

The Ukrainian Lustration Act

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On 16 September the *Verkhovna Rada* (parliament) of Ukraine adopted a law to clean up the government, commonly referred to as the Lustration Act. The bill was fiercely disputed in parliament. The initial project involved vetting elected offices (including the president), but this measure was withdrawn under pressure from the *UDAR* party (in other words, indirectly from President Petro Poroshenko). During the debate, the deputies did not know the final text of the act (meanwhile the text was only made available to the public on 25 September), and the vote was held three times (a common, though illegal procedure in the Ukrainian parliament), under pressure from protesters blocking the parliament building. The adoption of the lustration law (by 233 votes of the 226 required) came in response to growing public pressure, and was forced by the upcoming parliamentary elections. The Act is waiting for the President's signature, which is expected by mid-October. The document provides for the prohibition of the exercise of public functions (with the exception of directly-elected positions) by former civil servants from the time of Viktor Yanukovich, former members of the Communist Party and the *Komsomol* apparatus, and officers and secret employees of the KGB. The Act was the subject of lengthy political bargaining. In many places its provisions are unclear, and in part (regarding KGB collaborators) cannot be implemented. It seems likely that the new parliament will amend this project, or that it will be wholly or partially undermined by the Constitutional Court.

The provisions of the Act

In accordance with Article 1, points 1 and 2 of the law, "the clean-up of government means, as established by this law or by a decision of a court, a ban on certain persons holding certain positions or performing certain services (except for directly-elected positions) in the organs of state power and local self-government"; the purpose of lustration is "to prevent the participation in managing the affairs of state of persons who by their decisions, actions or inactions have taken decisions (and/or encouraged them) aimed at the usurpation of power by the President of Ukraine Viktor Yanukovich; at undermining the foundations of security and defence of Ukraine; or at unlawful violations of human rights and freedoms". The verification will cover persons holding or intending to hold any position in the organs of state power and local self-government (except the president, mayors of cities, deputies and councillors); a detailed discussion of the detailed scope of the Act is given in the Appendix.

Those subject to the lustration process must submit a declaration stating that the prohibitions under the Act apply (or do not apply) to them, and that they agree to this verification being carried out. Refusal to make this declaration entails the automatic

application of the ban. The lustration process will be conducted by the Ministry of Justice (which itself is to be examined first); it will designate the organs involved in verifying the declarations (including property), and establish the other procedures. The Ministry will also form a citizens' advisory body on lustration, which will include representatives of the media, among others. The Act does not specify a deadline for completing the process of checking the individuals, nor for the lustration process as a whole (it seems that it will last indefinitely for those candidates for the positions mentioned in the Act). The judgements of the vetting committee may be appealed to in the administrative courts on general principles.

The lustration's chances

The original targets of the drive to 'clean up the government' were against officials of the Yanukovych regime and corrupt bureaucrats. The law also reflects the enormous public support for the removal from public life of corrupt officials, prosecutors and judges. The move to exclude former members of the Communist *nomenklatura* and KGB agents probably occurred under pressure from *Svoboda*, which has long called for this kind of de-Communisation. Removing former functionaries from the CPSU is becoming less important, because most of them have already retired, and identifying agents of the Ukrainian KGB and GRU is unrealistic, since most of the documentation was removed from Ukraine in 1991.

The Act has been drafted in a chaotic manner, and many of its provisions are unclear. The Act is an element of 'revolutionary legislation', and is intended to meet one of the main demands of the 'Revolution of Dignity' (the *Euromaidan*). It introduces *de facto* collective responsibility for complicity in the 'usurpation of power' (the attempt to introduce authoritarian rule) by President Yanukovych and his entourage. This solution creates a precedent which could hinder any future transfer of power to opponents of the forces now ruling Ukraine.

Serious doubts have been raised regarding the exclusion from lustration of the president, parliamentarians and others directly elected to their posts (as well as people applying for these positions in the future, if they have not been scrutinised in other categories), especially as this element was withdrawn from the initial bill under political pressure. In this way the 'clean-up of government' has been limited to the executive and the judiciary, while the legislature and local government bodies remain unaffected. Controversy has also been caused by the ban on holding public office for judges, prosecutors and investigators who undertook lawful proceedings against participants in the 'Revolution of Dignity' and others who were later covered by the amnesty laws.

