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CURRENT PROBLEMS OF THE REALISATION OF THE RIGHT TO EFFECTIVE REMEDIES IN THE UKRAINIAN CONTEXT OF LUSTRATION

Abstract

The article focuses on current problems of the realization of the right to effective remedies for everyone who has fallen within the purview of the Law of Ukraine “On Government Cleansing” in Ukraine during the lustration, since this right is guaranteed by the Convention for the protection of human rights and fundamental freedoms of 1950. The analysis of the established lustration standards, which were formulated by the European institutions taking into account other countries’ experiences, showed that the appropriate realization of the right to effective remedies during lustration is one of the key aspects of government cleansing in a democratic country founded on the rule of law. The article raises the issue of the applicability of the constitutional principles of presumption of in-

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nocence and individual responsibility to the Ukrainian context of lustration. This issue remains open for domestic legal theory and practice because it is complex and requires the official legal position of the Constitutional Court of Ukraine.

Keywords

lustration; right to remedies; administrative proceedings; fair trial; reasonable time.

INTRODUCTION

In the current radical transformation of socio-economic, political, legal, and spiritual life in Ukraine, political processes come to the fore which should lead to a radical reform of the established system and become conditional catalysts for democratic change, among which political lustration is one of the leading reforms. The issue of state power cleansing through the use of lustration procedures is one of the most important and at the same time ambiguous in political science. The phenomenon of lustration has not yet been fully studied. Lustration is often cited as a way to abandon the legacy of the communist past or the corruption of the past government. Lustration is used as a quick way to reform the political system, the political system of the country, and to change political epochs, regimes, ruling classes, and elite groups. By its nature, lustration is the leading means of liberating and preventing the activities of those people who have tarnished themselves by actions against the independence of Ukraine, against the true democracy of the Ukrainian state. The ongoing crisis of representative democracy, which has existed in the Ukrainian parliament so far, has confirmed the lack of constitutional modernization and the infantile state of parliament. The modern political space of the Ukrainian state is changing its determinants, lustration plays an important role in this process.

Since the Law of Ukraine “On Government Cleansing” (hereinafter called the Law) was adopted, almost a decade has passed.¹ The Law of Ukraine “On Government Cleansing” of 2014 was adopted to cleanse

¹ Verkhovna Rada of Ukraine, *Law of Ukraine No. 1682-VII “On Government Cleansing”*, 2014, available at: <https://zakon.rada.gov.ua/laws/show/1682-18#Text> [last accessed 10.1.2022].

power (lustration) to prevent persons who by their decisions, actions, or inaction had carried out measures (and/or facilitated their implementation) aimed at usurpation, to participate in the management of state affairs power by the President of Ukraine Viktor Yanukovich, undermining the foundations of national security and defense of Ukraine or committing unlawful violation of human rights and freedoms. The Law of Ukraine "On Government Cleansing" defines the concepts of "government cleansing" and "lustration" as a prohibition established by this law or court decision on the holding by certain individuals of certain positions in state authorities and local self-government bodies.

The Law of Ukraine "On Government Cleansing" prohibits the holding of certain positions for 10 years by persons who held certain public positions for more than 1 year from February 25, 2010, to February 22, 2014.² A similar ban will apply to persons who held the positions specified in the law for less than 1 year, including the period from November 21, 2013, to February 22, 2014, and were not dismissed of their own volition. In addition, lustration applies to persons who held positions in the Communist Party of the USSR or one of the union republics, from the secretary of the district committee and above, in Komsomol organizations, or worked in the KGB.

In addition, previously convicted officials and law enforcement officers who cooperated with foreign intelligence services, called for violations of Ukraine's territorial integrity, or violated human rights and freedoms recognized by the European Court of Human Rights are subject to lustration. In addition, officials who submit inaccurate information about property in income tax returns or whose property value does not correspond to the level of legal income during their tenure are subject to lustration.³

In 2019, Ukraine enshrined the European course irreversibly at the constitutional level. Thus, it recognized the need to follow European legal values. However, Ukraine never managed to fulfill its main constitutional duty towards a person and guarantee an effective remedy for lustrated persons. The issues of lustration have just become a subject

² Ibid.

