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THE POLYAKH CASE: IMPLICATIONS FOR LUSTRATION IN UKRAINE AND ABROAD

Abstract

In October of 2019, the ECtHR found violations of the Convention in the case of Polyakh and Others v. Ukraine, thereby questioning the legitimacy of Ukrainian lustration and declaring that such interference had no signs of being necessary in a democratic society. The Strasbourg decision, even so, implied a new and permissible scope in subject and time for lustration. This paper analyses the implications of the ECtHR decision in the Polyakh and Others v. Ukraine case regarding the constitutionality of lustration in Ukraine and it assesses the Government Cleansing Act's international implications.

Key Words*: Lustration; Constitutional Court of Ukraine; Polyakh case; European Court of Human Rights*

Introduction

On 17 October 2019, in the case of Polyakh and Others v. Ukraine, the European Court of Human Rights (ECtHR) delivered an eagerly awaited decision on Ukraine's Government Cleansing Act (GCA).[1] The ECtHR was called to assess whether dismissing five civil servants under the GCA pursued legitimate aims. The ECtHR ruled that the law violated the principles of the European Convention on Human Rights. In all respects, the outcomes of this decision go far beyond the individual interests of the five applicants. This decision complicated ongoing constitutional deliberation on the GCA by requiring the Constitutional Court of Ukraine (CCU) to consider the ECtHR ruling, and possibly amend or reverse the GCA. In terms of dismissed Yanukovych-era civil servants, the Court did recognize that the Yanukovych-era was dominated by serious challenges of corruption to

[1] Polyakh and Others v. Ukraine, App. No 58812/15 and 4 others. (17 October 2019). https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-196607%22]}

democratic governance. However, the nature of blanket dismissals of individuals connected with the democratically elected Yanukovych government remains questionable, and the Court asserted the need for a more individualized approach to dismissing officials under lustration. The decision in the Polyakh case showed shortcomings in the Ukrainian GCA due to arbitrary and blanket dismissals. Therefore, the CCU faces a dilemma. It can push ahead with the Strasbourg Court's decision by outlawing lustration or reconsider the ECtHR findings by giving in to public demands, following the end of the Yanukovych government in 2014, to cleanse the government of corrupt and oppressive officials.[2] This paper explores the implications of the ECtHR decision in the Polyakh and Others v. Ukraine case regarding the constitutionality of lustration in Ukraine and assesses the GCA's international implications.

ECtHR Case Law on Lustration in Different European Countries: Status Quo

Lustration is a dichotomous phenomenon. On the one hand, it intends to protect democracy from disloyal, radical, or corrupt officials in a cost-effective and prompt legal manner. On the other, blanket dismissals often run contrary to the principle of the rule of law. As noted by the Venice Commission, "lustration must strike a fair balance between defending the democratic society on the one hand and protecting individual rights on the other hand."[3]

Despite the relatively low turnover of lustration cases,[4] the European Court of Human Rights (ECtHR) developed a comprehensive interpretation and set standards regarding lustration measures. Explicitly, the ECtHR recognized that applying lustration is consistent with the European Convention on Human Rights (ECHR) under specific criteria (e.g., proportionality, appropriate time limits, historical preconditions, etc.).[5] Lustration is generally scarce in international law; only a few documents issued by international organizations deal with it. One of the most cited papers is the PACE Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.[6] On three occasions, the Venice Commission presented reports on lustration legislation in member states.[7] In its reports, the Venice Commission stressed that the implementation of lustration should be

[2] Roman David, "Lustration in Ukraine and Democracy Capable of Defending Itself", in Cynthia Horne and Lavinia Stan (eds.), *Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking toward the Future* (Cambridge University Press, Cambridge, UK, 2018), 135.

[3] Venice Commission, "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" (20 June 2015), 19.

[4] In the following cases, the ECtHR scrutinized employment of lustrated persons in private sector and public sector: Naidin v. Romania (21 October 2014); Sidabras and Džiautas v. Lithuania (27 July 2004); Rainys and Gasparavičius v. Lithuania (7 April 2005); Žičkus v. Lithuania (7 April 2009); Sõro v. Estonia (3 September 2015). In the cases against Poland and Slovakia, the ECtHR reviewed access to documents of lustrated persons: Turek v. Slovakia (14 February 2006); Matyjek v. Poland (24 April 2007); Bobek v. Poland (17 July 2007); Luboch v. Poland (15 January 2008); Joanna Szulc v. Poland (13 November 2012). In a few cases against Latvia, the ECtHR reviewed limitations of the right to be elected for former collaborators: Ždanoka v. Latvia (16 March 2006); Adamsons v. Latvia (24 June 2008). There are also other cases: Haralambie v. Romania (27 October 2009); Vogt v. Germany (26 September 1995); Ivanovski v. The Former Yugoslav Republic of Macedonia (21 January 2016).

[5] Eva Brems, "Transitional Justice in the Case Law of the European Court of Human Rights," 5(2) *International Journal of Transitional Justice* (2011), 282-303, at 295.

[6] The Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) "Measures to dismantle the heritage of former communist totalitarian systems".

[7] Venice Commission, "Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania" (13 October 2009). Venice Commission, "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" (17 December 2012). Venice Commission, "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" (20 June 2015).

undertaken only to address exceptional historical and political injustices.[8]

The ECtHR has developed its own set of standards in lustration cases consisting of two levels: the macro- and the micro-level. At the macro-level, the ECtHR measures lustration with a three-fold test[9] (except cases under Article 3 of Protocol No. 1 of the European Convention on Human Rights).[10] To pass the test, valid lustration in a democratic society should be prescribed by the law, have a legitimate aim, and be necessary for a democratic society. Being necessary includes an assessment of the pressing social need and proportionality. In all cases cited above, the Court found lustration acts pursued a legitimate aim.