Effective implementation of the Act, in the form in which it has been approved, will lead to the elimination from public life of most politicians and officials of the older generation, accelerating the process of generational change. In some offices and institutions (especially in the judiciary), this may result in disruption as a result of the departure of experienced personnel, who cannot be replaced in a short time. We may also expect court procedures which drag on for years; the use of so-called *kompromaty* ('compromising material', especially regarding cooperation with the KGB) as local interest groups fight among each other, as well as various other abuses.

Given the strength of the local political and bureaucratic cliques in Ukraine, it can be assumed that the lustration procedures will not be conducted fairly or effectively at lower levels or in the field, and that a large number of the corrupt state officials will retain their positions. This may also happen in the military and the institutions of force. However, one positive result will certainly be the removal from public life of senior officials who managed the state during Yanukovych's time in office, although this would have been possible even without the passage of this law.

The law may raise doubts in the Constitutional Court (a challenge to it is almost certain), and some of its provisions (and possibly the whole Act) may be repealed by it. However no decision by the Court can be expected before the winter of 2015. It is also possible that Poroshenko, who must approve the lustration before the elections because of public pressure, will initiate amendments to the Act after the voting.

Appendix: Categories of public officials covered by lustration

The lustration procedure covers those persons who upon the date of entry into force of the Act are holding, or who will in the future apply to hold, the following positions or departments:

The Prime Minister, members of government and other central offices in the broad sense (including the National Bank of Ukraine and the Central Electoral Commission) and their deputies; the heads of the prosecutor's office and the institutions of force as well as their deputies; staff of the armed forces and other formations of power (to what extent remains unclear); prosecutors, judges, councillors, employees of the National Bank of Ukraine (to what extent remains unclear), managers of state enterprises (arms producers and some others); and 'other state and local officials' (the original expression refers to officials of a certain official status, which does not include rank-and-file office workers).

An absolute prohibition from holding public office for 10 years from the entry into force of the Act covers persons who during the presidency of Viktor Yanukovych (from 25 February 2010 until 22 February 2014) occupied the following positions for at least one year (in total), and did not resign between 21 November 2013 and 22 February 2014:

The President, the Prime Minister, members of the government; heads of central bodies of state power which are not part of the government; the head of the National Bank of Ukraine and their deputies; the Attorney General; the heads of the Security Service of Ukraine; the Foreign Intelligence Service, the managers of other institutions of force and their deputies; the Secretary of the National Security and Defence Council and his deputies; the heads of the Presidential Administration and the Secretariat of the Government and their deputies; members of the High Council of Justice (except the President of the Supreme Court) and other governing judiciary bodies and their deputies; members of the managements (it is unclear whether this applies at the level of heads of departments, or lower organisational units) of the Ministry of Internal Affairs, the SBU, the Attorney General's Office, the Foreign Intelligence Service and other institutions of force, as well as officers of the territorial structures of these ministries; the heads of regional, county and district state administrations and their deputies; the chief of the General Staff; the commanders of the armed land, sea and air forces and their first deputies; members of national committees regulating natural monopolies, telecommunications, the securities market and financial

services; and the heads of state-owned enterprises engaged in the provision of administrative services (this last definition is entirely unclear).

An absolute prohibition from holding public office for 10 years from the entry into force of the Act also covers persons who performed the functions of election or appointment in the leadership of the CPSU (from the degree of district committee secretary) and the *Komsomol* (from the degree of Central Committee member); former employees of or secret collaborators with the KGB and GRU; and graduates of the KGB's colleges (excluding technical courses).

An absolute prohibition from holding public office for 10 years from the entry into force of the Act also covers ordinary employees (and probably lower management) of the police, investigators, prosecutors and judges who participated in actions (the term 'unlawful' is not used) towards persons covered by the amnesty statutes of January and February 2014. For some of these people, the ban will be reduced to five years.

An absolute prohibition from holding public office for 5 years from the entry into force of the Act covers other employees of the organs of state and local government administrations who have been tried and convicted of participation in the 'usurpation of power' by Viktor Yanukovich; resisting the public protests in the period from 21 November 2013 to 22 February 2014; collaboration with the intelligence services of foreign countries; violated the defence of the state; called for the violation of the territorial integrity of Ukraine; "inflamed ethnic hatred" or illegally brought about human rights violations as sentenced by the European Court of Human Rights. For these persons the ban will be deemed an additional penalty by the court, and not by the lustration body.

An absolute prohibition from holding public office for 10 years from the entry into force of the Act covers public officials who are required to submit declarations of their assets under the anti-corruption law, in whom the verifying authorities find inconsistencies between their actual financial status and their declarations.