



FOREIGN AFFAIRS

Russia's Willing Collaborators

Ukraine Needs a Measured Lustration Policy to Strengthen Security and Rebuild Democracy

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As Ukrainian forces aim at a major counteroffensive against Russia, the issue of collaborators, especially in Russian-occupied areas, has drawn renewed attention. If Kyiv successfully regains significant territory, as it did in the fall of 2022, it will have to decide what to do with people in those areas who worked with or otherwise assisted Russian occupation authorities and forces in their repression of local populations and propaganda. Since the start of its illegal invasion of Ukraine in 2014, Russia has been actively relying on collaborators to establish its control over the occupied territories, get

information about military targets, help crush dissent and spread propaganda in occupied areas, and sabotage Ukrainian democracy from within, for example by infiltrating Ukrainian state institutions to assist Moscow's aggressive agenda.

For the Ukrainian government, there will be strong pressure to mete out harsh punishment against anyone suspected of helping the Russian side, regardless of the extent of the collaboration. After more than 15 months of brutal fighting in which Ukrainian civilians and civilian infrastructure have often been targets of Russian attacks, Ukrainian public opinion favors strong retribution against anyone who aided the enemy. Yet in areas under Russian occupation, there have been various forms of cooperation by some locals, not all of whom have actively sought to help Russia or harm Ukraine. Alongside purposeful collaborators are an assortment of Russia sympathizers or passive bystanders who, although not directly engaging in the war, bolster the Russian invasion through their ideological alignment or their indifference. As Ukraine liberates more of its territory, the government will face the crucial task of discerning among these different levels of involvement with the Russian side and determining how to deal with specific individuals in a way that best serves Ukraine and its democratic foundations.

One of the ways to tackle the collaboration problem is lustration, a transitional justice mechanism aimed at identifying individuals who pose a significant danger to democracy and often barring them from public positions. The instrument is familiar to many governments whose populations have emerged from the clutches of unsavory regimes, including central and eastern European states who struggled with their post-communist legacy. Indeed, Ukraine itself already went through a version of lustration in 2014, following the Maidan revolution. It sought to ban from public office a number of specified categories of individuals, including those

who had served during the notoriously corrupt and pro-Russian administration of Viktor Yanukovych. Almost invariably, the challenge is balancing the desire to draw a bright line around the actions dangerous for the democratic order with the need to maintain due process and avoid unnecessarily and unfairly antagonizing a larger part of the population. At worst, a poorly executed lustration process can undermine democracy and lead to new instability—or even sow the seeds of future conflict.

For Ukraine, the stakes are high. In the heat of war, and its immediate aftermath, Kyiv must be able to coolly differentiate among dangerous collaborators, who pose or have posed a real threat to the country, a larger group of possible Russia sympathizers, and people who had no other choice but to coexist or even cooperate with the aggressor in some way, including under outright coercion. In doing so, Ukraine must look to the pitfalls of past lustration efforts and try to avoid them.

RESTRAINING ORDERS

As it has been practiced in countries such as Germany, Bosnia, and Iraq, lustration typically aims to identify people who have violated human rights or engaged in other compromising activities under a previous hostile regime or recent enemy occupation. Based on their past conduct and associations, such individuals may pose a significant threat to democracy. The goal is often to temporarily prevent these people from holding public positions, thereby safeguarding the democratic process. Designing and implementing such a policy, however, is not as simple as it may appear. History makes clear that the process requires restraint, including establishing safeguards to minimize potential risks and unintended consequences. This will be especially important in Ukraine, given the direction of popular sentiment and the brutality of the war.

Ukrainian attitudes toward suspected war criminals and collaborators are understandably intense. Many Ukrainians harbor a deep desire to exact severe retribution against such individuals. According to a poll conducted late last year, for example, 39 percent of polled Ukrainians said that lynching Russian war criminals is justified. A solid majority, 57 percent, said that no amnesty should be given to journalists who collaborated with Russia, and an even higher proportion of respondents—78 percent—said the same of local government and law enforcement officials who collaborated with Russia.

Until now, suspected collaborators have been primarily dealt with by Ukraine's law enforcement agencies and courts. Right after the full-scale invasion, in March 2022, Ukraine amended its criminal laws to deter and punish a broad spectrum of collaborative conduct. Those found guilty could receive a prison sentence of three to 15 years depending on the type and severity of the collaborative activities—or even life imprisonment if the actions led to serious harm or death. People convicted of collaboration crimes could also be fined, have their property confiscated, and be subject to a ten- or 15-year ban from certain public offices, including in state and local government.

