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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

FINAL OPINION

**ON THE LAW ON GOVERNMENT CLEANSING
(LUSTRATION LAW)**

OF UKRAINE

**As would result from the amendments
submitted to the Verkhovna Rada on 21 April 2015**

**Adopted by the Venice Commission
At its 103rd Plenary Session
(Venice, 19-20 June 2015)**

On the basis of comments by

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I. Background Information and Facts

1. In October 2014, the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the Law on Government Cleansing (so-called Lustration Law of Ukraine, CDL-REF(2014)046).
2. The Law on Government Cleansing was adopted by the Verkhovna Rada on 16 September 2014, signed by President Poroshenko on 9 October and published in the Official Gazette on 15 October 2014. The Law entered into force and took effect on 16 October 2014.
3. In December 2014, the Venice Commission adopted an *Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine* (CDL-AD(2014)-044, Opinion No. 788/2014). In the course of the preparation of the opinion, the Venice Commission did not have the possibility of visiting Kiev and/or discussing the law with the Ukrainian authorities. It also lacked access to the explanatory report of the Lustration Law and the translation of this law, provided by the Ukrainian authorities, exhibited some inaccuracies.
4. The Ukrainian authorities having engaged in a constructive dialogue on the improvement of this law, the Venice Commission decided that the opinion be adopted as an interim one and be followed by a final opinion.
5. In February 2015, a delegation of the Venice Commission visited Kiev. Extensive exchanges of views with the representatives of the Ministry of Justice of Ukraine, other state authorities as well as the civil society took place. In March 2015, a delegation of the Ministry of Justice of Ukraine met with the rapporteurs in Venice.
6. In April 2015, the Venice Commission received from the Ukrainian authorities a set of draft amendments to the Law on Government Cleansing that had been submitted to the Parliament (CDL-REF(2015)015). These amendments are under consideration and have not been formally approved yet. This final opinion nevertheless takes them into account when assessing the Law. Related draft amendments to other legislative acts (notably electoral laws and the Law on the Restoration of the trust in the judiciary).have also been submitted to the Verkhovna Rada. The Venice Commission has not examined these provisions separately, but only to the extent that they are necessary to understand the scope of application of the Lustration Law.
7. In October, the External Intelligence Service of Ukraine, the Supreme Court of Ukraine and a group of 47 members of the Parliament requested the Constitutional Court of Ukraine to assess the compatibility of certain provisions of the *Law on Government Cleansing with the Constitution of Ukraine and to provide authoritative interpretation of certain provisions of the Law*. On 16 April 2015, the Constitutional Court of Ukraine decided to postpone the hearings until the amendments to the Law would be formally adopted.¹
8. Ms V. Bílková, Mr G. Papuashvili, Ms A. Peters, Ms H. Suchocka and Mr B. Vermeulen, as well as Mr Gerhard Reissner (DGI expert), acted as rapporteurs with respect to this Final Opinion.
9. The present opinion is based on the English translation of the Law on Government Cleansing and the amendments thereto, provided for by the Ukrainian authorities. It was adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015).

¹ Ukraine's Constitutional Court Postpones Hearings On Lustration Law, *Radio Free Europe*, 16 April 2015.

II. Applicable Legal Framework

A. National Legal Framework

10. The **Constitution** of Ukraine, adopted in 2014, provides that *“human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. .../ To affirm and ensure human rights and freedoms is the main duty of the State”* (Article 3). The catalogue of human rights granted to the citizens of Ukraine and other persons on the territory or under the jurisdiction of Ukraine is included in Chapter II of the Constitution. The Chapter contains, among others, the prohibition of discrimination (*“Citizens have equal constitutional rights and freedoms and are equal before the law”* – Article 24), the right to personal and family life, encompassing the protection of personal data (Article 32) and the right to *“participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government”* as well as the right to *“the equal right of access to the civil service and to service in bodies of local self-government”* (Article 38).

11. The **Law on Government Cleansing**² sets conditions for cleansing the government, which is defined as *“a ban imposed by the Law or a court judgment on particular individuals to take certain positions (serve) (except for elective positions) in central and local government authorities”* (Article 1(1)). The draft amendments slightly change the definition, speaking about the ban applicable *“in public authorities, local selfgovernment authorities, including apparatus and their secretariats”* (draft Article 1(1)).

12. The Law states that the cleansing process aims at *“keeping away from public governance those persons 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 defense or violate human rights and freedoms”* (Article 1(2)). The draft amendments delete this provision, replacing it with a preamble that sums up the recent history of Ukraine and stresses the need for public officials to exhibit loyalty to the fundamental values of the constitutional democracy.

13. The principles on which the cleansing process is to be based are: the rule of law and lawfulness; openness, transparency and public accessibility; presumption of innocence; individual liability; and guarantees of the right to defense (Article 1(2)). The draft amendments add the principle of proportionality (draft Article 1(2)).

14. Articles 2 of the Law contain the list of persons to whom measures of Government Cleansing shall be imposed. Article 3 enumerates criteria on which government cleansing (lustration) is to be based.

15. The Law on Government Cleansing is the first comprehensive and all-encompassing law on lustration adopted in Ukraine. Yet, already on 8 April 2014, the **Law on the restoration of trust in the judiciary of Ukraine**,³ which introduced lustration – under the title of judicial screening – into the judiciary, was adopted by the Parliament. The Council of Europe issued comments on this Law concluding that the Law was in need of revision due to certain shortcomings relating both to the conditions of the judicial screening and procedural guarantees offered in its framework.⁴ The draft amendments relating to this law and currently

² Закон України, *Про очищення влади*, Відомості Верховної Ради (ВВР), 2014, № 44, ст. 2041.

³ Закон України, *Про відновлення довіри до судової влади в Україні*, Відомості Верховної Ради (ВВР), 2014, № 23, ст. 870.

⁴ Council of Europe, *Assessment of the Law on the Restoration of Trust in the Judiciary in Ukraine of 8 April 2014*, 7 May 2014.

pending before the Verkhovna Rada have not been assessed by the Council of Europe. In March 2015, the Venice Commission and the Directorate of Human Rights and the Rule of Law issued a Joint Opinion on the Law on the Judiciary and the Status of Judges of Ukraine (CDL-AD(2015)007). They noted that transitional Article 6 of this law provides for a qualification assessment of the judges, and warned that “the provision should also be harmonised with the lustration process”.