³ O.V. Stogova, *Lustration as a prerequisite for an effective fight against corruption*, "Modern society: political science, sociological sciences, cultural sciences: collection of scientific works", Issue 1, Vol. 13, 2016, pp. 167-178.

matter of academic discussions. Regardless of theoretical studies, scholars pay attention to specific features of carrying out the lustration in different fields that are comprehensible and practically relevant.

The Convention for the protection of human rights and fundamental freedoms (hereinafter called the Convention) provides in Article 13 that everyone whose rights and freedoms were violated has a right to an effective remedy in the national body even if such an offence was committed by persons exercising their official powers.⁴ Since the Convention became a part of the Ukrainian legal system (as a Member State of the Council of Europe), the domestic remedies, being the first line of human rights protection, should have become more efficacious. Instead, the realization of the right to protection became problematic during the lustration in Ukraine as the implementation of the Ukrainian government cleansing model was conducted automatically and was applied to a large number of people and against the principles and standards of lustration developed by the international and European institutions.

According to §4 of the PACE Resolution No. 1096 “On measures to dismantle the heritage of former communist totalitarian systems”,⁵ a democratic country founded on the rule of law disposes of enough means to serve justice and punish the guilty. However, it cannot and must not indulge in revenge instead of ensuring justice. On the contrary, the state is obliged to uphold human rights and fundamental freedoms such as the right to a fair trial and the right to get one’s word heard.

§12 of this PACE Resolution indicates that administrative measures can be consistent with the democratic state based on the rule of law under the conditions of the following criteria: individual (not collective) guilt must be proved in every single case; the right to defense, the presumption of innocence, and the right to retrial must be guaranteed.⁶

⁴ Council of Europe, *Convention for the protection of human rights and fundamental freedoms*, 1950, available at: https://www.eods.eu/library/CoE_European%20Convention%20for%20the%20Protection%20of%20Human%20Rights%20and%20Fundamental%20Freedoms_1950_EN.pdf [last accessed 10.1.2022].

⁵ Parliamentary Assembly, *Resolution No. 1096 “On measures to dismantle the heritage of former communist totalitarian systems”*, 1996, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507> [last accessed 10.1.2022].

⁶ Ibid.

The purpose of this article is to reveal the current problems of realization of the right to effective remedies in the conditions of lustration and study possible ways to solve them. The methodological basis of the study is the volume of universal (philosophical), general scientific, special and specialized methods of scientific knowledge. Such general scientific methods as analysis, deduction, abstraction, generalization, and formalization were used.

I. THE NOTION OF LUSTRATION IN INTERNATIONAL LAW

Considering Ukraine, the lustration criteria, which were defined in the PACE Resolution and proved by the practice of the ECtHR, became the foundation for two opinions of the Venice Commission on the Law: the Interim Opinion and the Final Opinion.⁷ Accordingly, in §15 of the Interim Opinion, the Venice Commission pointed out that lustration is one of the instruments of the transition period justice that are used to protect new democratic states against the threats of those associated with the previous totalitarian regimes and to prevent such a regime from coming back.

Apart from that, §17 of the Interim Opinion states that “the lustration does not constitute a violation of human rights per se, as a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. However, to respect human rights, the rule of law, and democracy, lustration must strike a fair balance between ‘defending the democratic society on the one hand and protecting individual rights on the other’”.⁸ The Venice Commission reminded us that “lustration procedures, despite their political nature, must be devised and carried out only by legal means, in compliance with the Constitution and taking into account European standards con-

⁷ Venice Commission, *Interim opinion No. 788/2014 on the Law On Government Cleansing (“Lustration Law”) of Ukraine*, 2014, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PL-PV\(2014\)004-bil](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PL-PV(2014)004-bil) [last accessed 10.1.2022]; Venice Commission, *Final opinion No. 788/2014 on the Law On Government Cleansing (“Lustration Law”) of Ukraine*, 2015, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e) [last accessed 10.1.2022].

⁸ Venice Commission, *Interim opinion*, *supra* note 7.

cerning the rule of law and respect for human rights. If this is done, then lustration procedures can be compatible with a democratic state governed by the rule of law”.