At a micro-level, the ECtHR specified a subject scope of lustration. Lustration measures should only target public service employees or elected officials and not private sector employees.[11] Sweeping purges run contrary to Convention guarantees.[12] This is because decisions should be made on a case-by-case basis, according to the law. Any dismissals should be under regular judicial review to minimize any perception of political retribution or arbitrariness.[13] Before the Polyakh case, lustration in Central and East European countries (CEE) applied only to those who were affiliated with the former totalitarian state apparatus: e.g., in Germany, official and unofficial employees of Stasi;[14] in Slovakia and the Czech Republic, officers or collaborators of the State Security Service;[15] in Poland, functionaries, employees or secret collaborators of special services;[16] in Latvia, former KGB agents, informers, and sympathizers.[17]

So far, the temporal scope of the lustration policy was generally subject to two conditions. First, before the Polyakh case, lustration legislation primarily addressed individual behaviour or an official's position during the period of totalitarianism, 1948-1989 (-1991). Second, the period of lustration measures should be limited. Sanctions imposed by lustration legislation must not last forever and should reduce in severity over time.[18] The concept of the "timeless nature" of lustration varies in CEE. As an example, the Constitutional Court of the Czech Republic ruled that lustration laws can be enforced up to "ten years after the passage" of new regulations.[19]

The Constitutional Court of Albania declared the lustration law[20] passed in 2009 as unconstitutional due to the time-lapse: "eighteen years after the fall of the Communist regime and seven years after the end of the term of the prior legislation."[21] Many lustrated applicants

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[8] Venice Commission, "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" (17 December 2012), 16.

[9] Brems, op.cit. note 5, at 295.

[10] Ždanoka v. Latvia, ECtHR Judgment App. no. 58278/00 (16 March 2006). https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2258278/00%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-61827%22]}

[11] Sidabras and Džiautas v. Lithuania (27 July 2004); Rainys and Gasparavičius v. Lithuania (7 April 2005); Žičkus v. Lithuania (7 April 2009).

[12] Id.

[13] Sõro v. Estonia, ECtHR Judgment App. no. 22588/08. (3 September 2015). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156518%22]}

[14] Gary Bruce, "East Germany", in Lavinia Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Routledge, New York, US, 2009), 28.

[15] Venice Commission, report "Lustration: the experience of Czechoslovakia/the Czech Republic" (2015), 3.

[16] Venice Commission, report "Lustration experience of Poland" (2015), 5.

[17] Cynthia Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries (*Oxford University Press, New York, 2017), 73–74.

[18] The Constitutional Court of the Czech Republic, Judgment Pl. ÚS 9/01: Lustration II (2001).

[19] Id.

[20] Law no. 10034 "On the cleanliness of the figure of high functionaries of the public administration and elected persons" (22 December 2008).

[21] The Constitutional Court of Albania, Decision no. 9, V – 9/10 (23 March 2010).

argued that lustration legislation is punishment per se, thereby it is contrary to the principle of non-retroactivity of law. In the opinion of the ECtHR, in its assessments of Ukrainian or Latvian lustration cases, lustration is non-punitive.[22] Robertson summarized the position of the Czech Constitutional Court, which ruled the following, "there was no question of retroactivity, no question of discrimination, no breach of any international obligations... All that was happening according to them was that the state was setting an extra qualification for holding a post."[23] The Polish Constitutional Tribunal took the opposite approach to the principle of non-retroactivity. In 2006, the Polish parliament passed a lustration law.[24] This Act was partly challenged in the Constitutional Tribunal in 2007,[25] which ruled that "such sanctions [disclosure information under lustration act] are, by their very nature, punishments."[26]

Finally, all lustration cases, considered by either national courts or the ECtHR, are closely linked with the principle of a "democracy capable of defending itself."[27] The idea that a democratic society can take steps to protect itself by imposing different limitations on human rights in the interest of "the stability and effectiveness of a democratic system"[28] underpins the principle of a "democracy capable of defending itself", according to ECtHR doctrine. In more general terms, this principle designates, "democracy is not held to tolerate its own abolition by democratic means..."[29] This is the theoretical basis of lustration, except for the temporal and subject scope. The analysis of the Polyakh case that follows demonstrates that a new paradigm about the temporal and subject scope of lustration measures is emerging.

Polyakh Case: Redefining Subject and Temporal Scope of Lustration

The case concerned five applicants who held positions at different levels of public office and were dismissed under provisions of the new Ukrainian GCA. The ECtHR laid down key considerations while assessing compliance of "an interference with the applicants' right to respect for their private life" with a three-fold test (§262-324 of the ECtHR decision). The Court rejected the applicants' claims that GCA provisions run contrary to the principle of prohibiting retroactive legislation.[30]

Consequently, the ECtHR expressed concerns about the stated aims of the GCA and noted the appearance of politicization in the GCA. The ECtHR held that lustration legislation in CEE countries in the post-Soviet period was necessary to uphold democracy. However, the Court stated that applying the same approach to

[22] Id.

[23] David Robertson, "A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity", in Wojcieh Sadurski, Adam Czarnota and Martin Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer, Dordrecht, the Netherlands, 2006), 88.

[24] Act "On the Disclosure of Information on Documents of State Security Agencies from the period between the years 1944-1990 and the Content of such Documents".

[25] The Constitutional Tribunal of Poland, Judgment No. K 2/07 as of 11 May 2007.

[26] Id.

[27] Id

[28] Vogt v. Germany, App. 17851/91. (26 September 1995). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58012%22]}

[29] Paul Cliteur and Bastiaan Rijpkema, "The Foundations of Militant Democracy", in Afshin Ellian and Gelijn Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing, Dordrecht, the Netherlands, 2012), 256.