Yet the Ukrainian criminal justice system may not be able to appropriately handle the issue of collaboration on its own. Ukrainian law enforcement bodies are already overloaded with war crimes and other war-related investigations. Among other problems, they may not have the resources and evidence required to criminally prosecute all different forms of behavior posing a threat to democracy. According to the estimates made by Ukrainian officials, under current Ukrainian law, more than 200,000 people in the Crimea alone may have committed collaboration crimes. The figure gives some indication of the scale of the problem Kyiv faces in areas that have been under Russian control, especially in those that Russia has illegally

occupied since 2014. The justice system cannot appropriately handle such high numbers of criminal prosecutions. A formal administrative lustration process, overseen by an independent lustration agency, could effectively complement criminal trials of dangerous collaborators. And it could add flexibility, confronting less severe forms of collaboration by relaxing strict evidentiary standards that would be required in criminal proceedings.

WITCH HUNTS AND REVENGE RISKS

The most challenging aspect of designing an effective lustration policy is establishing a clear-cut definition of compromising or threatening conduct. On the one hand, a policy that is aimed at an overly broad group of potential collaborators or whose targeting criteria are too vague can morph into a large-scale witch hunt. Such a purge, which may be aimed at an entire social group or political parties, may create more problems than it solves. Nonetheless, governments may be tempted to pursue a maximalist approach when they want to deter potential collaboration and when popular opinion strongly supports punishment. On the other hand, governments that fail to deal effectively with collaborators may invite vigilante justice or erode public trust in state institutions. For Ukrainians, there is also the risk that pro-Russia individuals left in important public positions will endanger Ukraine's democratic stability in the years to come.

The particular stresses that occupied populations have faced in Ukraine bring added complexity. Under harsh Russian control, some people have been forced to make difficult moral choices. Overbroad lustration policies may end up targeting people whose communities were occupied and who needed to engage in certain activities—such as keeping public enterprises running or teaching the Russian curriculum in schools under credible threats of harm—to keep themselves and their loved ones safe. Many people in such situations may have been coerced to do certain things, while others

continued to meet the population's critical needs, such as providing medical services and utilities, while the Russians were in control. And in many such cases, there is a fine line between those who voluntarily supported unlawful policies and propaganda of the aggressor and those who had no real choice but to adhere to occupation authorities in some way. To add more complexity, those who voluntarily supported the unlawful policies may dishonestly claim that they were coerced.

Ukraine's own history shows how ruinous and cruel anticollaboration policies can be. For example, the arbitrary policies that Soviet authorities implemented against Nazi collaborators, including in Ukraine, did not account for moral gray zones created by the Nazi occupation itself. One of the most egregious results was the Soviet government's mass deportation in 1944 of around 200,000 Crimean Tatars and members of other ethnic minorities, including women and children, from the Crimea to Central Asia under the pretext of the crime of alleged "collective collaboration" with Nazi authorities. A large number of those people died in the process of deportation or in its aftermath.

An infamous more recent example of overly broad lustration was the de-Baathification policy pursued by U.S. authorities in Iraq after 2003. The policy sought to remove everyone in the top four ranks of the deposed Iraqi dictator Saddam Hussein's Baath Party and everyone in the top three layers in each government ministry from public sector positions. In the end, 85,000 employees were driven out of and prevented from working in public service. Thousands of teachers who had been required to join the Baath Party to keep their jobs under Saddam were also removed from their positions. Skilled administrators and other professionals were forced underground with ruinous consequences for the Iraqi economy. In some cases, those who lost employment reportedly went on to join al Qaeda in

Iraq and, subsequently, the Islamic State (also known as ISIS), helping the terrorist group conquer significant parts of Syria and Iraq.

Although there are many significant differences between the cases of Ukraine and Iraq, de-Baathification provides important lessons. One of the main deficiencies of the Iraqi policy was its focus on the collective responsibility of Baath Party members rather than on the individual conduct of influential functionaries, who could have been evaluated on a case-by-case basis or at least on more narrow criteria requiring individuals to be tangibly linked with compromising practices. In lacking this kind of precision, the blanket policy targeted some people who did not pose any threat to the new government and failed to target other dangerous individuals who happened not to be officially associated with the Baath Party. Moreover, procedures to appeal decisions were vague, inconsistent, and nontransparent.

The disastrous outcome of de-Baathification also underscores the large risk of lustration being improperly influenced by politics. In Iraq, the process reportedly became weaponized, for example, by members of the de-Baathification commissions who blackmailed political rivals for alleged Baathist sympathies. These lessons serve as a stark reminder of the need for a balanced and impartial lustration policy.

