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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE LAW ON GOVERNMENT CLEANSING (LUSTRATION LAW)

OF UKRAINE

On the basis of comments by

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TABLE OF CONTENTS

I. Introduction

1. By a letter of 3 October 2014, the Chairperson of the Monitoring Committee of the Parliamentary Assembly requested the opinion of the Venice Commission on the law "On Government Cleansing" (hereinafter: "the Lustration law"; CDL-REF(2014)046).

2. A working group was set up, composed of Ms Veronika Bilkova, Mr Hubert Haenel, Ms Anne Peters, Mr George Papuashvili, Ms Hanna Suchocka and Mr Ben Vermeulen, as well as of Mr Gerhard Reissner, expert of the Human Rights Directorate of the Directorate General of Human Rights and Rule of Law (DGI).

3. The present draft opinion was discussed at the Sub-commission on fundamental rights on 11 December 2014. and was subsequently adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014).

II. Background information

4. The Lustration law was adopted by the Verkhovna Rada on 16 September 2014, and signed by President Poroshenko on 3 October 2014. Published in the Official Gazette on 15 October, it entered into force on 16 October 2014.

5. On 17 October 2014, the Ministry of Justice of Ukraine issued Regulation No. 1704 on the Unified state register of individuals to whom the Lustration law shall apply. The Regulation establishes an electronic database containing information on persons to whom the Law applies. On 28 October 2014, the database was open to public access and the Ministry of Justice published the list with the names of some 200 people who had been removed from their office based on the Law.

6. On 18 October 2014, the External Intelligence Service of Ukraine appealed to the Constitutional Court of Ukraine, requesting an official interpretation of Articles 3.1.7, 3.2.3, 4.3 and Clause 2.1 of Final and Transitional Provisions of the Law in relation to Article 1.2 of the Lustration law, as well as the interpretation of Article 19 of the Constitution of Ukraine in relation to the above provisions of the Lustration law and Article 64 of the Constitution of Ukraine.

7. On 17 November 2014, the Supreme Court of Ukraine appealed to the Constitutional Court of Ukraine, challenging the constitutionality of Articles 2.2, 3.3, 6.1 and 13.2 of the Lustration law.

8. A law relating to lustration in the judiciary (the Law on the restoration of trust in the judiciary of Ukraine[1]) was previously adopted by the Verkhovna Rada on 8 April 2014. This law, which was assessed by the Council of Europe[2] is still in force.

III. Scope of this opinion

9. The Venice Commission has been asked by the Monitoring Committee of the Parliamentary Assembly in October 2014 to assess the Lustration law of Ukraine within the earliest possible timeframe. Under this time constraint, as parliamentary elections have taken place in late October 2014, it has not been possible to carry out a meaningful visit to Ukraine prior to the preparation of this opinion in order to discuss the grounds for adopting this law in this form with the Ukrainian authorities. For this reason, and because of the absence of an explanatory note accompanying the law, the present assessment can only be an abstract one. It covers the main aspects of the Lustration law. Four key-issues will be specifically dealt with by the Venice Commission in the present opinion: a) the temporal scope of application of the law; b) the personal scope of application of the law; c) the procedural guarantees for persons to whom the lustration procedures are applied; d) the publication of the names of the lustrated persons.

10. Two constitutional appeal cases relating to some provisions of this law are pending before the Constitutional Court (see §§ 6 and 7), whose decisions are expected not earlier than in the spring of 2015. Following its usual practice, the Venice Commission will avoid to take a position on the issues under constitutional review (to the extent that it has knowledge of them).

11. Finally, the present assessment is based on an unofficial translation of the Lustration law; some comments may derive from inaccuracies in the translation.

12. The present assessment relates to the substance of the Lustration law. The Venice Commission has also learned from available reports that the procedure of adoption of this law took place in peculiar circumstances, with the text of the draft law and its proposed amendments not being promptly available to MPs during the three votes and with the voting taking place under pressure from protesters blocking the building of the Verkhovna Rada. The actual text of the law was only made public after it was signed by the speaker several days following its adoption.

13. The Venice Commission wishes to underline that such procedural irregularities are at odds with the rule of law. While they do not necessarily render the law unlawful, they certainly cast a negative light on its legitimacy, which is particularly problematic for a law aiming at restoring

[1] Закон України, Про відновлення довіри до судової влади в Україні, Відомості Верховної Ради (ВВР), 2014, № 23, ст. 870, http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/_restoring%20confidence_full%20ENG.pdf

[2] http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/Appendix_draft_law_of_Ukraine_FINAL010414.pdf

trust in the public authorities and ensuring an open and transparent exercise of public power. The Commission therefore calls on the Ukrainian parliament not to repeat similar irregularities in the future.

IV. International standards

14. The European standards in the field of lustration mainly derive from three sources:

- the European Convention on Human Rights and Fundamental Freedom (in particular Articles 6, 8 and 14) and the jurisprudence of the European Court of Human Rights;[3]
- the case-law of national constitutional courts;[4]
- Resolutions by the Parliamentary Assembly of the Council of Europe, namely Res. 1096(1996) on measures to dismantle the heritage of former communist totalitarian systems and Res. 1481(2006) on the need for international condemnation of totalitarian communist regimes. PACE Res 1096(1996) pointed to the 'Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law' (hereinafter: "the Guidelines on Lustration" or "Guidelines") as a reference.

15. The Venice Commission has had the occasion to identify and analyse these standards in its previous opinions on lustration laws in Albania[5] and "the former Yugoslav Republic of Macedonia"[6] and refers to them.

16. The following four key-criteria summarize the essence of the standards pertaining to lustration procedures:

- guilt must be proven in each individual case;
- the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;
- the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i.e. punishing people presumed guilty, have to be observed;
- lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened.