[30] Polyakh and Others v. Ukraine, Appl. 58812/15 and 4 others (17 October 2019) https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-196607%22]}

totalitarian regimes and the Yanukovych regime was problematic (§274-275). The ECtHR stressed:

> the far-reaching nature of the measures applied to the applicants, combined with the highly charged language used in section 1 of the GCA concerning the Act's aims raise the possibility that some of those measures may have been motivated, at least in part, by vindictiveness towards those associated with the previous governments… If that were to be shown to be the case, then, far from pursuing the aim of protecting democratic governance, the GCA measures could be seen as undermining that very governance through politicization of the civil service, a problem the law was supposedly designed to combat.[31]

All findings in this part of the ECtHR decision are assumption-based considerations, which demonstrated that the Strasbourg court found itself unwilling to declare Yanukovych's democratically-elected government as an authoritarian one, thus passing the ball to the Ukrainian Constitutional Justice court. In its decision, the ECtHR referred to the legal opinion of the Venice Commission, which characterized the subject scope of the Ukrainian lustration as "overbroad". The Court commented (§277-278),

> …those aims [lustration aims] could conceivably have been achieved by less intrusive means such as, where possible, following an individual assessment, removing the applicants from their positions of authority and transferring them, where possible, to less sensitive positions.[32]

This indicates that the ECtHR did not contest the need for lustration in Ukraine. Instead, it wrote that lustration was not well-designed in Ukraine. The Court suggested possible ways of improving the lustration process by a more individualized approach to dismissals, case-by-case assessments taking into account the full circumstances, and less severe level of sanctions, especially in instances of prolonged time-lapse. Based on these factors, one of the most notable outcomes of this ECtHR decision is the establishment of new norms regarding the scope of lustration in subject and time. Perhaps most importantly, the ECtHR did not entirely rule out the need for lustration policy outside the context of post-totalitarian (denazification or decommunization) governments. The Court did not rule that lustration was necessarily invalid to combat the adverse effects of a democratically elected leader. The Court simply ruled that the process could be improved.

In the remaining part of the three-fold test, the ECtHR considered whether the dismissal measures were necessary for a democratic society. The Court ab initio recognized and duly considered the events, "which led to the fall of Mr Yanukovych's government"[33] by citing various reports of international organizations. Subsequently, the Court affirmed a broad margin of appreciation of the Ukrainian authorities in the Polyakh case (§288-289), similar to comparable cases in CEE countries.

The Court held that disproportionate punishment was undertaken by lustration measures for the following reasons: 1) no individual assessment was performed; 2) the blank character of sanctions; 3) no convincing reasons were presented by the government. The Ukrainian government merely held that the act of "remaining in office in the period when Mr Yanukovych occupied the post of

[31] Id, p. 277

[32] Id.

[33] Id.

President sufficiently demonstrated that they [applicants] lacked loyalty to the democratic principles of State organization or that they engaged in corruption";[34] 4) "lack of coherence between the Act's proclaimed aims and the rules it actually promulgated"[35] (§288-289); 5) unreasonably long constitutional review of the lustration, any CCU findings might have served as a potential source for ECtHR judicial scrutiny; 6) the concept of a pressing social need is questionable in several instances, as some of the lustrated applicants were appointed as civil servants before Yanukovych entered office (§298); 7) the triggering element for the application of lustration was manifestly ill-founded (the ECtHR noted that it should have been dependent on individual actions); 8) the temporal scope of lustration is not based on any valid criteria or reasoning; 9) regarding the fourth applicant, a 4 day delay in submitting a lustration declaration cannot be seen as a valid reason for a dismissal; 10) regarding the fifth applicant, the Court pointed out that "the Ukrainian authorities have failed to give cogent reasons to justify lustration with regard to persons who merely occupied certain positions in the Communist Party prior to 1991."[36]

The two most compelling shortcomings of the GCA in the opinion of the ECtHR are the broad character of lustration, where individualized assessment criteria are absent, and a lack of proportionality of sanctions taken by the Ukrainian government, legislators, and courts. There is also no clear theoretical explanation of how the dismissal of civil servants would combat corruption, strengthen national security, and protect Ukraine's territorial integrity. In short, the ECtHR found that the GCA failed to meet ECtHR criteria, which include a three-fold test, proportionality and a pressing social need. It is noteworthy that the ECtHR delivered its judgment before the Ukrainian Constitutional Court's decision.[37] Before the Polyakh case, the ECtHR had been ruling on the legality of lustration in CEE while taking into consideration the findings and observations made by national constitutional courts.[38]

Scope of constitutional and administrative review of lustration in Ukraine

The Supreme Court and members of parliament have repeatedly challenged the unconstitutionality of various provisions of the law, which dealt with various aspects of lustration, from the prohibition of certain individuals from holding office to the ideological provisions of the law. The proceedings in the case had a dubious dynamic: several plenary sessions were held, during which various experts and authors were involved. At the plenary session in 2016, a motion for recusal of CCU judges was filed in the case, after which the CCU moved to the closed part of the plenary session[39].

The issue of judges disqualification is actually quite ambiguous and interesting: the CCU dismissed the motion for disqualification of six judges and then CCU chairman, arguing that there was no evidence of a conflict of interest in this regard. According to the initiators of the

[34] Id.

[35] Id.

[36] Id.

[37] The Constitutional Court of Ukraine opened proceedings on the constitutionality of the GCA on 6 July 2017. In its ruling, the Constitutional Court of Ukraine merged four different constitutional proceedings regarding the GCA (the first of which was launched on 12 February 2015). The European Court of Human Rights, in the Polyakh case, received notice from the first three applicants on 30 May 2017. As a result, two proceedings on Ukrainian lustration were being considered in parallel.

[38] Luboch v. Poland, App. 37469/05. (15 January 2008), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-84373%22]}

[39] The Constitutional Court of Ukraine has completed the oral hearing of the case on the constitutionality of certain provisions of the Law of Ukraine https://ccu.gov.ua/novyna/konstytuciynyy-sud-ukrayiny-zavershyv-usne-sluhannya-spravy-shchodo-konstytuciynosti-okremyh

petition, the lustration case was considered by judges who voted for the very laws that triggered the lustration and indicate signs of power usurpation by President Yanukovych. Thus, from this point of view, there is a situation of mutual inconsistency: how can those who directly contributed to the prerequisites for the adoption of such a law accurately assess the constitutionality of lustration measures? On the other hand, the assessment by other branches of power of the CCU's role in the active usurpation of power seems questionable, given the institutional independence of public authorities and the absence of a normative reference to CCU judges in the lustration legislation, not to mention the lack of a comprehensive assessment of CCU decisions in the context of usurpation influence. However, the above is not an attempt to justify the CCU in removing itself from an uncomfortable issue, but rather an attempt to outline the versatility and unpopularity of the potential verdict of constitutional justice. The mere reliance on receiving an answer through constitutional proceedings indicates institutional weakness and public uncertainty about the planned reform.