B. International Legal Framework

16. Lustration is not explicitly foreseen and regulated in any binding international instrument. Human rights instruments such as the 1950 European Convention on Human Rights or the 1966 International Covenant on Civil and Political Rights, both binding upon Ukraine, are however fully applicable here. The two instruments prohibit discrimination (Article 14 of the ECHR and Protocol 12 to it, Article 26 of the ICCPR) and grant the right to respect for private life (Article 8 of the ECHR, Article 17 of the ICCPR). Under Article 9 of the Constitution of Ukraine, “*international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine*”.

17. Article 21 of the Universal Declaration of Human Rights stipulates that “*everyone has the right to take part in the government of his country, directly or through freely chosen representatives*” (para. 1) and “*everyone has the right of equal access to public service in his country*” (para. 2). Although the Universal Declaration is not legally binding, most of its provisions are considered to reflect norms of customary international law. Article 25 (c) of the UN International Covenant on Civil and Political Rights grants every citizen the right and the opportunity, without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and without unreasonable restrictions, to have access, on general terms of equality, to public service in his country.

18. Lustration is explicitly dealt with in the Resolution by the Parliamentary Assembly of the Council of Europe **1096 (1996)** on measures to dismantle the heritage of former communist totalitarian systems. The resolution states that lustration measures “*can be compatible with a democratic state under the rule of law if several criteria are met*” (para. 12). These criteria are the following ones: guilt, being individual, rather than collective, 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. e. punishing people presumed guilty, have to be observed; and lustration has to have strict limits of time in both the period of its enforcement and the period to be screened. The criteria are explained in more details in the report attached to the resolution 1096 (1996),⁵ which contains **Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law** (hereafter the 1996 Guidelines). These guidelines have been created to guide policies seeking to dismantle the heritage of the communist era which ended in 1991. The underlying principles can be applied mutatis mutandis to dealing with the heritage of the Yanukovitch regime.

19. Lustration has been considered by the **European Court of Human Rights** in several cases relating to the relevant legislation enacted in Slovakia (Turek v. Slovakia⁶), Poland (Matyjek v. Poland,⁷ Luboch v. Poland,⁸ Bobek v. Poland,⁹ Szulc v. Poland¹⁰), Lithuania

⁵ Doc. 7568, *Measures to dismantle the heritage of former communist totalitarian systems*, 3 June 1996.

⁶ ECtHR, *Turek v. Slovakia*, Application No. 57986/00, 14 February 2006.

⁷ ECtHR, *Matyjek v. Poland*, Application No. 38184/03, 30 May 2006.

⁸ ECtHR, *Luboch v. Poland*, Application No. 37469/05, 15 January 2008.

⁹ ECtHR, *Bobek v. Poland*, Application No. 68761/01, 17 July 2007.

¹⁰ ECtHR, *Szulc v. Poland*, Application No. 43932/08, 13 November 2012.

(Sidabras and Džiautas v. Lithuania,¹¹ Rainys and Gasparavičius v. Lithuania,¹² Žičkus v. Lithuania¹³), Latvia (Ždanoka v. Latvia,¹⁴ Adamsons v. Latvia¹⁵) and Romania (Naidin v. Romania¹⁶).

20. The European Court has taken a similar approach as Resolution 1096 (1996) and the Guidelines. It has concluded that lustration does not constitute a violation of human rights *per se*, because “a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded”.¹⁷ The Court has also repeatedly invoked the concept of a “democracy capable of defending itself”.¹⁸ Such a democracy has to be able to take measures preventing a return of the totalitarian regime. At the same time, the Court has made it clear that lustration can violate human rights, if, for instance, individuals subject to it do not have a sufficient access to classified materials relating to their case; if those individuals are denied procedural guarantees; if lustration applies invariably to the positions in the public and private sphere; or if the lustration laws remain in force once the need for them has ceased and/or there is no review of their enduring utility.

21. In addition to the European Court of Human Rights, several national constitutional courts – especially those of Czechoslovakia, Czech Republic and Poland – have had an opportunity to assess the legality of lustration laws.

22. The **Venice Commission** has previously considered lustration at two instances, with respect to the draft lustration laws of Albania¹⁹ and “the former Yugoslav Republic of Macedonia”.²⁰ In the two cases, the Commission embraced the European standards based on the case-law of the European Court and the Resolution 1096 (1996) and confirmed by the practice of national constitutional courts.

III. Assessment of the Law on Government Cleansing

A. Aims of the Law on Government Cleansing

23. The Law on Government Cleansing differs from lustration laws adopted in other countries of Central and Eastern Europe in that it is broader in scope. It pursues **two different aims**. The first is that of protecting the society from individuals who, due to their past behaviour, could pose a threat to the newly established democratic regime. The second is to cleanse the public administration from individuals who have engaged in large-scale corruption. The term lustration in its traditional meaning only covers the first process.²¹

24. The Venice Commission accepts that the two aims pursued by the Law on Government Cleansing are both legitimate.

¹¹ ECtHR, *Sidabras and Džiautas v. Lithuania*, Applications Nos 55480/00 and 59330/00, 27 July 2004.

¹² ECtHR, *Rainys and Gasparavičius v. Lithuania*, Applications Nos 70665/01 and 74345/01, 7 April 2005.

¹³ ECtHR, *Žičkus v. Lithuania*, Application No. 26652/02, 7 April 2009.

¹⁴ ECtHR, *Ždanoka v. Latvia*, Application No. 58278/00, 16 March 2006.

¹⁵ ECtHR, *Adamsons v. Latvia*, Application No. 3669/03, 24 June 2008.

¹⁶ ECtHR, *Naidin v. Romania*, Application No. 38162/07, 21 October 2014.

¹⁷ ECtHR, *Vogt v. Germany*, Application No. 17851/91, 26 September 1995, para. 59.

¹⁸ *Ibid.* See also *Sidabras and Džiautas*, op. cit., para. 54.

¹⁹ Venice Commission, CDL-AD(2009)044, *Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania*, Opinion no. 524/2009, 13 October 2009.

²⁰ Venice Commission, CDL-AD(2012)028, *Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security*, Opinion no. 694/2012, 17 December 2012.