[3] Lustration has been considered by the European Court of Human Rights in several cases relating to the relevant legislation enacted in *Slovakia* (ECtHR, Turek v. Slovakia, Application No. 57986/00, 14 February 2006); *Poland* (ECtHR, Matyjek v. Poland, Application No. 38184/03, 30 May 2006, ECtHR, Luboch v. Poland, Application No. 37469/05, 15 January 2008, ECtHR, Bobek v. Poland, Application No. 68761/01, 17 July 2007, ECtHR, Schulz v. Poland, Application No. 43932/08, 13 November 2012); *Lithuania* (ECtHR, Sidabras and Džiautas v. Lithuania, Applications Nos 55480/00 and 59330/00, 27 July 2004, ECtHR, Rainys and Gasparavičius v. Lithuania, Applications Nos 70665/01 and 74345/01, 7 April 2005, ECtHR, Žičkus v. Lithuania, Application No. 26652/02, 7 April 2009); *Latvia* (ECtHR, Ždanoka v. Latvia, Application No. 58278/00, 16 March 2006, ECtHR, Adamsons v. Latvia, Application No. 3669/03, 24 June 2008); and recently *Romania* (ECtHR, Naidin v. Romania, Application No. 38162/07, 21 October 2014).

[4] Link to a search for case-law on lustration in the CODICES database of the Venice Commission: http://www.venice.coe.int/files/CODICES_search_Opinion_788_2014_UKR.pdf

[5] CDL-AD(2009)044.

[6] CDL-AD(2012)028.

V. Analysis of the Lustration Law

A. General comment

17. The Preamble of the Lustration law states that the aim of the law is "to protect and affirm democratic values, the rule of law and human rights in Ukraine". As any lustration law, it is aimed at dealing with the past and protecting the present and the future from the shadows of this past. It intends to do so by removing/excluding individuals, who due to their past behaviour could constitute a danger to the new and still fragile democratic society, from positions in central and local government authorities. Article 1.2 of the Lustration law defines these individuals as "those who made decisions, took actions or inaction (and/or contributed to their taking) facilitating power usurpation by the President of Ukraine Viktor Yanukovich and seeking to undermine the foundations of the national security and defence and violate human rights and freedoms".

18. Lustration laws are always a mixture of a legal act and a political document. An appropriate balance between these two elements must be struck if the lustration law is to serve its important function to establish the rule of law in the country. As the Venice Commission has previously recalled, "lustration procedures, despite their political nature, must be devised and carried out only by legal means, in compliance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is done, then lustration procedures can be compatible with a democratic state governed by the rule of law."[7]

19. Art. 1.2 of the Lustration law enumerates the general principles governing the lustration process: a. the rule of law and lawfulness, b. openness, transparency and public accessibility, c. presumption of innocence, d. individual liability, e. guarantee of the right to defence. This list of principles appears to be fully in line with the European guidelines. A detailed analysis of the law however shows that the law does not live up to these principles and guidelines.

B. The temporal scope of application of the law

20. The Lustration law has been enacted 18 years after the adoption of the democratic constitution on 28 June 1996. It covers the period of the Soviet communist regime up to the Maidan events, until 22 February 2014. The effects of lustration are set to stretch for ten years after the Law takes effect or five years after relevant judgments take effect.

1. Periods of the past to be screened

21. The Lustration law (Article 1(2)) seeks to deal with two different periods of undemocratic rule in the country: the Soviet communist regime and the "power usurpation by the President of Ukraine Viktor Yanukovych".

a. The Communist rule

22. The first period dealt with in the Lustration law is that of the communist Soviet Union, to which Ukraine belonged until the dissolution of the USSR in 1991. There is no doubt that the communist regime was marked by serious violations of human rights and by a general lack of freedom and democracy. This was explicitly confirmed in the Resolution 1481 (2006) of the Parliamentary Assembly. All the other lustration laws that have been adopted in the countries of Central and Eastern Europe over the past three decades focus on this period. The totalitarian nature of the regime whose return lustration seeks to prevent is beyond question.

[7] CDL-AD(2009)044, § 149.

b. The rule of President Yanukovich

23. The second period is that of period of "power usurpation by the President of Ukraine Viktor Yanukovych", corresponding, according to Article 3.1 of the Law, to the whole term of office that Mr. Yanukovych served from 25 February 2010 to 22 February 2014.

24. This is a period which occurred over more than two decades after the end of the totalitarian communist regime and almost twenty years after the accession of Ukraine to the Council of Europe (1995).

25. The Guidelines stipulate that lustration "may only be used to eliminate or significantly reduce the threat posed by the lustration subject to the creation of a viable free democracy by the subject's use of a particular position to engage in human rights violations or to block the democratisation process."[8] Thus, 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".[9] So "the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism, while the secondary goal thereof, subordinated to the realization of the primary goal, shall be the individual penalization of persons who undertook collaboration with the totalitarian regime".[10] The period to which lustration applies is therefore one of the crucial issues. Lustration, as a method of dealing with the past, should apply to the period of the former political system which violated human rights and human dignity, and not to the subsequent period when the new system has been established, based on the guarantees of democracy and human rights.

26. According to the ECtHR, a particular historical and political context affecting the framework of democratic institutions may represent a threat to the new democratic order (through the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring a totalitarian regime) and may therefore justify the application of lustration measures to acts committed after the end of a totalitarian regime.[11]

27. The Venice Commission, as regards the application of lustration measures in respect of acts committed in a period after the end of the communist totalitarian regime, stressed on a previous occasion that a democratic constitutional order should defend itself directly through the democratic functioning of its institutions, the implementation of the rule of law and the safeguards of human rights protection (which include the prohibition of abuse of rights). First, a democratic government is responsible to the electorate, who may deny re-election. Second, in a state ruled by law government is itself subject to legal and constitutional standards. Third, crimes committed by members of government are subject to criminal prosecution. Finally, every democratic state may require a minimum of loyalty of its servants and may relieve them from office otherwise, without resorting to the special instrument of lustration.[12] In sum: lustration should be an instrument of last resort.

[8] Guidelines, lit. b).

[9] Guidelines, lit. c).

[10] Constitutional Tribunal of Poland, judgment K2/07.

[11] ECtHR, Ždanoka v. Latvia, op. cit.

[12] CDL-AD(2012)044, § 25.

28. Party affiliation, political and ideological reasons should not be used as grounds for lustration measures, as stigmatization and discrimination of political opponents do not represent acceptable means of political struggle in a state governed by the rule of law.[13]

29. In February 2010 President Yanukovych won the Ukrainian presidential elections, which were considered to have met international standards.[14] The situation in the country started to deteriorate in a gradual way.[15] Measures aimed at suppressing opposition forces were adopted but, in spite of them, Mr Yanukovych never gained a full political, ideological and economic monopoly in and over the country. Moreover, some of the negative phenomena marking this period, such as corruption, had been present in the Ukrainian society even prior to 2010. Senior civil servants serving under Mr Yanukovych were presumably already in office and had presumably been loyal to previous governments too. Measures aiming at combating corruption, including, following recommendations by GRECO, new anti-corruption legislation, had already been adopted. It should be noted in addition that Ukraine has been a member state of the Council of Europe since 1995 and, as such, has been monitored for its democratic performance and its compliance with European standards.

