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**CONFERENCE ON**

**"PAST AND PRESENT-DAY LUSTRATION: SIMILARITIES, DIFFERENCES, APPLICABLE STANDARDS"**

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# REPORT

# "SECOND WAVE OF LUSTRATION: LUSTRATION AFTER MAIDAN IN UKRAINE"

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## I. Basic documents

### A. PACE Resolution 1096 (1996) "Measures to dismantle the heritage of the former communist totalitarian systems"

1. On institutional level the heritage of the of the former communist totalitarian systems includes (over)centralisation of civilian institutions, bureaucratization, monopolization, and over-regulation, on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns (para. 1).
2. To re-establish a civilized, liberal state under the rule of law on this basis is difficult – this is why the old structures and thought patterns have to be dismantled and overcome (para. 1).
3. The goals of this transition process are: to create a pluralistic democracies, based on the rule of law and respect for human rights (para. 2)
4. The Assembly recommends that the member states dismantle the heritage of the former communist totalitarian regimes by restructuring the old legal and institutional systems (para.5).
5. The Assembly also recommends that criminal acts committed by individuals during the communist regime be prosecuted and punished under the standard criminal code. Passing and applying retroactive criminal laws is not permitted (para. 7).
6. Concerning the treatment of persons who did not commit ant crimes that can be prosecuted in accordance with para. 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or to or belief in them in the past and have no interest or motivation to make the transition to them now (para.11).
7. The Assembly stresses that, in general, *these measures can be compatible with democratic state under the rule of law if several criteria are met.* Firstly, *guilt, being individual, rather then collective, must be proven in each individual case – this emphasizes the need for an individual, and not collective, application of lustration laws.* Secondly, *the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty – this is the task of the prosecutors using criminal law – but to protect the newly emerged democracy* (para.12).
8. The Assembly thus suggests that *it be insured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and democratization process* [***Guidelines***] (para.13).
9. The Assembly recommends that th authorities of the countries concerned verify that their laws, regulations and procedures comply with the principles contained in this resolution, and revise them, if necessary. This would help to avoid complaints on these procedures lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure (para.15).

**B. National Legislation**

10. Two Laws:
    - The Law *on restoration of trust in the judiciary* (08 August 2014);
    - The Law *on* Government Cleansing (16 October 2014);
    - *Draft amendments* to the Law on Government Cleansing (submitted to Parliament and still are under consideration there and have not been formally approved yet).
11. The Law *on Government Cleansing* differs from lustration laws adopted in other countries of Central and Eastern Europe: it pursues ***two different aims*** –
    - to protect the society from individuals who, to their past behavior, could pose a threat to the newly established democratic regime;
    - 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.
12. The Law addresses the ***two challenges at the same time***.
    In doing so, it goes beyond the process of lustration as this has been traditionally defined.
13. 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). Altogether, the Law should apply to about 1 000 000 people.
14. The Law explicitly includes "professional judges". This suggests that ***judges are subject to two pieces of legislation relation to lustration***. *The relationship* between the two laws (the Law *on Government Cleansing* and the Law *on restoration of trust in the judiciary*) ***is unclear.***
15. *The criteria* for government cleansing: the disqualification is based solely on *the position.* All the positions listed in the Law ***do not meet conditions*** set up by [the ***Guidelines***].
16. *The time frame*, set up in the Law, of holding the positions in the offices ***is not justified***.
17. *An automatic disqualification* from access to public positions for a period of 10 years of all individuals whose verification shows some irregularities in their financial data (regardless of the nature and extent of these irregularities) looks like ***a radical measure***.
18. The Law introduces a simplified, ***non-individualized procedure*** entailing a single, uniform sanction as an *anti-corruption mechanism*. The period of exclusion imposed as this sanction is more than three times longer than the maximum period of exclusion foreseen under Criminal Code:
    - the procedure ***does not allow individualization***, therefore, is ***discriminate*** (the application of the Law 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 pair with individuals responsible for serious human rights violations and crimes);
    - this element is open to ***two objections*** –
        1) the question of the relationship to the Law *on restoration of trust in the judiciary*;
        2) it introduces a uniform system of sanctioning which is applicable to all cases involving the violation of oath or of incompatibility regardless of their gravity

(in this context: the Criminal Code of Ukraine contain a whole section on Criminal Offences 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*).