The ECtHR decision did not go unnoticed by the Ukrainian Government: the Minister of Justice of Ukraine rightly pointed out that the implementation of the judgment "Polyakh and others vs Ukraine" would consist of, firstly, compensation payment, and, secondly, bringing the lustration legislation of Ukraine into compliance with the requirements of the Convention. The promised changes have not taken place yet, but the Ministry of Justice's thinking can be characterized positively: it was planned to introduce a more personal approach to lustration, remove from the list of such persons those who held positions during the Soviet era and subject to lustration only those officials who held high positions, for example, were government ministers during the Yanukovych era[40].

Despite the fact that the issue of lustration was never considered by the CCU, it cannot be said that it has completely passed by. We are talking about the decision to ban people who voted for the "dictatorial laws" in 2014 from heading higher education institutions[41]. Although the decision does not directly and fully relate to lustration, as the CCU considered it in terms of the freedom of indemnity of the People's Deputy of Ukraine and the impossibility of bearing responsibility for voting., we still can focus on its main features relevant to the lustration issue. Thus, the CCU made a decision that such a requirement for the heads of the higher educational institutions was unconstitutional, arguing that it violated the indemnity of the deputy, namely the principle enshrined in the Constitution of Ukraine that a deputy cannot be held liable for the results of his or her vote.

In fact, the CCU withdrew from assessing the characteristics of the dictatorial laws of 2014 and their substantive essence, and only aloofly defined the concept of parliamentary indemnity as a guarantee of the member of Parliament of Ukraine not to be held liable for the result of the vote. The fact that the CCU equated the existence of such a requirement for a managerial position in a higher education institution with a measure of legal liability should be emphasized separately.

It can be said that the CCU initially determined the illegality of such a measure and, therefore, it can be assumed that there is no point in talking about the significance

[40] *The Ministry of Justice has drafted a bill changing the lustration procedure*, Ukrinform (21 May, 2020), https://www.ukrinform.ua/rubric-polytics/3030367-minust-rozrobiv-zakonoproekt-so-zminue-proceduru-lustracii.html

[41] Decision Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" № 1-5/2017 20th of December https://zakon.rada.gov.ua/laws/show/v002p710-17#Text

of the public interest in the initiative to ban the persons who voted for the dictatorial laws of January 16, 2014. However, such an approach may seem too formalized and narrow, as it eliminates a comprehensive and inclusive doctrinal interpretation in constitutional proceedings.

This, in turn, was reflected in the Dissenting Opinions of three CCU judges on this decision, which are to some extent pertain to lustration. All three Dissenting Opinions contain a thorough analysis of the socio-political context of dictatorial laws adoption and their impact on social relations.

According to judges Melnyk I.[42] and Moisyk V.[43], the decision on the unconstitutionality of the said normative provision was unbalanced and unreasonable, which they described quite specifically, referring to the constitutional norms on the meaning of parliamentary indemnity. According to the conclusions they reached, the decision should have been of a different nature[44].

Special attention should be paid to the Dissenting Opinion of Slidenko I., as it touches upon many aspects related to the process of general lustration and is interesting in terms of the alternative decision he reached. Hence, according to Judge Slydenko I., the provision in question contains lustration provisions, which, by the way, was not mentioned in the text of the CCU decision, and what is important here is that such issues cannot be under the jurisdiction of the CCU in general, given the political nature of[45]. Unlike the CCU, the judge outlined all the prerequisites and social features of the social problem that led to the initiative to file a complaint with the CCU, paid attention to important points, although he ultimately concluded that the CCU did not have to decide on the unconstitutionality of such legislative provisions at all[46].

In fact, it seems that Slidenko said what the CCU has been silent about for so long and is still silent to this day. First, he drew attention to the fact that the decision lacks justification. Furthermore, he tries to find logic in the establishment of such requirements:

In our opinion, this is where the cause-and-effect relationship is correctly combined and the legal logic of lustration is outlined, which was lacking in the text of the law: there is an urgent social need to ban a certain category of persons from holding leadership positions in the military, due to the social context, which must be carefully assessed, and lustration in this case and with such wording seems not to be a punishment, but a professional qualification requirement.[47]

But the conclusion that Slidenko ultimately reaches is unusual:

> Given that the disputed provision of the Law of Ukraine "On Higher Education" is a lustration provision, the Constitutional Court of Ukraine should not have considered this issue at all, as it falls within the scope

[42] Dissenting opinion of the judge of the Constitutional Court of Ukraine I. Melnyk on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" , https://zakon.rada.gov.ua/laws/show/na02d710-17#Text

[43] Dissenting opinion of the judge of the Constitutional Court of Ukraine V. Moisyk on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" , https://zakon.rada.gov.ua/laws/show/nb02d710-17#Text

[44] Id

[45] Dissenting Opinion of Judge I. Slidenko of the Constitutional Court of Ukraine I.D. Slidenko on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" https://zakon.rada.gov.ua/laws/show/nc02d710-17#n2

[46] Id

[47] Id

> of the political expediency of the state[48]

Slidenko's approach is that constitutional justice should avoid lustration because, in his opinion, it is a political issue, and political issues are not subject to constitutional jurisdiction. However, the judge himself was critical of the decision, stressing the public need to determine the legal nature of the events of 16 January 2014. In other words, he recognized the harmful nature of these events for the future of the rule of law, in this case, education, but believes that this issue is not a matter for constitutional review.

According to this model of constitutional review, the political marker of the issue under consideration can interfere with impartiality by giving the process signs of bias. However, the constitutional and legal sphere itself is characterized by signs of political nature, given the subject matter of constitutional and legal regulation.

Instead, administrative justice did not hesitate in statements considering lustration disputes. According to the information provided by the district and appellate administrative courts, since the entry into force of the Lustration Law and as of 15 July 2015, the district administrative courts have received 746 cases and materials related to the application of the Law, as a result, from the very beginning of this law[4950]. Unlike the CCU, in recent years, the administrative court has developed a rather variable practice regarding the legality of lustration.