²¹ See Roman David, *Lustration and Transitional Justice. Personnel Systems in the Czech Republic, Hungary, and Poland*, University of Pennsylvania Press, 2011.

25. A newly democratic state might have good reasons to remove from the public life, on a temporary basis, individuals who occupied high-level positions under the previous, non-democratic regime or who engaged in serious human rights violations. Doing so limits the risk that the new regime be overturned or tarnished from the beginning by non-democratic practices. It strengthens public trust in the new government and enables the society to have a new, fresh start. At the same time, it is important to keep in mind that lustration is not, and is not meant to be, a form of criminal proceedings. It must never be used as a substitute for a criminal sanction, when such a sanction would be warranted, or as a measure of revenge and retaliation.

26. Anti-corruption measures also play an important role in building up a democratic society. In addition to undermining the national economy, corruption might constitute a security threat. It also has a negative impact on the trust in the public institutions and on social cohesion within the society. In Ukraine, corruption has for some time been a widespread problem with a tendency to grow. In the 2014 Transparency International Corruption Perceptions Index, Ukraine was ranked 142th of 175 countries.²² The fight against corruption is a long-term process. Corruption, once ingrained in the social life, can hardly be eradicated through a one-time measure.

27. The Law on Government Cleansing addresses the two challenges that the young Ukrainian democracy faces – non-democratic elites formerly loyal to President Yanukovich and corrupted officials – at the same time. In doing so, it goes beyond the process of lustration as this has been traditionally defined. During the meetings with the Ukrainian authorities, the Venice Commission delegation has repeatedly expressed the view that trying to deal with the two challenges in the same piece of legislation, and while using identical means, is not optimal. Lustration on the one hand and anti-corruption measures on the other hand, though both legitimate, are not identical in nature. They are also not subject to the same international legal standards and require different means to fight them.²³

28. The Venice Commission understands that in the specific Ukrainian context, institutionalized corruption was in fact closely linked to, and made part of non-democratic practices exhibited by the regime of the president Yanukovich. This regime, rather than serving any specific ideology, was established to allow the ruling elites to extend their personal wealth. Widespread corruption together with systematic misuse of power was among the means to achieve this goal.

29. Yet, despite the interrelation between corruption and anti-democratic practices in Ukraine, dealing with these two the threats to the young Ukrainian democracy in a largely identical way gives rise to practical difficulties (see, for instance, paras. 54-58 of this opinion). The Ukrainian authorities should therefore consider either removing the sections of anti-corruption to another piece of legislation (The Law on the Principles of Preventing and Combating Corruption) or, at least, modifying the cleansing procedure with respect to individuals falling under Article 3(8) of the Law on Government Cleansing to reflect the differences between lustration in the traditional sense and anti-corruption.

30. The Law on Government Cleansing bans certain categories of individuals from occupying certain public offices. The Venice Commission stresses that in line with the concept of the “democracy capable of defending itself”, the state has the right to exclude from the access to public positions those individuals who might pose a threat to the democratic system and/or have shown themselves unworthy of serving the society. At the

²² Transparency International, *Corruption by Country – Ukraine (2014)*, online at http://www.transparency.org/country#U_KR_DataResearch_SurveysIndices (accessed on 23 May 2015).

²³ See, e.g., Susan Rose-Ackerman/Paul Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Durham: Carolina Academic Press 2013).

same time, as the European Court of Human Rights noted in the *Ždanoka* case, “every time a State intends to rely on the principle of “a democracy capable of defending itself” in order to justify interference with individual rights, it must carefully evaluate the scope and consequences of the measure under consideration, to ensure that the /.../ balance is achieved”.²⁴ The legal regulation imposing limits on the access to public positions thus has to be clear and non-arbitrary in nature and has to respect the principle of proportionality.

B. Personal Scope of the Application of the Law

1. The Positions Subject to Government Cleansing

31. The positions subject to government cleansing are listed in Article 2 of the Law. These positions cannot be occupied by individuals falling under Article 3 of the Law. Current holders of these positions have already been screened, or will be screened in the nearest time, according to the schedule approved by the Cabinet of Ministers of Ukraine. If they admit, or it is found, that they belong to any of the categories under Article 3, they have to be immediately dismissed. Candidates for these positions will be screened and, if they fall under one of the categories falling under Article 3, will be denied appointment.

32. The 1996 *Guidelines on Lustration* stipulate 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;
- Lustration shall not apply to elective offices; and
- Lustration shall not apply to positions in private or semi-private organisations.

33. The list under Article 2 of the Law contains a rather extensive number of positions in all the spheres of the public administration (government, prosecution, courts, military forces, police services etc.). The Prime Minister Arseniy Yacenyuk estimates that altogether, the Law should apply to about one million people.²⁵ The Ukrainian authorities, however, with a view to proving that the impact of lustration measures (in the first meaning of this term) on the civil service will not be as extensive as feared, have provided the Venice Commission with statistical estimates on the percentage of civil servants that are likely to be lustrated on the basis of having occupied specific positions in the Prosecutor’s Office (337 to 1348 out of 20367 total amount of posts), in the Ministry of the Interior (372 to 1488 out of 210,000 total amount of posts) and in the State fiscal services (335 to 1340 out of 58,826 total posts). As it stated in its Interim Opinion, the Venice Commission warns that an overbroad personal scope of application of the Law would be very problematic. Not only would it risk violating individual fundamental rights: it would also affect the functioning of the whole Ukrainian civil service and social peace, giving rise to serious antagonisms and stimulating the rancour of those working under the former regime being disqualified from public functions in a disproportionate manner. A large scale lustration process would result in enormous bureaucratic burdens and might lead to an atmosphere of general fear and distrust.

34. **Article 2(4)** explicitly includes “*professional judges*”. The draft amendments do not bring any change in this respect. This suggests that judges continue to be subject to two pieces of legislation relating to lustration, the Law on Government Cleansing and the Law on the restoration of trust in the judiciary of Ukraine. The Ukrainian authorities have argued that judges will only be subject to the anti-corruption measures under the Lustration Law, this is not clear from the text of the law. The relationship between these pieces of legislation remains unclear.

²⁴ *Ždanoka v. Latvia, op. cit.*, para. 100.

²⁵ Yatsenyuk: Ukraine lustration will cover 1 million officials, *Kyiv Post*, 17 September 2014.