19. *Temporal scope*: the Law deals with ***two different periods*** of undemocratic rule in the country – 1) the Soviet communist regime, and "the powerful usurpation by the President of Ukraine Viktor Yznukovych":
    - 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, seems to be rather controversial: some of the representatives of the communist regime in Ukraine should not be presumed simply on the position they held prior to 1991;
    - the assessment and the measures of lustration with regard to "exceptional historic and political conditions" of the second period must respect human rights and the European standards on the rule of law and democracy.
20. *Period of disqualification* in the Law:
    1) the *10-year period* – for high level officials form the communist era and from the Yanukovich's rule; individuals holding high positions during the Maidan revolutions; individuals involved in corruption to persons discharged from judicial office violating the oath or violation of incompatibility (all lustration measures will end on 15 October 2014).
    2) the *5-year period*, considered from the day when a corresponding court judgment takes effect – for the other categories of individuals.

    This entails that individuals will be banned from access to public office for different periods depending on when they are screened.
21. The Law defines lustration as a ***decentralized process*** whose course is overseen by the Ministry of Justice – "as an agency authorized to ensure the screening provided by this Law" – Article 5 (1). This approach contains 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.
22. *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 (CEB)** is designed to replace the Ministry of Justice as the central organ monitoring the lustration process: the CEB 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 5).
23. ***Two main questions*** arise with respect to the CEB: 1) issue of independence; 2) 2) issue of competencies:
    - Issue of ***independence***:
      - the CEB is *specifically created* (legal basis in the Law);
      - the CEB is *relatively independent* (the *Parliament* is to be involved in the removal of the head of the CEB, although Parliament has no powers on it under the Constitution; nothing seems to prevent an active involvement of the

*President of Ukraine* as well; active involvement of the *civil society* is not ensured by the draft amendments).

- Issue of ***competences***:
  - the CEB has rather week competencies and lustration procedure is to remain a decentralized one;
  - it is fully unclear whether the CEB has the competence to recieve and consider (as an organ of administrative review) complaints of individuals subject to lustration;
  - an administrative review by the CEB can never serve as a substitute to the judicial review.

24. *The Law* provides that information about persons subject to lustration "*shall be entered in the Uniform Register of persons who are subject to the Law* [on lustration] *made and kept by the Ministry of Justice*" – Article 7(1). The Draft amendments foresee that the Uniform Register will be administered by the CEB, and (with some exceptions) only persons whose misbehavior 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 would not.
25. In February 2015, a delegation of the Venice Commission visited Kyiv. 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. In the course of the talks, the Venice Commission learnt that in ***many courts cases there is a standstill***. This prevents an effective implementation of the Law.

### C. Conclusions

26. Negative lustration screening does not prevent individuals from "intending" to occupy a certain position but from "being appointed" to such a position.
27. 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 ***does not meet the principle of proportionality*** included among the principles of the cleansing process.
28. The possibility of being excluded from public offices for different lengths of time for the same facts raises ***issues of equality***.
29. Practice of implementation of the Law has already proved that 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***.

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30. **Ukraine's case on lustration demonstrates that state of the rule of law and of human rights protection in the country is yet in rather poor condition.**
31. **Ukraine's experience to use lustration as one of the tools of transitional justice has produced negative result of multidimensional character. An overbroad personal scope application of the *Law on Government Cleansing (16 October 2014)* constitutes a huge problem. It created not only a risk of multiplicity in violating individual fundamental rights. What is more substantial is that it also affects the functioning of the whole Ukrainian civil service and social peace,**

**giving rise to serious antagonisms and stimulating the rancor of those working under the former regime being disqualified from public functions in a disproportionate manner. Lustration of this model, having a character of a large scale lustration process, contains enormous bureaucratic burdens and inevitably leads to atmosphere of general fear and distrust throughout the whole society.**

32. **In the light of negative effects of the Ukraine's lustration model there is a need for the Council of Europe institutions to study this case rather thoroughly and probably reconsider in general its perception of lustration, encompassing the issue of morality of law.**