Overall, administrative courts prefer to apply the provisions of the Council of Europe Guidelines on lustration, which, in turn, were created for transitional justice processes from communist regimes, so the general relevance of these principles is questionable, despite their substantive relevance. And despite the criticism of the lack of an individual approach to the assessment of lustrated persons in the law, the court mentions "a democracy that is able to defend itself" in the context of the ECtHR case law, unfortunately, without detailing how this concept should be applied in the Ukrainian realities of governmental purification. It is interesting that we rightly say that in addition to the fact that the ECtHR negatively assessed the content of the Law of Ukraine "Law on Government Cleansing", it lacked a justification for the authoritarian power of President Yanukovych, but it seems that national courts also lacked it:

> The Supreme Court concluded that measures of such severity as dismissal from office with a ban on holding office for 10 years cannot be applied to civil servants only because **they remained in their civil service positions after the election of a new head of state**, without analyzing the individual behavior of such persons and establishing a link between their activities and the usurpation of power, undermining the foundations of national security and defense of Ukraine or unlawful

[48] Id

[49] Analysis of the practice of application by administrative courts of certain provisions of the law of Ukraine «On Government Cleansing», *The Sixth Administrative Court of Appeal* https://6aas.gov.ua/ua/law-library/court-practice/vishchij-administrativnij-sud-ukrajini/analiz-praktiki-zastosuvannya-administrativnimi-sudami-okremikh-polozhen-zakonu-ukrajini-pro-ochishchennya-vladi.html

[50] In general, the administrative justice system reviewed 197 cases and materials, including 137 cases related to dismissal from public service and 62 cases related to the performance of such service. 106 cases were considered on the merits, of which 62 were upheld. As of 2023, more than 800 people have appealed to the courts to challenge their dismissal

violation of human rights and freedoms[51] [52].

It should also be noted that administrative courts have paid attention to the absence of individually defined criteria for assessing the need for lustration[53]

> The Supreme Court considers it is necessary to note that the absence of a procedure and mechanism in the Law of Ukraine "Law on Government Cleansing" that would determine an individual approach to the application of the prohibitions established by it does not remove the obligation of the court to apply an individual approach to resolving each particular dispute according to the criteria of legality[54].

In addition, in its decisions, the court clearly distinguished between liability for offenses defined in anti-corruption legislation and lustration itself[55]:

> *failure to indicate property in the declaration does not entail liability under the Law of Ukraine "On Government Cleansing", since the issue of declaring the income of certain persons is regulated in this case by the Law of Ukraine "On Principles of Prevention and Counteraction to Corruption"*[56]

In another case, the Supreme Court decided to define lustration in the context of official responsibility and seems to have paid attention to an important detail regarding the distinction between legal responsibility and lustration itself referring to the shortcomings of law enforcement in the implementation of lustration measures:

> *The Supreme Court pointed to the political nature of lustration measures.... decided that the measures applied by the lustration legislation cannot be considered measures of legal liability, as they are not a sanction for a specific wrongful act. Their purpose was **to restore confidence in the public authorities**, not to bring the relevant officials to justice*[57].

In conclusion, administrative courts have drawn attention to the political nature of lustration, hinting at the lack of legal arguments in its favor.

To sum up, despite the absence of a constitutional review on the Law of

[51] Resolution of Supreme Court № 813/7910/14 15th of July 2020, p. 42 https://reyestr.court.gov.ua/Review/90425382

[52] This legal position has become a stable and leading one in judicial practice concerning lustration. However, it appeared after the ECHR judgment was passed. Prior to that, the courts' conclusions mostly concerned the correctness of compliance with the established administrative procedure for conducting the relevant inspection and related to formal issues (for instance, Resolution of Supreme Court 27th of August 2019 № 820/12062/15 https://reyestr.court.gov.ua/Review/83883168)

[53] Id, p. 40

[54] On the one hand, the courts outline the importance of an individual approach to the implementation of the lustration, but they do not provide their own subjective assessment of the appropriateness of applying the concept of militant democracy to Ukrainian lustration, but only point out the lack of normative certainty

[55] The principles of lustration stipulate that it should not be a punishment. The chaotic nature of Ukrainian lustration has led to the substitution of concepts and the application of lustration legislation to situations where there has been a violation of other norms by public officials, or where the application of lustration has been excessive, as in the case of the ECtHR decision Samsin v. Ukraine, where a judge resigned but was dismissed through lustration, ignoring his personal application. Such cases point to the practical sham of the lustration goal.

[56] Resolution of Supreme Court № 815/3268/15 31 th of January 2018 https://reyestr.court.gov.ua/Review/71979644

[57] Resolution of Supreme Court №823/3269/14 18th October 2023, p.60-61 https://reyestr.court.gov.ua/Review/114270365

Ukraine «On Government Cleansing» due to the complex social and political developments, certain opinions on this issue were expressed in the proceedings concerning the prohibition of holding office for persons who voted for «the dictatorial laws of 16 January 2014» as members of the Parliament of Ukraine. More precisely, the assessment of lustration as a phenomenon was provided in the dissenting opinion of the judge, who noted the impossibility for constitutional justice bodies to assess the legality of lustration through the political nature of this phenomenon. According to this approach to the methodology of constitutional review, the CCU should stand aside and not become a political instrument for regulating power relations.

With regard to administrative proceedings, it should be noted that the cassation instance mostly sided with the plaintiffs, arguing that there were no individually defined requirements for the application of lustration in the law. Instead, the courts did not properly analyse the concept of '"democracy capable of defending itself"' in the Ukrainian context, and mentioned it only as a formal reference. The courts themselves did not apply an individual approach when deciding the issue, but rather made decisions based on the fact that the law was of poor quality, and therefore the decision was unlawful.