35. Judges of the Constitutional Court have now been included in Article 2(4). This inclusion does not collide as such with the applicable international standards.

36. As the Venice Commission stated in the Interim Opinion, the inclusion of Article 2(11), relating to *“persons intending to occupy the positions specified in clauses 1-10 of this part”*, is clearly a mistake. Negative lustration screening does not prevent individuals from “intending” to occupy a certain position but from “being appointed” to such a position. Yet, the draft amendments keep this category.

37. The draft amendments add new **Article 2(12)** which extends the scope of the positions subject to cleansing to *“candidates for members of parliament of Ukraine, candidates for members of Verkhovna Rada of the Autonomous Republic of Crimea, regional, district, city, borough, village, town councils, candidates for the President of Ukraine, for village, town and city mayors in accordance with the law”*. This provision is problematic in two ways.

38. First, by including members of the Parliament of Ukraine, members of Verkhovna Rada of the Autonomous Republic of Crimea and members of various councils, the provision breaches the fundamental principle that *“lustration shall not apply to elective offices, unless the candidate for election so requests”* (1996 Guidelines, para. e)).

39. Secondly, by applying to “candidates”, the provision faces the same difficulty as Article 2(11), namely that lustration should prevent an individual from acquiring a certain position, not from standing as a candidate for it.

40. During one of the meetings with the representatives of Ukraine, the Venice Commission was informed that draft Article 2(12) was not meant to turn candidates for the relevant posts into a new category of positions subject to government cleansing. Instead, it was to introduce an obligation for these candidates to provide a statement on the availability of information about them in the Unified State Register and on whether they fall under one of the categories listed in Article 3 of the Law. The provision of false information would entail the cancellation of the candidate registration. The system is somewhat similar to the model used in Poland.

41. The Venice Commission notes that such a regulation, even when applicable to candidates to elective posts, would not be *per se* at odds with international standards.

42. In order to reflect the meaning indicated by the Ukrainian authorities, the relevant provisions of the draft amendments (draft Article 51(5¹) of the Law on the Election of the President of Ukraine, draft Article 54(7¹) of the Law on the Election of members of Parliament of Ukraine) would however benefit from a revision, because their text – at least in its English translation – is not fully clear. What does, for instance, *“the fact that to them used the prohibitions /.../ or not used the relevant prohibitions”* mean? Does this refer solely to cases when a person has been formally lustrated and included in the Register or does it cover other situations as well? The text of the draft amendments does not make it clear whether the cancellation of the candidate registration would be subject to a judicial review or not.

43. At the same time, draft Article 2(12) should be deleted, as it is misplaced and misleading.

2. The Criteria for Government Cleansing

44. The criteria for government cleansing are listed in Article 3 of the Law. Individuals falling under one of the categories in this provision are banned from occupying the positions listed in Article 2 of the Law for the period of 5 or 10 years.

45. The period of exclusion of **10 years** applies to the following categories:

- a) Individuals who occupied high positions in the state apparatus for at least a year between 25 February 2010 and 22 February 2014;
- b) Individuals who occupied certain positions, mostly within the military, police, judicial or media sectors, between 21 November 2013 and 22 February 2014;
- 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;
- d) Individuals who enriched themselves in violation of the Law on the Principles of Preventing and Combating Corruption.

46. The period of exclusion of **5 years** applies to the following categories:

- 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;
- 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.
- 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.
- 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; 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.

47. In case of individuals falling under paragraphs b)-d), a court judgment against them that relates to the facts indicated in the relevant provision and that has taken effect, is needed.

48. The 1996 **Guidelines** on Lustration make it clear that:

- Lustration shall 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
- Lustration needs to be based on the principle of individual (not collective) liability.

49. 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, shall be excluded from lustration.

50. **Article 3(1)-(2)** disqualifies certain individuals on the basis of the position that they held during the period of presidency by Viktor Yanukovych in 2010-2014 (1) or during the Maidan events at the turn of 2013-2014 (2). The disqualification based solely on the position is not a *priori* contrary to international standards, provided that it is reserved for the high positions within organizations responsible for serious human rights violations and for serious cases of mismanagement. The Venice Commission is not completely persuaded that all the positions

listed in Article 3(1)-(2) meet this condition. It notes however that the Ukrainian authorities are better placed to assess which public institutions played a prominent role, engaging in non-democratic processes, in the two relevant periods.

51. The time frame set in Article 3(1) – holding an office “*for at least a year cumulatively between February 25, 2010 and February 22, 2014*” – would require some justification. Given that Article 3(1) mostly relates to high-level posts within the state administration, it is not clear, why a minimum period of holding such posts is needed and why this minimum period has been set to one year.

52. **Article 3(3)** disqualifies “*police officers, public prosecutors 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 of 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*”. The Venice Commission does not have the Law No. 792-VII at its disposal to be able to consider the content of the provision. Yet, the scope of persons covered by it seems to be rather extensive, including not only those who could an active part in the prosecution but also those who helped them by their inaction (no knowledge or intent is required) or contributed in any form.

53. **Article 3(5)-(7)** disqualifies certain categories of individuals subject to a court decision against them that has taken effect. All the provisions should specify, as Article 3(7) does, that the decision has to relate to the very act for which the disqualification occurs.

54. **Article 3(8)** relates to the fight against corruption. It disqualifies persons whose verification done under the 2011 Law on the Principles of Preventing and Combating Corruption showed “unreliability of data about their possession of property indicated in property, assets, expenses and financial declarations, or their family members’, and/or discrepancy value of the property” submitted to the fiscal authorities. After extensive talks with the Ukrainian authorities, the Venice Commission has got a better understanding of what data will be screened (acquisition of assets during the time when the positions specified in paras. 1-10 of Article 2 were held), how the screening procedure is carried out in practice and what the role of various organs (fiscal authorities, screening bodies etc.) is. The Venice Commission has also acknowledged the scale that corruption has attained in Ukraine and the implications this has for the stability of the country and the public trust in its institutions.

55. The Venice Commission does not contest that Article 3(8) pursues a legitimate purpose, that of protecting the Ukrainian society from the scourge of corruption. It notes however that the provision is drafted in a somewhat problematic manner. An automatic disqualification from access to public positions for a period of 10 years of all individuals whose verification shows some irregularities, regardless of the nature and extent of these irregularities, is a radical measure. It is questionable whether it could meet the principle of proportionality included among the principles of the cleansing process (Article 1(2) of the Law).