30. Resort to wide-ranging lustration measures in respect of this specific period would imply a questioning of the actual functioning of the constitutional and legal framework of Ukraine as a democratic state governed by the rule of law. It is not for the Venice Commission but for the Ukrainian authorities to assess whether there is a justification for such measures. At any rate, lustration has to be complemented by other means of ensuring justice and fostering good governance and the rule of law, such as criminal prosecutions of individuals responsible for serious crimes, including crimes against humanity, and structural reforms aimed at strengthening the rule of law, combatting corruption and eradicating nepotism. Lustration might serve as a complement to these other means but it can never replace them, as its role should be a specific and narrowly tailored one.

2. Time of adoption of the law with regard to former Communist officials

31. It may be that a democracy sometimes has to defend itself (the concept of a "streitbare/wehrhafte Demokratie"), as has been acknowledged by the ECtHR.[16] However, such need obviously decreases over time. Thus, the need for Ukraine to defend itself against those that were involved in the Soviet Communist regime after more than two decades have elapsed since the fall of that regime is questionable.

32. The Venice Commission has previously dealt with the issue of the introduction of lustration measures a very long time after the beginning of the democratization process in the country in the context of the Albanian and Macedonian lustration laws, referring to the PACE resolutions and guidelines and to the case-law of the ECtHR and of several European Constitutional courts. According to the Commission[17] *«the Parliamentary Assembly's Guidelines* […] *introduce*

[13] CDL-AD(2013)028.

[14] "The presidential election met most OSCE commitments and other international standards for democratic elections and consolidated progress achieved since 2004." OSCE, Presidential Election, 17 January and 7 February 2010, Warsaw: ODIHR, 28 April 2010 p. 1.

[15] As regards the situation in the judiciary, serious issues of structural lack of independence and impartiality were revealed by the European Court of Human Rights in its judgment Volkov v. Ukraine (ECtHR, Oleksander Volkov v. Ukraine, Application no. 21722/11, 9 January 2013). See also the Venice Commission's opinions CDL-AD(2010)026 and 029, and, more in general for the constitutional situation, CDL-AD(2010)044.

[16] ECtHR, Glasenapp v Germany, no. 9228/80, 28 August 1986; Vogt v. Germany, Application no. 17851/91, 26 September 1995, para. 59; Pellegrin v France, 8 December 1999, Application no. 28541/95, para. 65; ECtHR, Ždanoka v. Latvia, op. cit., paras. 100-101.

[17] CDL-AD(2009)044, paras 27-33; CDL-AD(2012)028, para. 15.

the general suggestion that lustration measures should preferably end in all ex-communist states no later than on 31 December 1999. This has to do with the threat which is posed by such former regimes." The Commission found that while every democratic state is free to require a minimum amount of loyalty from its servants[18] and may relieve them from office or refrain from hiring them on account of their actual or recent behaviour, introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. It is necessary to justify why someone who has not represented a threat to democracy for a long time may suddenly become such a threat, making it necessary to ban him from public office. Both in the Albanian and the Macedonian case, the VC therefore asked for *cogent reasons* to justify enacting a new lustration law so many years after the fall of the communist regime.[19] It asked the respective country's constitutional courts to scrutinize with special attention the *specific reasons* which had been given by the authorities to enact new lustration legislation so many years after the end of the communist regime.[20]

33. In the case of Ukraine, insofar as the Commission knows, no reasons to justify lustration with regard to persons involved in the Communist regime have been given. No indication has been given of a specific threat posed nowadays. Persons are subjected to lustration based on their mere involvement with the past communist agencies. In these circumstances, the Venice Commission finds it difficult to justify the adoption of lustration measures.

3. Period during which the lustration measures remain in force

34. Under Article 1.3 and 1.4 of the Lustration Law, individuals who occupied one of the positions listed in Article 3 are to be excluded from any of the positions listed in Article 2 for a period of either 5 or 10 years. Candidates for the latter positions will also have to be screened (for an undetermined period of time, but presumably for 10 years after the adoption of the Law). The length of the ban depends on the position occupied: the 10-year period is set for high level officials from the communist era and from Yanukovych´s rule, for individuals holding certain positions during the Maidan revolution and for individuals involved in corruption. Furthermore, the 10-year ban is put on persons that did not file statements as required by Article 4.1 (a declaration as to whether one falls within the scope of the Law). The 5-year period is set for other persons, according to a court judgment.

35. The Guidelines on Lustration provide that "*disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated; 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*" (par. g).

36. The deadline of 31 December 1999 could obviously be relevant only with respect to the disqualification of those having occupied certain positions during the communist period. *Stricto sensu*, this deadline was meant to apply only in the countries which resorted to lustration in the immediate or short aftermath of the fall of communism, in the early 1990s, as was the case in Czechoslovakia or in the Baltic countries. In the countries which did not or/and could not, for various reasons, start a lustration process in this period, the deadline could be a different one. Yet, the criteria for its determination would still encompass the level of consolidation of a new democratic system and the threat that those who occupied high position in the communist regime could pose to this system.

[18] ECtHR Sidabras and Džiautas v. Lithuania, Application nos. 55480/00 and 59330/00, 27 July 2004, § 57.

[19] CDL-AD(2009)044, para. 35; CDL-AD(2012)028, para. 17.

[20] CDL-AD(2009)044, para. 40; CDL-AD(2012)028, para. 18.

37. In this context, it is important to recall once again that "the aim of lustration is not to punish people presumed guilty … but to protect the newly-emerged democracy."[21] Thus, it is not the severity of human rights violations that an individual was associated with in the past which in itself shall determine whether this individual is to be disqualified from the public life. This factor will play a decisive role in a criminal prosecution of this person, but may only be an indication of the threat that he could present in the present and in future determining the need for (temporary) disqualification.