Outcomes of the Polyakh Judgment

The government of Ukraine primarily argued in the Polyakh case that the GCA is legitimate because it has a right to ensure national security and lacks the time and resources for case-by-case approaches to lustration during wartime. The ECtHR refrained from recognizing the principle that each democracy must take concrete measures to defend itself by stating that "previous findings in the post-Communist lustration cases have only limited relevance in the present case."[58] It appears that the ECtHR did not apply a "democracy capable of defending itself" principle in the Polyakh case, as the Court upheld in previous lustration cases.[59] The Strasbourg court abstained from applying national security arguments in the Polyakh case as well. These types of arguments are valid when democracy is fighting for the very survival of its democratic or institutional order against antidemocratic political parties or public employees who were disloyal to democratic principles.[60] This point of view is firmly rooted in ECtHR jurisprudence.[61] In its decision, the Strasbourg court raised doubts about treating Yanukovych's regime in the same way as Communist rule in post-Soviet republics. At the same time, the ECtHR did not contest that certain antidemocratic tendencies and developments took place during the period of President Yanukovych's government,[62] thus leaving the most crucial question about the democratic legitimacy of Yanukovych's government unresolved.

The "democracy capable of defending itself" principle and the democratic legitimacy of Yanukovych's government will require the CCU's scrutiny. Since the ECtHR was silent on the necessity to consider the Polyakh case in light of the "democracy capable of defending itself" principle, the CCU may fill this gap. In the Ždanoka case, the

[58] ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

[59] ECtHR, Vogt v. Germany, ECtHR Judgment (26 September 1995) App. 17851/91.

[60] Cliteur and Rijpkema, op.cit. note 29.

[61] ECtHR decisions in Vogt v. Germany; Sidabras and Džiautas; Bester v. Germany; Knauth v. Germany.

[62] ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

ECtHR noted that national authorities are better positioned to evaluate whether a threat to the democratic order was sufficiently imminent.[63] This fact empowers the CCU to assess the extent to which the Yanukovych government had constituted a potential threat to the democratic order. The most notable recent application of a "democracy capable of defending itself" principle can be traced to the National Democratic Party (NPD) judgment of the German Federal Constitutional Court.[64] Under that decision, the German Court rejected a ban of the NPD by stating that the party was not able to succeed in the implementation of its antidemocratic agenda. The CCU may also be faced with evaluating the capacity of the Yanukovych government to carry out an antidemocratic agenda.

Here are the legal observations favouring the triggering of lustration limitations under a "democracy capable of defending itself" principle or of objecting to it. In favour: in January 2019, Yanukovych was found guilty of committing high treason and waging an aggressive war against Ukraine and consequently sentenced to 13 years in prison by the Obolon District Court in Kyiv.[65] The court findings in that criminal case clearly show Yanukovych's role in undermining Ukrainian territorial integrity and backing war against Ukraine. Thus far, a formal determination of Yanukovych's government as undemocratic would strengthen and give increased legal and moral credibility to the GCA. The adversarial actions Yanukovych established in open court run blatantly opposite to the principle of civil servants' loyalty to the state and democratic principles. This provides a clear validation for the CCU to justify lustration. A requirement mandating the political loyalty of public officials to state institutions and the democratic system, according to the Constitutional Court of the Czech Republic, is "an undoubted component of the concept of 'a democracy able to defend itself'."[66]

Objecting: a "democracy capable of defending itself" principle is only in its infancy in Ukraine, and only one recent constitutional judgment has addressed this principle.[67] In contrast to the German Basic Law, the text of the Constitution of Ukraine does not contain the principle of a "democracy capable of defending itself." Nonetheless, this legal principle is central to "any debate about the conformity of the Ukrainian lustration law to European standards."[68] Thus, an appropriate application of this principle will have a pivotal role in the deliberations on the constitutionality of lustration, and the Constitutional Court of Ukraine still has two options; to reinforce this principle or not.

The upcoming constitutional judgment on Ukrainian lustration will have significant implications for the CEE context and comparative constitutionalism. There have been no known cases of national courts going against the ECtHR to declare lustration laws constitutional. Therefore, the Strasbourg Court's decision will likely limit the scope of potential legal positions for the Ukrainian Constitutional Court and make it more challenging to uphold the constitutionality of the GCA.

However, the possibility of overruling the Polyakh judgment should not be considered unprecedented. There are at least two arguments to support this notion. The first comes from the Czech experience. In 2001, the Constitutional Court of the Czech Republic deemed core provisions of Czech lustration legislation to be

[63] ECtHR, Ždanoka v. Latvia, ECtHR Judgment (16 March 2006) App. 58278/00.

[64] The Federal Constitutional Court, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13.

[65] The Obolon District Court in Kyiv, Decision as of 24.01.2019 in the case № 756/4855/17.

[66] The Constitutional Court of the Czech Republic, Judgment Pl. ÚS 9/01: Lustration II (2001).

[67] The Constitutional Court of Ukraine, Decision № 9-p/2019 (16 July 2019).

[68] David, op.cit. note 2, 141.

constitutional despite the highly critical stance of international organizations, such as the ILO and the Council of Europe. The main argument presented by the Constitutional Court of the Czech Republic had focused on the principle of civil servants' loyalty to the state and democratic principles. Thus, the CCU can apply a similar theoretical stance to justify the constitutionality of GCA by referring to the principle of civil servants' loyalty to democratic principles as a measure of self-defence against foreign aggression in times of emergency and war.

The second precedent backing the broad margin of appreciation of the CCU in the lustration case is inferred from the very recent judgment on Law no. 317-VIII (Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols of Ukraine).[69] According to this, the CCU conferred the complete constitutionality of Law no. 317-VIII whereby limitations, for instance, on freedom of association promulgated by the law at stake ran counter to the Convention guarantees.[70] The law, among others, prescribes prohibition of organizations (political parties or civil society organizations) who propagandize communist and national socialist (Nazi) totalitarian regimes and their symbols. The mere fact of the word "communist" in the title of any legal entity came to be a sufficient ground for its dissolution. Such strict conditionality on freedom of association is not consistent with the ECtHR standards, under which, "Political party's choice of name: could not in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances…"[71] Against this backdrop, the CCU justified blanket limitations prescribed by Law no. 317-VIII through a prism of the concept of moral retribution for past injustices and the necessity to counter foreign aggression.

