and officers of local self-government bodies who, by commission or omission proposed to impede or impeded exercise by Ukrainian citizens of constitutional right to peaceful assembly. . . .” Draft law, Chapter I, Article 3, Section 3 (f); and persons who prior to August 19, 1991, were high-level Communist Party officials, were agents or officers of various Soviet-era secret police bodies or who persecuted members of the Ukrainian liberation movement during World War II or after. Article 3, Section 4(f).

The draft law is also highly impractical in several ways. Two issues stand out in particular. First, the proposed administration of the law’s lustration procedures is extraordinarily complicated, which complexity multiplies opportunities for failure and, what may be worse as far as the proponents of lustration are concerned, discreditation of any effort at lustration. As envisioned by the draft law, the heads of individual agencies will be responsible for the vetting process within their individual agencies (with additional multiple carve-outs: for example, the Central Election Commission will vet elected officials). Each head of an agency will have to submit his/her vetting plan for approval by the National Agency for Public Administration along with that of the Tax Authority. The Cabinet of Ministers will “coordinate” the activities of the agencies in the implementation of vetting procedures. The National Agency for Public Service will control and coordinate the vetting plans to be performed by the individual agencies according to the procedures specified by the Cabinet of Ministers. And, for the purpose of vetting those who perform the vetting, the National Agency for Public Administration shall establish a central vetting commission along with local vetting commissions. Draft law, Chapter II, Article 5.

Second, the draft law envisions that within three months of adoption, the Cabinet of Ministers shall draft and propose to Parliament draft laws “on judicial reform, ‘On [the] Prosecutor’s Office,’ ‘On the Security Service of Ukraine,’ ‘On Police,’ ‘On the National Bureau of Investigation,’ ‘On the Cabinet of Ministers,’ ‘On Public Service’. . . .” Draft law, Chapter VI, Section 2. A well-researched and carefully thought out proposed law that reforms the Prosecutor’s Office is under consideration by Parliament. Unless the other draft laws referenced in Chapter VI that the Cabinet of Ministers will have to have ready in three months after the passage of the law on lustration are in similar shape, what Chapter VI envisions is not only impractical but could actually be harmful. It is simply impossible to prepare good complex legislation in such a short period of time.

Conclusion

If the main focus of reform activities is corruption reduction, then what is needed is that corrupt public officials be prosecuted rather than lustrated, although the law on labor must be changed to

allow for suspension of officials against whom there exists credible evidence of corruption whether or not such officials are under criminal investigation. Furthermore, what is needed is effective anti-corruption mechanisms, both preventive and punitive; a new understanding of what professional ethics by public servants means and why it is urgently required; conflicts of interest rules; and a system of financial

declarations with criminal liability for filing false declarations (the draft law on lustration contains a declarations provision, but it is embedded in the lustration law). Last, but not least, there is information that the president will within the immediate weeks have registered in Parliament a very good draft law on the prevention of corruption that was prepared by the Ministry of Justice with significant input from Ukrainian civil society. Perhaps Parliament might be better served directing its focus in that direction.

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, with particular attention devoted to the biggest CIS countries: Russia, Kazakhstan and Ukraine.

The Foundation pursues its goals through the organisation of observation missions, including election observation and monitoring of the human rights situation in the CIS countries. Based on these activities, the Foundation creates its reports and distributes them among the institutions of the EU, the OSCE and other international organisations, foreign ministries and parliaments of EU countries, analytical centres and media.

In addition to observational and analytical activities, the Foundation is actively engaged in cooperation with members of parliaments involved in foreign affairs, human rights and relationships with the CIS countries, in order to support the process of democratisation and liberalisation of internal policies in the post-Soviet area. Significant areas of the Foundation's activities also include support programmes for political prisoners and refugees.

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