38. As the Venice Commission stated in its amicus curiae opinion on Albania, "activities well in the past will regularly not constitute conclusive evidence for a person´s current attitude or even his/her future".[22] The Guidelines on Lustration are also clear on this point, stressing that "it is unlikely that anyone who has not committed a human rights violation in the last ten years will now do so (this time-limit does not, of course, apply to human rights violations prosecuted on the basis of criminal laws)" (par. j). While unlikely does not necessarily mean impossible, the Ukrainian authorities, when disqualifying from the public life individuals associated with the communist regime (Article 3.4 of the Law), have to see to it that the disqualification only applies to individuals who can still constitute, due to their pre-1990 involvement in the communist structures (Communist Party, Komsomol or KGB), a threat to the current democratic system in Ukraine.

39. This does not mean that the Ukrainian society has to turn a blind eye to all serious violations of human rights committed during the communist period and pardon those responsible for these violations. It simply means that when trying to deal with its communist past, it should, when the conditions stated in the previous paragraph are not met, use other tools than lustration, such as individual criminal prosecution.

40. The maximum period of disqualification, set at 5 years in the Guidelines, is not respected in the Lustration law. Yet, as the Czech Constitutional Court held in 2001, "the determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question". Since the countries of Central and Eastern Europe have taken unequal paths of developments in the post-1990 period and the risk of recurrence of a totalitarian/autocratic regime has proved to be more real in some of them, including Ukraine, a margin of appreciation should be left to the national authorities to determine the period for which lustration is required.[23]

41. At the same time, national authorities that opt for a period which is longer than that recommended in the Guidelines, need to have good reasons. The same applies, if different periods of disqualification are introduced, as is the case in Ukraine (5 and 10 years). While such a differentiated approach might be legitimate, the national authorities should demonstrate that individuals belonging to the categories subject to a longer disqualification constitute *en bloc* a bigger threat to the new democratic society than other disqualified individuals.

42. The 5-year period foreseen in the Guidelines is meant to apply not only to individual disqualification but to the whole process of lustration as such. Yet, whereas the 10-year period runs "for ten years after this Law takes effect" (Article 1.3) - till 15 October 2024 - the 5-year period runs "for five years after a corresponding court judgment takes effect" (Article 1.4). As there is not, and can hardly be, a deadline set for the court procedures relating to the recent events in Ukraine to end by, and since these procedures may go on for years, the lustration process is potentially open-ended. Moreover, individuals subject to the 5-year period of

[21] Guidelines, preamble.

[22] CDL-AD(2009)044, § 38.

[23] ECtHR, *Naidin v. Romania*, op.cit.

disqualification could *de facto* be banned from the public life for a longer period than those subject to the 10-year period. The Lustration law should provide for a fixed end of all the lustration process (with the possibility to shorten the duration of a specific lustration measure if it would overstep the date of official ending of the process).

43. In addition, lustration applies not only to the current holders of the lustrated positions but also to those intending to occupy them. The Lustration law fails to indicate a fixed term applying to the screening of candidates (it might be presumed that it is ten years from the entry into force of the law). This, together with the lack of a fixed time limit imposed on the 5-year disqualification, turns lustration into a potential "never-ending story".

44. Yet, as already stated above, it is clear that with the passing of time after the fall of a totalitarian or autocratic regime, the need for lustration should decrease, as the new democratic system is consolidating and individuals linked to the past regime lose their influence and power. At a certain point of time, maintaining lustration might become counter-productive, preventing the normalization of the situation in the country and hindering the reconciliation process, rather than contributing to them.

45. Moreover, as the European Court of Human Rights held in the Ždanoka case, the national authorities "must keep the statutory restriction under constant review, with a view to bringing it to an early end."[24] No such procedure, however, is foreseen in the Law.

C. The personal scope of application of the law

1. The positions subject to lustration

45. Article 2 of the Lustration law provides for an extensive list of positions which need to be "protected" and whose holders will thus be subject to lustration. Individuals who currently occupy these positions will be screened in the nearest months according to the schedule approved by the Cabinet of Ministers of Ukraine.

46. The Guidelines provide guidance in respect of the personal scope of application of lustration measures.

46. The Lustration law is in compliance with the requirement that "*lustration shall not apply to elective offices*", these offices being specifically excluded in its Article 1.1.

47. As regards the requirement that "*lustration shall not apply to positions in private or semi-private organisations*", Article 2.9 mentions "*heads of national enterprises including state-owned companies in defence industries and public companies managed by the administrative service entities*".

48. A further requirement is that "*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*". The list of lustrated positions is quite extensive, encompassing practically all positions - with the exception of the elective ones - in central and local governments as well as in other public organs. There are political positions, notably the Prime Minister and the ministers; the Prosecutor General and the members of High Council of Justice; but also administrative positions like the Chief of staff of the presidential administration, the Chairman of the State Property Found, the Chairman of the State Committee for Television and Radio Broadcasting, the Chairman and the members of the National Commission responsible for the government regulation of natural monopolies, communications and IT; as well as a very wide

[24] ECtHR, *Ždanoka v. Latvia*, op. cit., § 135.

category of other officials and officers of central and local governments. It is not clear why all of these positions may be reasonably prognosticated by the legislator to constitute a significant danger and to be genuinely "appointed state offices involving significant responsibility for making or executing governmental 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", as required by paragraph (d) of the Guidelines. The Venice Commission has already expressed doubts as regards to the justification of the presumption of danger for some of these positions.[25] The list of lustrated positions should be restricted.

49. The inclusion in Article 2 of "persons intending to occupy the positions specified in clauses 1 to 10" (Article 2.11) is clearly mistaken. This clause should appear in Article 3.

2. The criteria for lustration

50. Article 3 of the Lustration Law lists the criteria for lustration, imposing a ban from public office (i.e. from the positions listed in Article 2) of either five or ten years, depending on the position previously occupied, from among a long list, during the periods of the past to be screened.

51. The first category entails a ban of ten years (Article 1.3) and includes:
   a) Individuals who occupied high positions in the state apparatus for at least a year between 25 February 2010 and 22 February 2014 (Article 3.1);
   b) Individuals who occupied certain positions, mostly within the military, police, judicial or media sectors, between 21 November 2013 and 22 February 2014 (Article 3.2);
   c) Individuals who occupied high positions in the Communist Party or Komsomol during the Soviet period or worked as employees or covert agents of the KGB in that period (Article 3.4);
   d) Individuals who enriched themselves in violation of the Law on the Principles of Preventing and Combating Corruption (Article 3.8);
   e) Law enforcement officers, public prosecutors and judges who took certain action in respect of persons falling under the Amnesty laws.