Moreover, in the Interim Opinion, the Venice Commission indicated that “lustration laws are always a mixture of legal action and a political document.”⁹ An appropriate balance between these two elements must be struck if the lustration law is to serve its important function to establish the rule of law in the country” (§22). The Venice Commission summarised the following essential criteria that reflect the essence of the lustration standards: “(a) guilt must be proved in each case; (b) the right of defense, the presumption of innocence, and the right to appeal to a court must be guaranteed; (c) the different functions and aims at the one hand of lustration, namely the protection of the newly emerged democracy, and on the other hand of criminal law, i.e. punishing people proved guilty, have to be observed; (d) lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened” (§20).¹⁰

In the Final Opinion No. 788/2014 on the Law On Government Cleansing (“Lustration Law”) of Ukraine, the Venice Commission reminded us that “a newly democratic state might have good reasons to remove from public life, temporarily, individuals who occupied high-level positions under the previous, nondemocratic regime or who engaged in serious human rights violations” (§25).¹¹ Furthermore, according to the Venice Commission, “at the same time, it is important to keep in mind that lustration is not, and is not meant to be, a form of criminal proceedings. It must never be used as a substitute for a criminal sanction, when such a sanction would be warranted, or as a measure of revenge and retaliation” (§25).¹² Thus, the Venice Commission underlined the necessity to comply with the procedural guarantees of the lustrated persons’ rights during the government cleansing. It also put forward that the suspended legal proceedings of such persons charac-

⁹ Ibid.

¹⁰ R. David, C.M. Horne, *Lustration and the personnel reform of the state*, [in:] H.O. Yusuf, H. Van Der Merwe (eds), *Transitional Justice*, London: Taylor and Francis Inc., 2021, pp. 122-142.

¹¹ Venice Commission, *Final opinion*, *supra* note 7.

¹² Ibid.

terize negatively the level of legitimacy and human rights protection in Ukraine.

Therefore, the appropriate realization of the right to an effective remedy during the lustration belongs to one of the key aspects of the government cleansing in a democratic country founded on the rule of law. According to the practice of the ECtHR, it means the following:

- a) the national system of remedies is not formal but efficient and accessible (not only in theory but in real terms), takes into account an applicant's circumstances, provides a real possibility for the applicant to initiate his/her defence, and redresses human rights violations, including making indemnification;
- b) an authority, entitled to hear an appeal against the violation of the applicant's rights, is not inactive, but does its duty effectively;
- c) such authority is independent of a potential offender, and thus, is impartial;
- d) scope of the domestic remedies is more effective than the use of one remedy, which is not able to fulfil the requirements of Article 13 of the Convention (Council of Europe, 1950);
- e) the application of a certain domestic remedy is well-timed and carried out without excessive delays.¹³

Article 35 of the Convention enshrines the criteria of admissibility for applications submitted before the ECtHR and puts into effect the crucial principle of the conventional system of human rights protection – subsidiarity. Consequently, the proper ensuring of the right to an effective remedy is a direct duty of the state. Especially, the fulfillment of this duty can be observed in ensuring “the right to a trial” which means the everyone's right to a fair and public hearing of his/her case within a reasonable period of time by an independent and impartial court, which will adjudicate the controversy over his/her civil rights and responsibilities, according to Article 6 §1 of the Convention.

Hence, the right to an effective remedy and the right to a fair court, according to the letter and the spirit of the Convention, are closely connected to the rule of law. At the same time, this correlation between the right to an effective remedy and the right to a fair court means that

¹³ P. Morgan, *Literature and lustration: Rebuilding social trust through literature*, “Journal of European Studies”, Issue 50, Vol. 1, 2020, pp. 60–69.

the violation of the latter presupposes the violation of the right to a defense, while the violation of the former testifies to the ineffectiveness of the state to ensure the right to a fair court trial. The proof of this correlation is also the case of *Polyakh and others v. Ukraine*.¹⁴ Although taking into account the reasons for which the ECtHR established a violation of Articles 6 and 8 of the Convention, a separate hearing of the declared violation of Article 13 of the Convention by one of the applicants was not held (§ 328), the compatibility of the Conventional right to an effective remedy and the right to a fair trial appeared to be expected.¹⁵

According to the case law of the ECtHR, the aspect of a reasonable period of time of the case examined by the court is important in this correlation. As is known, neither the case law of the ECtHR nor the national court practice gives a full list of criteria for reasonable terms of legal proceedings. Moreover, it is impossible to define the universal list of such criteria because of the biased nature of the category of “reasonableness”. At the same time, the analysis of the theoretical provisions and the case law allows one to conclude that the assessment of the reasonableness of a period of time of legal proceedings is conducted by taking into account the scope of the criteria.¹⁶