Another central problem left unanswered by the Strasbourg decision is defining which provisions of the Constitution were in effect during Yanukovych's government. Levits, an ECtHR judge, in his concurring opinion,[72] delineated a problem of interpretation and application of the law in newly-democratic, but former socialist countries:

> …the same legal texts (the Constitution of the GDR or the International Covenant on Civil and Political Rights), when applied according to different methodologies of application of the law inherent in the political order concerned, will lead to different results.[73]

However, the problem concerning the Ukrainian lustration law may be even more complicated than described above. In February 2010, Yanukovych won the presidential election in Ukraine. Consequently, he was elected under the Constitution of 2004, where presidential authorities were much more limited in power than under the Constitution of 1996. Some observers asserted that the Constitutional model of 1996 introduced the presidential-parliament model, while the 2004 Constitution mandated the parliamentarian-presidential model of government.[74] However, in September

[69] Op.cit. note 48.

[70] Venice Commission, "Joint Interim Opinion on the Law of Ukraine on the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols" (18-19 December 2015), 28.

[71] ECtHR, United Communist Party of Turkey v. Turkey, ECtHR Judgment (30 January 1998) App. 19392/92.

[72] ECtHR, Streletz, Kessler and Krenz v. Germany, ECtHR Judgment (22 March 2001) App. 34044/96, 35532/97 and 44801/98.

[73] Id.

[74] "It is the first time when a system that allowed to foresee the prospects of the state's development is created", Center for Political and Legal Studies (23 April 2018), available at http://pravo.org.ua/ua/news/20872833-v-ukrayini-vpershe-stvorena-sistema,-yaka-dozvolyae-pobachiti-perspektivi-rozvitku-dergeavi,---kerivnik-politichnogo-viddilu-predstavnitstva-es-v-ukrayini.

2010, the CCU outlawed the Constitutional Reform of 2004 and mandated a return to the Constitution of 1996.[75] From September 2010 to February 2014, the Yanukovych government operated under the Constitution of 1996. As a result of mass demonstrations in February 2014, parliament adopted a law that restored the provisions of the Constitution of 2004.[76] According to the strictu sensu legal viewpoint, the Court must interpret and construe the activities and intentions of the Yanukovych government in light of the Constitution of 1996. Interpreting the actions of the Yanukovych government in terms of the Constitution of 1996 will undermine the current Constitution. It would mean that the Court disregards parliament's ruling to revert to the Constitution of 2004. These ambiguities in ascertaining which Constitutional provisions take precedence create significant challenges for the Constitutional Court.

Uzelac brilliantly noted, "if judges themselves are suspects of the links with the past regime, it is highly doubtful how a process in which they would have the final word in the matters of lustration would reach the goal of full legitimacy."[77] The same challenge compounds the current constitutional proceeding on lustration. Several criminal proceedings of high treason were commenced against some judges of the CCU, who voted for the decision to backpedal the 1996 Constitution in September 2010.[78] The National Anti-Corruption Bureau of Ukraine (NABU), in its turn, also disclosed materials of pre-trial investigation where the agents of the Bureau documented "facts of influence of the KDAC (the Kyiv District Administrative Court) Head of judges of the Constitutional Court of Ukraine…"[79] According to dossiers, the Head of the KDAC had put pressure on several CCU judges and sought to "break down the law on lustration."[80] Given that criminal proceedings provide the Constitutional Court "little legitimacy",[81] this may be even more questioned by society if the CCU declares the GCA unconstitutional.

Finally, the ECtHR's findings in the Polyakh case, to some extent, may be deemed lopsided. The ECtHR noted that the following: pressure on mass media, the adoption of so-called "dictatorship laws";[82] close ties with the Russian Federation, political repression (§ 9);[83] pressure on the judiciary (§ 10);[84] discredited parliamentary elections in 2012 (§ 11);[85] the escape of almost all high-ranking officials to the Russian Federation, making open judicial proceedings in the Ukrainian courts against them mostly impossible. Nonetheless, the unprecedented basis to introduce lustration was not taken into account in the Court's assessment.

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75 The Constitutional Court of Ukraine, Decision № 20-рп/2010 (30 September 2010).

76 Law "Pro vidnovlennia dii okremykh polozhen Konstytutsii Ukrainy" as of 21 February 2014 (the Law of Ukraine "On Restoring Specific Provisions of the Constitution of Ukraine").

77 Alan Uzelac, "(In)Surpassable Barriers to Lustration: Quis custodiet ipsos custodes?", in Vladimira Dvořáková and Anđelko Milardović (eds.), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Political Science Research Centre, Zagreb, Croatia, 2007), 47-48.

78 "Seven Judges of the Constitutional Court of Ukraine are under criminal investigation", Unian (9 April 2015), https://www.unian.ua/politics/1065446-provadjennya-vidkrito-schodo-simoh-suddiv-konstitutsiynogo-sudu-chlen-gromadskoji-radi-pri-minyusti.html.

79 "NABU and the SSU disclosed criminal organization headed by the Head of the Kyiv District Administrative Court (KDAC), which includes judges of the KDAC, the Head of the State Judicial Administration of Ukraine (SJA), former members of the High Qualification Commission of Judges of Ukraine (HQCJ) and others", the National Anti-Corruption Bureau of Ukraine (21 July 2020), available at https://nabu.gov.ua/en/novyny/zlovzhivannya-v-oask-novi-epizodi-rozshifrovka-video.

80 Id.

81 Klaus Bachmann and Igor Lyubashenko, "The Puzzle of Transitional Justice in Ukraine," 11(2) *International Journal of Transitional Justice* (2017), 297-314, at 307.

82 "Ukraine: Brief legal analysis of Dictatorship Law", Civic Solidarity (20 January 2015), available at http://www.civicsolidarity.org/article/880/ukraine-brief-legal-analysis-dictatorship-law.