52. The second category entails a ban of five years (Article 1.4) and includes:
   a) Judges, prosecutors, police officers and other law enforcement agents who were actively involved in the prosecution of anti-Yanukovych activities and of Maidan demonstrators (Article 3.3);
   b) Officials and officers of central and local government authorities who occupied high positions in the state apparatus between 25 February 2010 and 22 February 2014, are not included in the category 1a) above and who contributed to power usurpation by Mr. Yanukovych and seeking to undermine fundamentals of the national security, defense or territorial integrity of Ukraine which caused violation of human rights and freedoms (Article 3.5).
   c) Officials and officers of central and local government authorities, whose decisions, actions or sought to prevent the exercise of the constitutional right to peaceful assemblies, and hold rallies, demonstrations, marches or to harm human life, health or property between 21 November 2013 and 22 February 2014 (Article 3.6).
   d) Officials and officers of central and local government authorities if a court judgment against them, which has taken effect, established that they had cooperated as secret informers with special services of other countries to provide regular information; taken decisions, actions, failed to take actions and/or facilitated such actions, decisions or inaction to undermine the national security, defense or territorial integrity of Ukraine;

[25] CDL-AD(2009)044, § 54.

called publicly for the breach of Ukraine's territorial integrity and sovereignty; incited ethnic hostility; taken unlawful decisions, actions or inaction that violated human rights and fundamental freedoms where violations were proven by judgments of the European Court of Human Rights (Article 3.7).

53. Some of these provisions are unclear and vague. According to Article 3.2.10 the lustration ban should apply to any "law officer who drafted and/or contributed by their action to draft reports /…/ in regard of persons relieved from criminal or administrative liability" according to the Amnesties Law. What does "contribute to" mean in this context? Would individuals such as a typist or a lower officer having transcribed a report fall under the provision? Similarly, what criteria should courts take into account when determining, whether someone "contributed to power usurpation by … Viktor Yanukovych" under Article 3.5? In view of the extensive scope of lustration and its decentralised implementation, imprecise formulations could give rise to non-uniform application of the Law and could also facilitate its misuse for personal or political purposes. These provisions should be reformulated.

54. In case of the individuals mentioned in § 53, a court judgment against them that relates to the facts indicated in the relevant provision and that has taken effect, is needed.

55. In the other cases, the condition for applying the lustration measure is the mere fact of having occupied the specific position, without a judicial assessment.

56. Under the Guidelines, lustration should only be directed against persons who played an important role in perpetrating serious human rights violations or who occupied a senior position in an organization responsible for serious human rights violations; no one can be subject to lustration solely for personal opinions or beliefs; and conscious collaborators can be lustrated only if their actions actually harmed others and they knew or should have known that this would be the case. Moreover, individuals who were under the age of 18 when engaged in the relevant acts, voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic regime, or who acted under compulsion, should be excluded from lustration.

57. Finally, as is also stated in Article 1.2 of the Lustration law, "lustration needs to be based on the principle of individual (not collective) liability".

58. The Lustration law does not comply with these requirements. With the exception of the persons mentioned in Articles 3.5, 3.6 and 3.7, the establishment of individual guilt by an independent organ is not required. The ban on access to public functions, applied to these other persons, is based on the mere fact of having held a certain position, with an ensuing presumption of guilt. Whereas this approach might be acceptable with respect to the holders of high positions during the communist period and holders of some of the crucial government offices during Mr. Yanukovych´s reign (senior offices), in all other cases guilt should be proved on an individual basis. If the mere fact of belonging to a party, an organisation or an administrative body of the old regime is a ground for banning from public office, then such ban amounts to a form of collective and discriminatory punishment which is incompatible with human rights standards. Lustration then risks becoming a political instrument to oppress opponents.

59. Under the Lustration law individuals subject to lustration have no possibility to prove, that despite the position they held they did not engage in any violations of human rights and did not take or support any anti-democratic measures. There does not appear to be any possibility to invoke the time elapsed since the occupation of the position nor the subsequent conduct and attitude. Such an approach collides with the principle of "individual liability" on which lustration must be based (Article 1.2). Even a voluntary resignation from the position prior to 22 February 2014 would not be sufficient to exclude them from lustration, whereas the individual should

even be given the opportunity to resign voluntarily: this would governmental financial and human resources, while shielding the person from revealing his or her identity.

60. The absence of the requirement of an individualised decision is particularly problematic in case of the positions under Article 3.8. This provision stipulates that the ban in Article 1.3 shall be imposed "on persons whose screening has found unreliability of information about possession of property (property rights) in their transparency returns on the property, income, expenses and financial obligations for a previous year prepared in a form prescribed by the Law of Ukraine On the Principles of Preventing and Combating Corruption and/or a mismatch between the cost of property (property rights) acquired by them during their stay in offices specified in Articles 2.1.1–2.1.10 hereof (where the cost is indicated in their transparency returns) and incomes received from legitimate sources".

61. It is not clear how the lustration screening could find any unreliability of information with respect to financial data, as the Law does not indicate that such data should be assessed during the screening. In fact, checking such data would be more demanding than merely assessing whether an individual held a certain position in the past, requiring specialized knowledge that those organizing the screening do not necessarily possess. Furthermore, specialized anti-corruption procedures and authorities already exist under anti-corruption legislation of Ukraine. Finally, while corruption certainly undermines (the faith in) the democratic system and the rule of law, it is difficult to accept that in general a person who gets involved in corruption thereby creates a risk in terms of serious violations of human rights.

62. The Lustration law provides for the exclusion of those individuals who were dismissed from the relevant position (Article 3.2). No exclusion, on the contrary, is foreseen for those who resigned from the position of their own will. At the same time, individuals falling under other categories of positions, for instance Article 3.1, do not enjoy any exclusions. Since "the aim of lustration is not to punish people presumed guilty … but to protect the newly-emerged democracy" (Guidelines on Lustration), changes in the opinions and attitudes of the individual are factors that should be taken into account.