DEMOCRATIC DEFENSES

Ukraine has already experienced some of the pitfalls of an expansive approach to lustration in its recent history. Following the Maidan revolution in 2014, Ukraine banned from public service a number of categories of state officials, including those who had served for at least one year cumulatively during the pro-Russian Yanukovich administration. It also targeted those who maintained their positions during the Maidan demonstrations, as well as former managing members of the Soviet Communist Party and its

affiliates, and agents of Soviet intelligence agencies. In a 2019 decision, the European Court of Human Rights found significant deficiencies in those policies. For example, the Ukrainian policy targeted state officials who failed to resign within one year after Yanukovich became president, even if they could not be shown to have significant connections to undemocratic activities. The court also found a violation of the right to a fair trial as Ukrainian courts failed to resolve the lustrated officials' complaints within a reasonable time frame.

Indeed, Ukraine should pay close attention to European Court of Human Rights case law when it designs any future lustration policies, to avoid more such legal challenges. Ukraine has ratified the European Convention of Human Rights, and the case law is binding for Ukraine and its national courts as a matter of both international and Ukrainian domestic law. Notably, the court confirms that lustration, when properly designed, can comply with human rights standards as a recognized tool of a "democracy capable of defending itself." According to the court, a state can demand loyalty to democratic principles from its civil servants and even interfere with individual rights in order to protect democracy subject to certain requirements developed by the court's case law. Furthermore, the court deems states to have wide discretion in choosing measures to protect the democratic order from the legacy of authoritarian regimes, and this discretion is even more relevant in the context of the pending full-fledged international war.

The court specifies, however, that lustration as a form of democracy protection is not a blank check, and states need to follow a series of requirements. First, lustration must be conducted according to a law that is sufficiently clear and precise as to the criteria being used and the consequences to which a lustrated individual is subject. Second, lustration

must be designed to pursue a clearly defined aim such as the protection of rights and freedoms, national security, or safeguarding democracy. And importantly, a policy “may not be used for punishment, retribution or revenge.” Third, lustration measures must be proportionate to the specified and legitimate aims. In this respect, policies must convincingly link lustrated individuals to compromising forms of cooperation or collaboration and give a reasonable justification for any targeting criteria used. Last but not least, states must guarantee due process, including proper and timely judicial review of any measures.

For Ukraine, the case law provides an important reference point for any future lustration policy aimed at suspected Russian collaborators to ensure its legitimacy. Albeit the mentioned court jurisprudence considered peacetime lustration measures in the aftermath of the authoritarian regimes, it is still highly relevant considering that Ukrainian lustration policies will be aimed at safeguarding the democratic order beyond the end of the war.

LESS BAGHDAD, MORE PRAGUE

Even if lustration is recognized by European human rights standards as an appropriate means to protect democratic institutions, a larger question for Ukraine is whether such a policy could actually help it defend and strengthen its own democracy. In this regard, it is useful to consider how states have used lustration policies in recent decades, as well as the effect of those policies. Although Iraq provides a cautionary tale, the record shows that many states that have used lustration have generally succeeded in defending their democratic institutions. Our project, Transitional Justice Evaluation Tools, has analyzed 40 lustration policies between 1985 and 2020. The countries included in the analysis span eastern Europe, the Balkans, and post-Soviet Central Asia. Although some of these cases differ in important respects from present-day Ukraine in the context of

international war, this research offers important insights into the effects of lustration on democratic resilience overall.

The study first examined the relationship between lustration policies and improvements in liberal democracy in the countries in question. To this end, it drew on quantitative measures developed by the Varieties of Democracy Project, which defines liberal democracy as the combination of free and fair elections, constitutionally protected civil liberties, an independent judiciary, and checks on the executive. As it turns out, lustration policies are associated with, on average, a seven percentage point improvement in liberal democracy. While this may seem like a small effect, there is seldom drastic change in regimes' democracy scores over time. That lustration is, on balance, associated with gradual movements toward the consolidation of liberal institutions is a statement about the ability of this mechanism to neutralize threats to democracy.

But the data also show that it matters how fair the policy is and how extensively it is applied. To measure fairness, the study registered whether lustration policies targeted individuals rather than whole political parties and whether they had at least minimal due process provisions that allowed for appeal or constitutional review. The study also counted how many distinct public institutions—including the executive branch, the judiciary, the legislature, the public sector, and the security sector (police and military)—were targeted for screening. Most lustration policies target three to four of these sectors at a time. The study found, though, that the more institutions targeted for lustration, the greater the improvements to liberal democracy over time.