83 ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

84 Id.

85 Id.

Bachmann and Lyubashenko characterized the overall state of rule by indicating that, "the issue at stake was no longer whether Ukraine would be democratic and independent, but whether the country would descend into autocracy under President Viktor Yanukovych or maintain the integrity of its formerly democratic institutions."[86]

Though there are many missing elements from the Ukrainian government's stance in the Polyakh case, Ukrainian lustration takes on strong symbolic meaning. As Uzelac emphasized, "so far, the concept of lustration has a strong political and social meaning, above all as a symbolical departure from the past totalitarian practices and those who were instruments in their enforcement."[87] This logic holds that declaring the GCA unconstitutional would probably encourage revanchist sentiments towards the Yanukovych government. While the GCA serves as a symbolic reminder of departure from past injustices, it is evident that the political and social perception of the GCA is more significant than any legal outcome.

McAuliffe asserts that outlawing lustration by the ECtHR may serve better for the interests of the rule of law long-term.[88] At the same time, short-term difficulties may be less desirable for Ukraine. Abandoning lustration is complicated by the fact that the need to dismiss corrupt officials was one of the core goals of the Euromaidan protests and a justification for the legality of Yanukovych's resignation. Nonetheless, the ECtHR is a human-centric body. In contrast, the CCU may adjudicate based on a wide-range of factors, including the Polyakh decision, other national court decisions and precedents.

Conclusions

The implications of the Polyakh judgment have far-reaching international consequences. For the first time, the ECtHR considered lustration policy outside the post-communist (or denazification) context. Analysing Ukrainian lustration, the ECtHR did not implicitly outlaw lustration policy against previously democratically elected governments. Instead, the Strasbourg court questioned the proportionality of sanctions and the blanket character of lustration. The ECtHR implied a new scope in subject and time for permissible lustration policy by affirming the possibility of introducing lustration measures against individuals who violated democratic norms in a post-totalitarian government. Nonetheless, the ECtHR expressed serious concerns about Ukraine's GCA in terms of politicization, the absence of compliance with accepted lustration criteria, the lack of an individualized approach to sanctions, and the lack of clear trigger elements under lustration law. Thus, the ECtHR found the lustration law failed to meet the proportionality criterion, and doubted compliance with the criterion of pressing social need.

Another serious concern stems from the fact that the CCU is still considering the constitutionality of the GCA, so the Polyakh judgment might limit the CCU's legal manoeuvring. Regardless of the ECtHR decision, the CCU still has broad discretion in the case on lustration. The Czech court precedent and the recent CCU decision demonstrated that constitutional justice might prioritize other principles than mentioned by international human rights bodies (like the Venice Commission or

[86] Bachmann and Lyubashenko, op.cit. note 62, 298.

[87] Uzelac, op.cit. note 58, 47-48.

[88] Padraig McAuliffe, "Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?," 2(2) *Hague Journal on the Rule of Law* (2010), 127-54, at 154.

even the ECtHR). Robertson compared a choice between two attitudes towards lustration: legalistic formalism (in the Hungarian case), and the determination to ensure substantive justice (in the Czech experience).[89] This is the ultimate question before Ukrainian Constitutional Justice in the present case. The primary issue will be how the CCU formulates a decision based on earlier ECtHR, Hungarian, Polish, and Czech legal findings. It is possible the upcoming decision on the Ukrainian GCA will completely neglect existing decisions and precedents and will come up with its own unique legal approach to the issue. In any case, the present task before the CCU is complex, with far-reaching implications.

Since 2015,[90] the CCU has had the opportunity to evaluate the compliance of the GCA with international standards and constitutional prerequisites on its own, as done in the past by other CEE courts. Now, the findings of the Strasbourg court in the Polyakh case stand as an integral part of the future constitutional decision. Regardless of the outcome, the ECtHR has been the first to take the lead in this open political question for Ukraine, but not the national CCU.

Although the constitutional review of the lustration issue did not take place, some peculiar opinions on this topic were expressed by the CCU judges in another proceeding, in particular, the opinion of one judge that the CCU should not interfere in the field of lustration, given the political nature of this issue.

Administrative courts mostly ruled in favour of the lustrated persons, arguing that there was no individual approach and general standards for lustration have not been met. They argued for the need to distinguish lustration from other types of liability and the problem of overly generalised application of the law. According to the conclusions of administrative judiciary, the unlawfulness of the lustration measures was based on the poor quality of the law without a detailed assessment of the relevance of lustration in Ukraine as such.

The courts did not fully apply the principles of militant democracy to the lustration process.

In closing, the legitimacy and the overall constitutionality of lustration are still ongoing in the court of the Ukrainian Constitutional Justice. If the CCU applies the ECtHR considerations in the Polyakh case, the complete annulment of the GCA is almost guaranteed. The chances of overruling the Strasbourg Court's decision seem unlikely, but even so, the judges sitting in the building on 14 Zhylianska St. in Kyiv have legal mechanisms to avoid extreme politicization[91] (in the case the law is to be annulled). Failure to make a sound decision and ignoring the ECtHR considerations in the Polyakh judgment would risk jeopardizing the image of the Ukrainian Constitutional Court as a real guardian of the constitution.

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[89] Robertson, op.cit. note 23, 95.

[90] From the period of commencing the constitutional proceeding on lustration (April 2015) to publishing the Polyakh decision (October 2019).

[91] Alexei Trochev, "Ukraine: Constitutional Court Invalidates Ban on Communist Party," 1(3) *International Journal of Constitutional Law* (2003), 534-540, at 534.

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СПРАВА ПОЛЯХА: НАСЛІДКИ ДЛЯ ЛЮСТРАЦІЇ В УКРАЇНІ ТА ЗА КОРДОНОМ

Анотація

У жовтні 2019 року ЄСПЛ визнав порушення Конвенції про захист прав людини і основоположних свобод у справі «Полях та інші проти України», тим самим поставивши під сумнів законність української люстрації та визначивши, що таке втручання не має ознак необхідності в демократичному суспільстві. Водночас, рішення Страсбурзького суду містить висновки щодо окреслення змісту та можливих часових меж люстрації як допустимого явища. У цій статті аналізуються практичні наслідки рішення ЄСПЛ у справі «Полях та інші проти України» щодо конституційності люстрації в Україні та наслідки дії Закону України "Про очищення влади" в контексті міжнародного правозастосування

Ключові слова: *люстрація; Конституційний Суд України; справа "Полях та інші проти України"; Європейський суд з прав людини*