56. Moreover, it seems that the fight against corruption could be effectively ensured through legal acts other than the Law on Government Cleansing. The Law on the Principles of Preventing and Combating Corruption foresees special screening of persons who aspire to hold positions involving the performance of State or local government functions (Article 11). The circle of those positions is quite similar to that under Article 2 of the Law on Government Cleansing. Moreover, a large part of individuals holding such positions have to submit annual declarations on property, incomes, expenses, and obligations of a financial nature for the previous year (Article 12). Any corruptive behaviour revealed in the course of the screening entails criminal, administrative, civil or disciplinary liability (Article 21).

57. The 2001 Criminal Code of Ukraine contains a set of “criminal offences in office” (chapter XVII). Those include neglect of official duty and taking a bribe (Articles 367-368). Persons convicted of such offences are punishable by imprisonment, forfeiture of property and/or by the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years. This procedure is subject to all the guarantees of the fair trial and allows to the court to determine the sanction while taking into account the severity of the offence and the threat that the individual constitutes for the society.

58. The Law on Government Cleansing bypasses this regulation by introducing a simplified, non-individualized procedure entailing a single, uniform sanction. The period of exclusion imposed as this sanction is more than three times longer than the maximum period of exclusion foreseen under the Criminal Code. The procedure does not allow individualization, it is indiscriminate. Thus the application of Article 3(8) of the Law on Government Cleansing could result in thousands of persons being excluded from the access to public positions for 10 years on the basis of irregularities in their financial data and being put at par with individuals responsible for serious human rights violations and crimes.

59. The Ukrainian authorities have informed the Commission that the application of lustration measures in the domain of corruption is only meant to be temporary, pending the full entry into force of the anti-corruption mechanisms.

60. This element, however, does not eliminate the Commission’s concerns. The draft amendments add new **Article 3(9)** which extends the 10-year ban on the access to public positions to “*persons discharged from judicial office for violating the oath or violation of incompatibility*”. This provision is open to two objections. First, since it concerns members of the judiciary, the question of the relationship to the Law on the restoration of trust in the judiciary of Ukraine arises here again. Secondly, similarly as Article 3(8), draft Article 3(9) introduces a uniform system of sanctioning which is applicable to all cases involving the violation of oath or of incompatibility regardless of their gravity. It is to be recalled in this context that the Criminal Code of Ukraine contain a whole section on Criminal Offenses against Justice (chapter XVIII) which, together with the disciplinary sanctions available, would be more appropriate to use than a blanket, one-fit-for-all regulation under the Law on Government Cleansing.

3. Exemptions from the Ban on Access to Public Positions

61. The Law on Government Cleansing provides for certain exemptions from the ban on access to the public positions.

62. Under Article 1(9), the Law does not apply to persons born after 1 January 1996. This reflects one of the principles set out in the 1996 Guidelines, namely that “*lustration shall not be imposed on a person who was under the age of 18 when engaged in the relevant acts*” (para. I).

63. Article 3(11) specifies that when calculating time within the periods foreseen in Article 3(1)-(2), certain periods, such as that of factual non-performance of the duties, shall not be considered. This is again in line with the 1996 Guidelines. The reference in Article 3(11)(c) to “*appropriate authority which is subject for reorganization at the period dated by the day of introduction of new staff schedule instead of existing authority, created as a result of the reorganization and the appointment of the head of the agency solely on his or her position in that authority*” is not very clear, at least in the English translation.

64. In its Interim Opinion, the Venice Commission noted that “*even a voluntary resignation from the position prior to 22 February 2014 would not be sufficient to be excluded from lustration*” (para. 65). The 1996 Guidelines explicitly state that “*lustration shall not be*

imposed on a person who /.../ in good faith voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic régime” (para. 1).

65. The draft amendments take this requirement partly into account by providing in the heading of Article 3(2) that the ban shall be imposed on the relevant persons who “*were not retired from the office on their own will*”. The provision is not completely clear as to whether the retirement must have occurred in the given period (21 November 2013 – 22 February 2014) or whether later retirement would also be taken into account. The draft amendments fail to include a similar provision into other sections of Article 3. Since “*the aim of lustration is not to punish people presumed guilty /.../ but to protect the newly-emerged democracy*” (Preamble of the Guidelines), the changes in individual attitudes are a factor to be taken into account with respect to all categories of individuals.

66. Article 1(7) foresees an exemption from the ban on the access to public positions for those individuals falling under Articles 3(2)-(4), “*who have been recognized as participants of military activities during the counterterrorism operation in the east of Ukraine as established by law*”. The draft amendments change partly the wording, referring to “*those who has been or are serving in the Armed Forces of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other of military units established under the laws, special forces of Ministry of Internal Affairs and Security Service of Ukraine and recognized as combatants of antiterrorist operation in eastern Ukraine*”. The rationale behind this provision is that by taking part in the armed struggle in Eastern Ukraine, individuals prove their loyalty to the new regime. This rationale is understandable. Yet, considering how few other exemption tools are available under the Law on Government Cleansing, Article 1(7) might give rise to difficult dilemmas (risking life or losing honour) for individuals subject to lustration.

C. Temporal Scope of the Application of the Law

67. The temporal scope of the application of the Law on Government Cleansing relates to the periods to be subject to the cleansing and the period during which the cleansing measures should remain in force.

1. Periods of the past to be screened

68. As the Venice Commission noted in its Interim Opinion, the Law on Government Cleansing “*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 Yanukovich’*” (para. 25).

69. With respect to the **first period**, the Venice Commission stressed that “*cogent reasons to justify lustration with regard to persons involved in the Communist regime need to be given*” (para. 37). Even after extensive exchange of views with the Ukrainian authorities, the doubts as to the presence of these *cogent reasons* still persist.

70. The Venice Commission once again recalls that “*the measures of lustration are, by their nature, temporary and the objective necessity for the restriction of individual rights resulting from this procedure decreases over time*”.²⁶ Whereas the totalitarian non-democratic nature of the pre-1991 regime in the Soviet Union is not open to question, the need to use lustration measures with respect to the representatives of this regime, almost 25 years after its fall, seem controversial. It might well be that some of the representatives of the communist regime still constitute a threat to the democratic regime in Ukraine. Yet, this should not be

²⁶ ECtHR, *Adamsons v. Latvia*, Application No. 3669/03, 24 June 2008, para. 116.

presumed based simply on the position they held prior to 1991. Their behaviour and activities in the period posterior to that date should be taken into account as well.