63. Under Article 1.7, the lustration ban "shall not be imposed on persons specified in Article 3.2 - 3.4 of this Law who have been recognized as participants of military activities during the counterterrorism operation in the east of Ukraine as established by law". The provision applies to a range of public positions, including many positions within the judiciary. Since the holders of such positions do not typically participate in military activities, it is not entirely clear what motivated the legislator to include those and exclude other positions.

64. The Lustration law does not establish any exception for individuals who were under the age of 18 when they engaged in the relevant acts. Taken into account the character of the suspect positions, it is highly improbable that individuals under the age of 18 could occupy them. Yet, such an option cannot be fully ruled out and it would thus be preferable for the Law to explicitly state the age limit of 18 years.

3. Lustration of judges

65. Lustration of judges deserves a specific analysis. The Ukrainian judiciary is already the object of lustration measures under the Law on the Restoration of Trust in the Judiciary, which was adopted on 8 April 2014. This law set up a "Special ad hoc Commission on the Screening of Judges". This Commission's conclusions relating to breach of the oath of office by a judge are transmitted to the High Council of Justice for consideration and decision as to whether or not to propose the dismissal of the judge. A disciplinary procedure may be initiated if the facts do not disclose a breach of oath.

66. Pursuant to Article 3 of the Law on Restoration of Trust in the Judiciary, "a judge of a general jurisdiction court shall be screened if he/she passed the following decisions independently or as a member of a judicial panel:

a) decisions to restrict civil rights to assemblies, meetings, street processions and demonstrations in Ukraine that were passed between November 21, 2013 and the effective date of this Law;
b) decisions to impose pre-trial custody, uphold requests for pre-trial custody, extend periods of custody, impose guilty verdicts, as well as rulings by courts of appeal or cassation to review guilty verdicts without revoking them, applied to individuals recognized as political prisoners for actions related to their political and public activities;
c) decisions to impose pre-trial custody, uphold requests for pre-trial custody, extend periods of custody, and impose guilty verdicts against participants of mass protests between November 21, 2013 and the effective date of this Law because of their participation in such actions;
d) decisions to administratively suspend driving licenses of persons who participated in mass protests between November 21, 2013 and the effective date of this Law according to Article 122-2 of the Code of Ukraine On Administrative Offences for the drivers' failure to stop when required by the police as well as rulings by courts of appeals to uphold the decisions, all of them passed between November 21, 2013 and the effective date of this Law;
e) decisions to impose administrative penalties against persons who participated in mass protests between November 21, 2013 and the effective date of this Law pursuant to Article 185 of the Code of Ukraine On Administrative Offences for wilful disobedience of lawful orders or requests of policemen, members of civil organizations for protection of public order and national borders, and military servicemen as well as rulings by courts of appeals to uphold the decisions, all of them passed between November 21, 2013 and the effective date of this Law;
f) decisions to impose administrative penalties against persons who participated in mass protests between November 21, 2013 and the effective date of this Law pursuant to Article 185-1 of the Code of Ukraine On Administrative Offences for violation of the procedures for organizing and holding assemblies, meetings, street processions and demonstrations as well as rulings of courts of appeal to uphold the decisions, all of them passed between November 21, 2013 and the effective date of this Law;
g) decisions to impose administrative penalties against persons who participated in mass protests between November 21, 2013 and the effective date of this Law pursuant to Article 185-2 of the Code of Ukraine On Administrative Offences for creating conditions violating procedures for organizing and holding assemblies, meetings, street processions and demonstrations as well as rulings of courts of appeals to uphold the decisions, all of them passed between November 21, 2013 and the effective date of this Law;
h) decisions on cases related to election of members of the Verkhovna Rada of Ukraine of the seventh convocation, invalidation of their results or deprivation of the status of a member of parliament of a person elected to parliament of the seventh convocation (a party whose rights or interests were violated directly initiates the screening of judges with an application);
i) warrants authorizing investigative (detective) actions and covert investigative (detective) actions against participants of mass protests between November 21, 2013 and February 21, 2014 because of their participation in such protests.

67. The Lustration law also applies to judges; at the outset, the Venice Commission does not see any justification for including the judges in the Lustration law, given that they are the object of another specific Lustration law, adopted only a few months ago.

68. Under Article 3.2.13, a judge has to be banned from an office which is lustrated under the new law for a period of 10 years (Article 1.3) if he "approved a decision to enforce compelled appearance in the court on custodial measure of restraint or, approved decisions on bringing to administrative or criminal liability the persons relieved from criminal or administrative liability according to the Law of Ukraine No.737–VII of January 29, 2014 *On eliminating negative consequences and preventing prosecution and punishment of persons in regard to events that happened during peaceful assemblies* and the Law of Ukraine No.743–VII of February 21, 2014 *On preventing prosecution and punishment of persons in regard to events that happened during peaceful assemblies, and recognizing certain laws of Ukraine as invalid*."

69. Under Articles 3.3, 3.6 and 3.7 respectively, a judge has to be banned from an office which is lustrated under the new law for a period of 5 years (Article 1.4) if the judge:

a) approved decisions to enforce compelled appearance in the court on custodial measure of restraint, approved or upheld guilty verdicts in regard to the persons subject to full personal amnesty according to the Law of Ukraine No. 792–VII of February 27, 2014 *On amending the Law of Ukraine On granting amnesty in Ukraine regarding full rehabilitation of political prisoners* officers of police, public prosecution or other law enforcement agencies who, through their decisions, actions or inaction, took steps (and/or contributed to their taking) to criminally prosecute and bring to criminal liability the persons subject to full personal amnesty according to the Law of Ukraine No. 792–VII of February 27, 2014 *On amending the Law of Ukraine On granting amnesty in Ukraine regarding full rehabilitation of political prisoners* (Article 3.3)

b) whose decisions, actions or inaction – which are proven by a court judgment against them that has taken effect – sought to prevent the exercise of the constitutional right of Ukrainian nationals to peaceful assemblies, and hold rallies, demonstrations, marches or to harm human life, health or property between November 21, 2013 and February 22, 2014 (Article 3.6)

c) if a court judgment against the judge, which has taken effect, established that the judge had:
   - taken decisions, actions, failed to take actions and/or facilitated such actions, decisions or inaction to undermine the national security, defence or territorial integrity of Ukraine;
   - incited ethnic hostility;
   - taken unlawful decisions, actions or inaction that violated human rights and fundamental freedoms where violations were proven by judgments of the European Court of Human Rights (Article 3.7)

70. There is an overlap between the Lustration Law and the Law on the Restoration of the Trust in the Judiciary as concerns the Maidan events, which raises the question of co-ordination: if a judge has already been the object of a procedure under the Law on the Restoration of Trust in the Judiciary, he or she should be immune from the application of the Lustration law pursuant to the principle of *ne bis in idem*. If no procedure has been carried out yet, it is unclear which procedure prevails. The Lustration law should indicate how it is to co-ordinate with previous legislation.