For instance, Czechoslovakia's 1991 Screening Act was extensive, in that it targeted a wide variety of institutions. All individuals seeking high-level

elected or appointed positions in the state administration, security sector, judiciary, public media, academies of science, and state corporations had to submit a confidential certificate to an independent committee of the Ministry of the Interior concerning their collaboration with the secret police or Communist Party. By one count, somewhere around 345,000 were screened, and over 11,000 individuals were positively vetted. One difference between the Iraqi and the Czech approach—outside of the disparity in the number of banned individuals—was that the latter also provided outs for those who were vetted. Proven collaborators' vetting certificates were kept secret (though they were published over a decade later), those who were screened had a right to request their files and challenge the decision, and sometimes vetted individuals could be transferred to different public posts that posed less risk to the government. In short, those banned from office could still avoid a civic death.

One final question for comparative analysis is whether it is productive to ban individuals from public office simply based on their past party affiliation. This kind of issue regularly emerges when there is a public debate about lustration policy. In fact, in the 40 cases studied, there was no discernible relationship between screening for public office based on party affiliation alone and the future health of liberal democracy. The general implication of these findings is that banning people from office on the basis of fair and legal consideration of their past individual conduct can, under the right circumstances, have a positive effect on democracy. But the effect will be less positive if people are excluded simply for being involved in a particular party, unless there are additional criteria that can establish with some certainty that these individuals pose a continued risk to the country's democratic institutions.

USE A SCALPEL NOT A MACHETE

As Ukraine confronts the problem of Russian collaborators—and those who are suspected or accused of collaborationist activity—it faces difficult choices. If it is successful in liberating areas that have long been under Russian occupation, such as some parts of the Donbas and, potentially, the Crimea, it will have to deal with tens or even hundreds of thousands of people who could qualify for lustration under the loosest criteria. But the historical record makes clear that blunt, sweeping policies that lack appropriate targeting criteria or that border on purges are unlikely to succeed and could well backfire, undermining the same democratic institutions they are intended to strengthen.

Fortunately, the experience of other countries and the European Court of Human Rights case law provide important guidelines on how to make lustration both effective and legal. The process can be used to ban or dismiss individuals from a wide variety of public institutions as long as there are clearly defined criteria for doing so, as well as clear due process, including proper and timely judicial review of any measures. In this regard, it will be crucial for Ukraine to develop criteria that specifically target individuals who pose a continuing threat to the democratic order and avoid targeting people who simply stayed in occupied territories or performed basic acts of cooperation with the enemy to save themselves and their families. Put simply, democracy-enhancing lustration should be done with a scalpel, not a machete. Also, the consequences and publicity of the lustration process should be proportional to the level of cooperation.

Second, and relatedly, the lustration process should be insulated as much as possible from potential political and corruption interests to avoid its weaponization. One of the ways to do this is to create an independent lustration body. Determining who serves on this body is critical. Its members should be respected, trustworthy, and nonpartisan people. Also, the

timely and proper judicial review of the lustration measures must be guaranteed.

Finally, the law should clearly define the timespan and criteria that are in play. For example, laws should specify exactly how far back lustration boards will look for evidence of compromising conduct. Without a defined time frame and clear criteria, lustration can more easily become arbitrary and susceptible to abuses. The timespan and criteria help scale the implementation process and allocation of resources. It is also a question of legal certainty and due process. A potential general starting point is Russia's illegal annexation of Crimea and invasion of eastern Ukraine in 2014. Still, calibrated exceptions are useful, such as targeting people affiliated with Russian intelligence agencies before 2014 and granting exceptions to people (depending on the severity of their prior conduct) who credibly changed their position following Russia's 2022 full-scale invasion and helped Ukraine defend its independence.

Lustration policy should clearly define which forms of collaboration and what level of involvement in or connection to undemocratic practices qualify, to prevent the process from being used against individuals who do not pose a significant threat to the democratic order. The targeting criteria should cover individuals whose past conduct and associations create reasonable risks that they may continue or resume advancing Russian aggressive interests in their respective positions. Such threats to democracy may also include attempts to manipulate opinions, spread misinformation, and overall distort the democratic process. The ongoing presence of collaborators in state institutions can be a source of social tensions and contribute to divisions and potential violence. It could also undermine public trust in justice and accountability and, more broadly, democratic institutions.

That Ukraine is grappling with the thorny issues relating to formerly occupied areas is a significant triumph: at the start of the Russian full-scale invasion, few observers might have predicted that Kyiv would not only resist the onslaught but also be able to liberate significant territory from Russian control. But this means that it will be all the more crucial for Ukraine to rebuild democracy in these areas—and address concerns about collaboration by the people who live in them. Indeed, the cohesion of Ukrainian society, as well as the country's future security, may depend on it.

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