71. With respect to the **second period**, that of the “*power usurpation by the President of Ukraine Viktor Yanukovich*” (Article 1(2) of the Law), the Venice Commission repeats that “*applying lustration measures in respect of acts committed after the end of the totalitarian regime may only be justified in the light of exceptional historic and political conditions*”.²⁷ It is primarily for the Ukrainian authorities to assess whether such exceptional conditions have existed in the country during and after the fall of the Yanukovich regime. However, this assessment and the measures taken by Ukraine must respect human rights and the European standards on the rule of law and democracy, and will be ultimately monitored by the European institutions.

2. Period of Disqualification

72. Under Article 1(3) and (4) of the Law on Government Cleansing, individuals falling into one of the categories listed in Article 3 are to be excluded from any of the positions enumerated in Article 2 for a period of 5 or 10 years. The time period depends on the category under Article 3. The 10-year period is set for high level officials from the communist era and from the Yanukovich’s rule, individuals holding high positions during the Maidan revolution, individuals involved in corruption and (under draft amendments) to persons discharged from judicial office for violating the oath or violation of incompatibility. The 5-year period, considered from the day when a corresponding court judgment takes effect, is set for the other categories of individuals.

73. The 10-year period runs from the day on which the Law took effect (16 October 2014), which means that all lustration measures will end on 15 October 2024. This entails that individuals will be banned from access to public office for different periods depending on when they are screened. The Ukrainian authorities have submitted that proportionality is taken into account by the order in which the screening procedures are carried out: the most serious cases have been screened first. The Venice Commission finds that the possibility of being excluded from public offices for different lengths of time for the same facts raises issues of equality which the Lustration Law does not address properly.

74. The 10-year period foreseen in the Law on Government Cleansing is at odds with the requirement of the 1996 Guidelines on Lustration 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*” (para. g). 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*”.²⁸ 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, some margin of appreciation shall be left to the national authorities to determine the period for which lustration is required.

75. At the same time, if national authorities opt for a period longer than that recommended in the 1996 Guidelines, it is for them to explain why they find such an extension necessary.

²⁷ CDL-AD(2012)028, *op. cit.*, para. 77.

²⁸ Constitutional Court of the Czech Republic, Opinion 09/01, 5 December 2001. Previously, in 1992, Thus, the Federal Constitutional Court of the Czech and Slovak Federative Republic held in 1992 that the Czechoslovak lustration law “*shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratisation will have been accomplished*”, setting 31 December 1996 as the outmost deadline (Opinion 03/92, 26 November 1992). The Czech Constitutional Court disagreed with this approach.

The same applies, if several different period of disqualification are introduced, as is the case in Ukraine (5 and 10 years).

76. The Ukrainian authorities argue that the 5-year period of exclusion is not sufficient for some of the categories of lustrated positions, because it corresponds to the usual length of the political term (elections to the Parliament take place in 5-year cycles). The period of exclusion could thus end at the moment when the next parliamentary elections would be held, bringing about the risk of a political overturn. This argument is plausible. It is also to be noted that several of the countries of Central and Eastern Europe which have resorted to lustration have opted for a period of disqualification longer than 5 years. This development suggests that the 10-year period of disqualification foreseen in the Law on Government Cleansing should not *per se* be seen as unreasonable and disproportionate.

77. The Venice Commission nonetheless recalls that, 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*”.²⁹

D. Administration of Lustration

78. The Law of Government Cleansing defines lustration as a decentralized process whose course is overseen by the Ministry of Justice (replaced by the Central Executive Body for Lustration under draft amendments) that is seconded by an advisory public council.

1. Decentralized Nature of the Lustration Procedure

79. Article 4 of the Law of Government Cleansing indicates that persons occupying one of the positions listed in Article 2 “*shall submit to their chiefs or agency written statements whether they are (or are not) subject to the ban under the law and consent to screening a publishing of information about them*”. The screening takes place according to the schedule approved by the Cabinet of Ministers of Ukraine. Lustration is thus a decentralized process with individuals screened within their own office or agency.

80. The decentralized nature of the lustration procedure is not uncontroversial. Since Ukraine had never experienced lustration in the past, there is a risk that the practice under the Law, which is to be implemented by a range of public agencies, could either lack uniformity or open space for settling accounts on a personal/political basis or lead to too lenient an approach towards some of the lustrated individuals. The situation is particularly problematic due to the fact that up to now, the judicial review of lustration decisions has been *de facto* inoperative and the decisions in individual cases are thus not subject to any external control.

81. The Ukrainian authorities should consider revising the lustration procedure with the view of centralizing it or, alternatively, should ensure that judicial review of the lustration decisions is not just a theoretical possibility but a reality.

2. Central Body Monitoring Lustration

82. Article 5 of the Law on Government Cleansing designates the Ministry of Justice as “*an agency authorised to ensure the screening provided by this Law*” (para. 1). It also stipulates that the Ministry shall, within one month following the effective date of the Law (16 October 2014), establish “*an advisory public council for lustration which shall comprise representatives of mass media and general public to ensure civil control over the government cleansing*” (para. 2). The Council (Громадська рада при Міністерстві юстиції України з питань люстрації) was established in November 2014. It currently has 12 members. The Law is not

²⁹ *Ždanoka v. Latvia*, *op. cit.*, para. 135.

very clear as to what the competences of the Council are and how concretely it should ensure civil control over the government cleansing.

83. The 1996 Guidelines state that *“lustration should be administered by a specifically created independent commission of distinguished citizens nominated by the head of state and approved by parliament”* (par a)). Based on this standard, the Venice Commission concluded in its Interim Opinion that: *“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”* (104 c)).

84. The draft amendments foresee the creation of *“the central executive body with special status which forms and implements the national policy on Government cleansing (lustration)”* (draft Article 5(1)). This Central Executive Body (hereafter the Executive Body) should thus replace the Ministry of Justice as the central organ monitoring the lustration process.