71. The aforementioned Amnesty laws state that, for certain crimes which are listed in the law, criminal proceedings must not be initiated or - if they are pending - must be terminated and the relevant decisions already taken must be declared null and void. This "release from criminal liability" lists 25 types of offences to which the amnesty should be applied. Among these offences are "violence against public officers" and "wilful destruction of property". It follows that criminal liability is abolished more or less automatically in cases which at the time when the

judge took the decision did represent criminal offenses. This means that action of the judge in many cases may have been totally correct. It is therefore essential not to blame judges for such lawful activity. Lustration measures under Article 3.3 should not be taken automatically in these cases.

72. Lustration measures should only be applied further to a court judgment; this is provided in Articles 3.5, 3.6 and 3.7, but it should be clarified that such judgment should result from a procedure directed against the lustrated person, not from the procedure initiated by the accused person under one of the two Amnesty laws. A court judgment should also be required for lustration measures under Article 3.3.

73. It is unclear whether the terms "persons subject to full personal amnesty" refer to persons who have already benefited from the amnesty or who could benefit from it in the future.

74. To the extent that judges may also be subject to lustration pursuant to the general provisions of Articles 3 § 4, 3 § 7 and 3 § 8, the remarks made in this opinion on those provisions apply.

75. The lustration of judges also raises specific questions regarding the lustration procedure, which will be examined below.

D. The procedural guarantees for the persons to which the lustration procedures are applied

76. It is settled case-law of the ECtHR that Article 6 of the Convention under its criminal head applies to lustration proceedings.[26] Resolution 1096(1996) demands the observance of the right of defence, the presumption of innocence until proven guilty and the right to appeal to a court of law.[27]

77. According to requirement m) of the Guidelines, "*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.*"

78. The Venice Commission further requires that disqualification from office should be suspended during the appeal and that the court must be empowered to quash the decision of the lustration commission due to the circumstances of each individual case.[28]

79. Article 1.1 of the Lustration law acknowledges that lustration is to be based, among others, on the presumption of innocence and on the guarantees of the right to defence. Yet, it fails to provide full-fledged procedural guarantees to individuals subject to lustration.

80. According to the Guidelines (a), "lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament". The purpose of this requirement is to ensure the objectivity and independence of the agency empowered to carry out the lustration procedures.

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[26] ECtHR, decision of 30 May 2006, *Matyjek v. Poland*, app. no. 38184/03, paras. 48 *et seq.*, decision of 24 October 2006, *Bobek v. Poland*, app. no. 68761/01, para. 2.

[27] PACE Res. 1096(1996), para. 12. See also ECtHR, *Turek* v. Poland, op. cit., par. 115.

[28] CDL-AD(2009)044, paras. 97 and 108.

81. Article 5 of the Lustration law designates the Minister of Justice as the "agency authorised to ensure the screening provided for in this law". There is no independent body overseeing the process. Instead decisions are taken by the Ministry of Justice on the basis of checks carried out by the management of the government bodies where the specific person works.

82. Pursuant to Article 5.2 of the Law, the Ministry of Justice has to set up "an advisory public council for lustration which shall comprise representatives of mass media and general public in order to ensure civil control over the government cleansing". While the aim of this provision is certainly positive, it is insufficient to represent a guarantee of democratic control of the process. The law in fact fails to indicate how this Council should operate and what its competences should be. In addition, the nominatation of the Council's members seems to be left in the hands of the Minister of Justice, instead of being given to parliament. This undermines the independence of this body. Finally, the advisory nature of the Council renders it a rather weak institution. These provisions should be thouroughly reconsidered.

83. Pursuant to Article 4, the screening process – for current officials and officers – starts on a date indicated in a schedule approved by the Cabinet of Ministers of Ukraine. Within 10 days after the start, all individuals holding a lustrated position are to submit a statement indicating whether he/she is or is not subject to the ban under Articles 1.3 and 1.4 of the Law. Failure to submit such a statement as well as the submission of a statement declaring that one falls within the scope op Article 1.3 or 1.4 is a ground for automatic dismissal of the person within three days of the expiration of the period or the date of submission of the report.

84. Negative statements are subject to screening within the agency where the relevant individuals work. Such delegation creates problems of foreseeability and accountability. As Ukraine has never experienced lustration, there is a risk that the practice under the Lustration law which is to be aplied by a wide range of different agencies will lack uniformity and might even allow for settling private or political disputes.

85. While Article 8 of the Law provides for "parliamentary control" with regard to compliance with the law, it fails to indicate how far such control could go. It is therefore unclear and even doubtful whether parliament - the Verkhovna Rada - could ward off all the potential risks involved in the decentralised exercise of the screening.

86. Under Article 5.3 of the Law individuals and legal entities are encouraged to send information about the imposition of bans on a person being screened within one month of the start of screening. It is not clear from the English translation of the Law whether such information shall only concern bans which have been already imposed on a person, or whether it may contain anything important for the screening procedure. If the latter is the case, the Ukrainian authorities shall take due care to ensure that the screening procedure will not become a platform for settling personal accounts among individuals.

87. If the screening shows that the statement was unreliable, the individual is informed and has the right to provide explanations and substantiating documents. The Law fails to indicate that this person shall have full access to his/her lustration file and all the materials relating to his/her case.