85. The Executive Body is to be an executive organ situated at the same level as ministries and other central bodies of executive power. Its head would be appointed by the Prime Minister upon the submission of the Cabinet of Ministers and removed by the Cabinet with the consent of the Parliament (draft Article 5²). The head would have up to two deputies, appointed and removed by the Cabinet of Ministers upon the submission of the Prime Minister (Article 19(1) of the Law on Central Bodies). As an executive organ, the Executive Body would not have members but administrative staff.

86. Two main questions arise with respect to the Executive Body – one relating to its independence, the other one relating to its competencies. The two questions are interrelated, as a public body endowed with full independence but with no competences would be equally problematic as a non-independent body with strong competences.

87. The ***independence of the Executive Body*** seems to be well guaranteed under the draft amendments. The 1996 Guidelines require that lustration be administered by a commission which is: a) specifically created, b) independent, c) composed of distinguished citizens; d) with members nominated by the head of state and approved by parliament. The Venice Commission in its Interim Opinion added yet another requirement: e) the active involvement of the civil society.

88. The Executive Body is *specifically created*. It would have the legal basis in the Law on Government Cleansing, as amended, and the Law on Central Bodies of Executive Power. It is only tasked to exercise activities relating to lustration and in this respect, it is created specifically.

89. The Executive Body is *relatively independent*. Under draft Article 5⁵, the independence of the Executive Body shall be ensured by *“1) its special status; 2) specialized procedure for appointment of the head /.../; 3) transparency of its activity; 4) otherwise, in way provided for in this Law”*. The draft amendments prohibit the use of the Executive Body for political, group or private interests. It bans activities by political parties in the Executive Body. The draft amendments do not specify by what means the transparency of the activities of the Executive Body should be ensured.

90. The third requirement seeks to ensure *internal independence* of the members of the commission. “Distinguished citizens” in this sense are meant to be individuals offering guarantees of their personal integrity and honesty. The draft sets no requirement for the head of the Executive Body, its deputies and the staff. It is to be expected that these individuals would be subject to the same requirements as any other civil servants in Ukraine. Since a new Law on Civil Service is still under preparation, the Venice Commission is

unaware as to what these requirements are and is thus unable to assess to what extent they would grant the internal independence of the Body's head/deputies/staff.

91. The Executive Body forms part of the executive power. It therefore has no "members" but solely the head, its deputies and the staff. There is no involvement by either the President of Ukraine or the Verkhovna Rada in the process of nomination and appointment of the head and his or her deputies, let alone of the regular staff of the Executive Body. At the same time, the Parliament is to be involved in the removal of the head of the Executive Body.

92. The Parliament cannot itself appoint or remove the head and the deputies of the Body, because under Article 85 of the Constitution, one of the powers the Verkhovna Rada has is: "*appointment or election, removal from offices, giving consent to the appointment and removal from offices of the persons in cases provided for in the Constitution*" (para. 15). The Body is not mentioned in the Constitution, a constitutional amendment would thus be needed. Yet, nothing in the Constitution prevents other forms of the involvement of the Parliament, or one of its committees, in the appointment/removal of the head of the Body and its deputies.

93. Similarly, nothing seems to prevent an active involvement of the President of Ukraine. In fact, under Article 106 of the Constitution, the President shall "*appoint upon the submission of the Prime Minister of Ukraine the members of the Cabinet of Ministers of Ukraine, Heads of other central executive power bodies as well as the Heads of local state administrations and shall terminate their authority in these offices*" (para. 10). It is not completely clear why the draft amendments seek to deviate from this rule and why the head of the body is to be appointed and removed by the Cabinet of Ministers.

94. The *active involvement of the civil society* in the appointment of the head/deputies of the Body and the operation of the Executive Body is not ensured by the draft amendments. The draft does not however give away with the Advisory Public Council for lustration established under Article 5(1) of the Law. It is not fully clear what the relationship between this Council and the Executive Body would be and whether the Council would have any formal competences with respect to the activities of the Executive Body. Ideally, the Council should have a role to play in the appointment and removal of the head of the Executive Body and its deputies.

95. The **competences of the new Executive Body** are set out in draft Article 5³. It will be tasked to "*supervise and monitor compliance with the legislation on government cleansing (lustration)*" (5³(2)). For these purposes, it is to coordinate public organs ensuring the screening procedure, provide methodological support and administrate the Uniform State Register. This indicates that the Executive Body has rather weak competences and the lustration procedure is to remain a decentralized one. For the reasons stated above, this is problematic.

96. The wording of draft Articles 5³ and 5⁴ does not make it fully clear whether the Executive Body has the competence to receive and consider, as an organ of administrative review, complaints by individuals subject to lustration. Under Article 5³(2), it is tasked to supervise and monitor compliance with the Law. Under Article 5³(6), it may make binding orders to eliminate violations of the Law. Article 5⁴(9) stipulates that the Executive Body is entitled to "*obtain statements of individuals and entities on violation of requirements of the Law*". The latter wording would suggest that the Executive Body might serve as an organ of administrative appeal. This would be welcome. Yet, if this is the case (according to the Ukrainian authorities there are constitutional hurdles to the exercise of judicial review by an executive body), the Law should state it more explicitly so that the citizens would know what legal venues are available to them. The Law should also define the conditions of the access

to the administrative review, the extent such a review can take and its relationship to the judicial review.

97. The Venice Commission stresses that an administrative review by the Executive Body can never serve as a substitute to the judicial review. Yet, already the administrative procedure and the possible review within the administrative procedure should follow the principles of the fair trial (access to the file, right to be heard, reasoning of the decisions, etc.).

E. Protection of the Rights of Lustrated Persons

98. The lustration procedure and the ban on access to public positions have an impact upon the rights of individuals concerned. In the Interim Opinion, the Venice Commission expressed concerns relating to the Uniform Register of Persons Subject to Lustration and to the procedural guarantees offered to the lustrated individual.

1. Uniform Register of Persons Subject to Lustration

99. Under Article 7 of the Law on Government Cleansing, information about persons subject to lustration “*shall be entered in the Uniform Register of persons who are subject to the Law of Ukraine On Government Cleansing /.../ made and kept by the Ministry of Justice of Ukraine*” (para. 1). The draft amendments foresee that the Uniform Register will be administered by the Body. Information about persons subject to the ban under Article 1(4) shall be also published on the official website of the Ministry of Justice. This would indicate that with the exception of persons falling under Article 3(3) only persons whose misbehaviour has been established by a court would have the information against them made accessible to the public, whereas information about persons banned from the public life without a court decision (Article 1(3)) would not.

100. This reading however does not correspond to the practice. The online version of the Register, available on the site of the Ministry of Justice (lustration.minjust.gov.ua/register) contains the names of individuals lustrated under all the provisions of Article 3.

101. The Venice Commission stated in its *amicus curiae* brief on “the former Yugoslav Republic of Macedonia”, 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 Based on this rules, the Venice Commission in its Interim Opinion recommended that “*information on the persons subject to lustration measures should only be made public after a final judgment by a court*” (104c).

102. The draft amendments seek to accommodate this recommendation by requiring that in addition to the name of the lustrated person, the period of his/her exclusion from the public life and the legal round of this exclusion, the Uniform Register should also contain “*information concerning the appeal by the person in court*” (draft Article 7(3)), provided that this information is made available to the Executive Body by the person concerned. This change is welcome by the Venice Commission. The English translation of the draft amendments seems to be erroneous in that some of the information (information on the time period and on the appeal) is included twice.

³⁰ CDL-AD(2012)028, *op. cit.*, para. 74.

2. Procedural Guarantees

103. The 1996 Guidelines stipulate 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 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”* (para. m)).

104. The European Court of Human Rights in its case-law also confirmed that *“if a State is 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”*.³¹ The Court indicated some of the procedural shortcomings that lustration laws might suffer from, such as the lack of access to the lustration file³² and non-respect for the equality of arms in the lustration-related trials.³³

105. The Law on Government Cleansing in its Article 1(2) acknowledges that lustration is to be based, among others, on presumption of innocence, and the guarantees of the right to defence (Article 1(2)). The Venice Commission draws attention to some of the shortcomings of the Law relating to procedural guarantees in its Interim Opinion.

106. In the course of the talks with the Ukrainian authorities and the civil society, the Venice Commission learnt that in many court cases there is a standstill. This prevents an effective implementation of the law and should be ended as quickly as possible. It casts a negative light on the state of the rule of law and of human rights protection in Ukraine.

IV. Conclusions

107. The Law on Government Cleansing differs from lustration laws adopted in other countries of Central and Eastern Europe in that it is broader in scope. It pursues two different aims. The first is that of protecting the society from individuals who, due to their past behaviour, could pose a threat to the newly established democratic regime. The second is to cleanse the public administration from individuals who have engaged in large-scale corruption. The term lustration in its traditional meaning only covers the first process

108. In its Interim Opinion, adopted in December 2014, the Venice Commission stressed that, in order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between defending the democratic society on the one hand and protecting individual rights on the other hand. It also drew attention to some of the shortcomings of the 2014 Law on Government Cleansing, relating to the personal scope of application of the Law (the need to limit lustration to the most important positions within the state etc.), the time element (two period of exclusion etc.), the administration of lustration (decentralized procedure, absence of an independent body etc.) and the procedural guarantees (individualised liability, protection of personal data of individuals subject to lustration, availability of the judicial review etc.).

109. The Ukrainian authorities have agreed that the Law requires improvement in order to meet the applicable international standards and have sought further assistance of the Venice Commission. In February-May 2015, extensive exchange of views took place between the

³¹ *Turek v. Slovakia*, *op. cit.*, para. 115.

³² *Matyjek v. Poland*, *op. cit.*; *Bobek v. Poland*, *op. cit.*

³³ *Luboch v. Poland*, *op. cit.*

Ukrainian authorities and the Venice Commission. The dialogue has been constructive and has helped clarify some of the points of contention.

110. In April 2015, the Venice Commission received from the Ukrainian authorities a set of draft amendments to the Law on Government Cleansing and to other related laws, notably to electoral laws, which are currently under consideration in the Parliament. The Venice Commission welcomes some of the improvements proposed in the draft, such as the creation of the Central Executive Body for Lustration or the changes in the Uniform Register. Yet, the Law – even if amended – still shows certain shortcomings.

111. The Venice Commission would particularly like to draw attention to the following main points:

- a) The protection of a newly democratic regime from the elites of the previous non-democratic one and the fight against corruption are both valuable and legitimate political aims. Yet, they can hardly be achieved through the same means. The exclusion from public life for a fixed (one-for-all) period should be reserved for those falling under the first category. Article 3(8) should be either moved from the Law on Government Cleansing to the Law on the Principles of Preventing and Combating Corruption, or revised to allow for individualisation. An exclusion from access to public positions based on irregularities in the financial data should take into account the nature and extent of the irregularities. The exclusion based of the Law on Government Cleansing must not be disproportionate to the sanction of the deprivation of the right to occupy certain positions that may be imposed under the Criminal Code.
- b) Ordinary judges should be excluded from Article 2(4) and subject solely to the regime of the Law on the restoration of trust in the judiciary of Ukraine.
- c) Articles 2(11) and 2(12) should be deleted since they are misplaced and misleading. The ban on access to public positions does not prevent individuals from standing as candidates to any position.
- d) It is for the Ukrainian authorities to consider whether all the positions listed under Articles 3(1)-(2) played a prominent role in the misuse of power by the regime of V. Yanukovych in 2010-2014 or during the Maidan events at the turn of 2013-2014. When doing so, they should take into account the concrete situation in Ukraine, while at the same time respecting that *“where an organisation has perpetrated serious human rights violations, a member, employee or agent shall be considered to have taken part in these violations if he was a senior official of the organisation”* (para. h) of the Guidelines).
- e) Articles 3(5)-(6) should specify that the relevant court decision has to relate to the very act for which the disqualification occurs.
- f) Lustration should be administered in a centralised way. If the decentralised procedure is maintained, the competences of the Executive Body should be strengthened (or clarified). Most importantly, the Executive Body should serve as an organ of administrative review open to complaints by individuals subject to lustration. The administrative review must not serve as a substitute to judicial review, which shall be made operative as soon as possible.

112. Lustration must never replace structural reforms aimed at strengthening the rule of law and combatting corruption, but may complement them as an extraordinary measure of a democracy defending itself, to the extent that it respects European human rights and European rule of law standards.

113. The Venice Commission is ready to provide further assistance to the Ukrainian authorities, should they request it.