88. Individuals who admit, or are found, to belong to any of the position groups listed in Article 2 shall immediately be dismissed from the positions that they currently occupy. They cannot be appointed to any other protected position. The term of dismissal – within three days after the submission of a positive statement (Article 4.3) or after the receipt of the screening report having established the unreliability of the information provided (Article 5.14) – is extremely short. The immediate dismissal within three days also applies to those who

fail to submit their statement (within the indicated 10-days period). This regulation is very strict, with no exceptions provided for special cases (health reasons etc.). Finally, no alternative options, such as voluntary withdrawal from the position, are foreseen in the Law and it is not clear whether there is room for such options.

89. Special problems arise in connection with the dismissal of judges pursuant to the Lustration law in that the tenure of judges is constitutionally protected in order to ensure their independence. According to the Constitution of Ukraine, the dismissal of judges is entrusted to either the President or the Verkhovna Rada, depending on the position of the judge (Articles 126 and 127 of the Constitution). Proposals to dismiss are exclusively within the competence of the High Council of Justice. The Lustration law puts the responsibility for the screening of the judges in the hands of the presidents of the relevant courts. For the sake of the separation of powers, the procedure of screening by decentralised screening agencies should not be applicable to judges. However, if the unreliability of the information provided by a judge is detected, according to Article 5.13 of the Law the agency has to send the report to the Minister of Justice, who will forward it to the High Council of Justice and to the High Qualification Commission of Judges and propose the dismissal of the judge. Pursuant to the Constitution, however, the High Council of Justice may not be bound by this proposal and should assess itself the substance of each case. The Lustration law should clarify these matters with due respect for the constitutional rules protecting the independence of the judges.

90. Articles 5.11 and 1.8 explicitly recognize that the report of the screening agency, as well as any decision, action or inaction of public administration entities in the course of the application of the Law "may be challenged in court" (presumably ordinary courts, but this should be clarified). However, they fail to provide for any concrete procedure and safeguards to the lustrated persons; the right of the lustrated persons to be present and to participate in this procedure, in particular, should be explicitly recognised. The Lustration law fails to provide that the effects of the screening report shall be suspended pending the appeal and until a final and irrevocable verdict is rendered by the competent court.

91. Finally, the relationship between lustration and criminal prosecution and between the sanctions imposed in these procedures is not clear. Under Article 1.5 of the Law, a lustration ban "may be imposed on a person only once". Article 3,10 of the Law, however, stipulates that individuals sentenced in a criminal procedure may have this ban imposed on them both as a primary and as an additional punishment. In the latter case, the ban shall be imposed for 5 years. Under Article 55 of the Criminal Code of Ukraine[29], the ban on certain activities may be imposed as a primary criminal sanction (2-5 years), an additional criminal sanction (1-3 years) or an additional sanction under the Lustration law (5 years, see Article 3.10). The relation between these various concepts is unclear. The Law also fails to state that the ban as a criminal sanction and as an additional lustration sanction cannot be imposed in a cumulative way, thus giving rise to certain concerns with respect to the *ne bis in idem* principle. The relevant provisions of the Lustration law should be amended.

E. The publication of the names of the lustrated persons

92. Under Article 7 of the Lustration law, information about individuals subject to lustration is entered in the Uniform Register of persons who are subject to the Lustration law. This register is created and maintained by the Ministry of Justice. In addition, this information regarding bans under Article 1.4 is also published on the website of the Ministry of Justice, where information including the individual's personal data and progress in the screening are made freely available.

[29] Закон України, Кримінальний кодекс України, Відомості Верховної Ради України (ВВР), 2001, № 25-26, ст. 131.

93. This provision is problematic. The Venice Commission has previously stated that "publication prior to the court's decision is problematic in respect of Article 8 ECHR. The adverse effects of such publication on the person's reputation may hardly be removed by a later rectification, and the affected person has no means to defend himself against such adverse effects. The latter may only appear to be a proportionate measure necessary in a democratic society when the collaboration is finally verified, not before. Publication should therefore only occur after the court's decision".[30]

94. The Lustration law fails to guarantee that publication is only allowed after a final court judgment; as such, it raises evident problems of compatibility with Article 8 ECHR. For this reason, the relevant provisions should be amended.

VI. Conclusions

95. The Venice Commission has analysed the Lustration law of Ukraine. It has not been possible to carry out a visit to Ukraine in the aftermath of the parliamentary elections of October 2014; this assessment has therefore not been discussed with the Ukrainian authorities and – due also to the absence of an explanatory report - is to be considered an abstract one.

96. The Venice Commission has assessed the Lustration law in the light of the four main principles flowing from the applicable international standards, namely that:

- guilt must be proven in each individual case;
- the right of defence, the presumption of innocence and the right to appeal to a court must be guaranteed;
- the different functions and aims of lustration, namely protection of the newly emerged democracy, and criminal law, i.e. punishing people presumed guilty, have to be observed;
- Lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened.

97. The Commission has reached the following main conclusions:

a) Applying lustration measures to the period of the Soviet communist rule so many years after the end of that regime and the enactment of a democratic constitution in Ukraine would require cogent reasons justifying the specific threat for democracy which former communists pose nowadays; the Commission finds it difficult to justify such late lustration.

b) Applying lustration measures in respect of the recent period during which Mr Yanukovych was President of Ukraine would ultimately amount to questioning the actual functioning of the constitutional and legal framework of Ukraine as a democratic state governed by the rule of law.

c) The Lustration law presents several serious shortcomings and would require reconsideration at least in respect of the following:
   - Lustration must concern only positions which may genuinely pose a significant danger to human rights or democracy; the list of positions to be lustrated should be reconsidered.

[30] CDL-AD(2012)028, § 74.

- Guilt must be proven in each individual case, and cannot be presumed on the basis of the mere belonging to a category of public offices; the criteria for lustration should be reconsidered;
- Responsibility for carrying out the lustration process should be removed from the Ministry of Justice and should be entrusted to a specifically created independent commission, with the active involvement of the civil society.
- The lustration procedure should respect the guarantees of a fair trial (right to counsel, equality of arms, right to be heard in person); court proceedings should suspend the administrative decision on lustration until the final judgment; the Lustration law should specifically provide for these guarantees.
- The lustration of judges should only be carried out with full respect of the constitutional provisions guaranteeing their independence, and only the High Council of Justice should be responsible for any dismissal of a judge. The Venice Commission does not see any justification for including the judges in the Lustration law, given that they are the object of another specific Lustration law, adopted only a few months ago.
- Information on the persons subject to lustration measures should only be made public after a final judgment by a court.