A complex approach to the assessment of the reasonableness of a period of time of legal proceedings is also applied by the ECtHR. Thus, in the case *Polyakh and others v. Ukraine*, the ECtHR reminded us that these criteria are the facts of the case, “the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute” (§ 171).¹⁷ Notably, the aspect of “a reasonable period of time” became one of the key ones during the hearing of this case. The applicants stressed the excessive length of the administrative proceedings, which was caused by a long-time examination of the case regarding the constitutionality of the Law (2014) by the

¹⁴ *Polyakh and others v. Ukraine*, Application No. 58812/15, Judgment of 17.10.2019, available at: <https://laweuro.com/?p=9711> [last accessed 10.1.2022].

¹⁵ Council of Europe, *supra* note 4.

¹⁶ Y. Skoromnyy, R. Skrynkovskyy, *Lustration as a particular procedure for bringing a judge to justice in Ukraine*, “Path of Science”, Issue 6, Vol. 11, 2020, pp. 1001-1009.

¹⁷ *Polyakh and others v. Ukraine*, *supra* note 14.

Constitutional Court (at the moment of the application it had been for 4,5 years).¹⁸

Disputing a claim, in this case, the Government of Ukraine stated that:

- 1) “the appeals to the administrative courts had been an effective remedy for the applicants’ complaints. The proceedings before the Constitutional Court had been no bar to the administrative courts proceeding with the applicants’ cases and resolving them on the merits”;
- 2) “the applicants themselves by their actions or inaction had created the situation in their cases: (i) none of the applicants had appealed against the rulings suspending the proceedings; (ii) the second and third applicants themselves had initiated the suspension of the proceedings in their cases; (iii) the applicants had not asked for the proceedings to be resumed”;
- 3) “The situation the applicants had found themselves in had been as a result of their own choice, rather than a flaw in the system of domestic remedies. The State could not be held responsible for this state of affairs”;
- 4) “the length of the proceedings before the Constitutional Court did not render this remedy ineffective since such proceedings had special features and could not be construed in the same way as for an ordinary court”;
- 5) “an appeal to the Ministry of Justice, which had powers in administering the GCA, would have provided the applicants with another avenue of redress” (§§117-122).¹⁹

Estimating the parties’ arguments from the viewpoint of the requirements of Article 6 §1 of the Convention, the ECtHR determined that Ukraine had violated the right to a fair trial, providing the following legal reasoning:

- a) the length of the proceedings “is not short in absolute terms”, and thus, “cannot be considered reasonable”;

¹⁸ O. Gerasymenko, *Preconditions of administrative responsibility: doctrinal issues*, “Journal of International Legal Communication”, Issue 1, Vol. 1, 2021, pp. 102-111.

¹⁹ Ibid.

- b) the labour disputes require a fast decision owing to the importance of the legal matter for the interested party that being dismissed loses the means of sustenance;
- c) “the legal matters involved in the resolution of the applicants’ cases were complex, raising as they did novel and difficult issues of constitutional and Convention law. It is therefore understandable that the Constitutional Court needed to resolve those questions before the ordinary court could proceed with the cases”;
- d) “it would be unreasonable, in the presence of such a well-defined position of the Supreme Court, to have expected the applicants to disagree and urge the ordinary courts to proceed with the cases anyway, expecting them to take a stand on the constitutionality of the GCA”;
- e) “the applicants could not have been expected to know that those time-limits would be exceeded, especially given that the Supreme Court asked the Constitutional Court to examine the issue as a matter of urgency”;
- f) “the particularity of the Constitutional Court’s role as guardian of the constitution makes it particularly necessary for it to sometimes take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms [...] cannot sufficiently explain the delay in the proceedings”;
- g) “in the light of its findings above, [...] in practice those Constitutional proceedings proved not to be an effective remedy in respect of the applicants’ grievances”. (§§171–196, 214).²⁰

So, in the case *Polyakh and others v. Ukraine*,²¹ the ECtHR reaffirmed its position that a period of time of a constitutional proceeding should be taken into consideration when calculating a corresponding period of time if the result of such a proceeding can influence the outcome of the dispute before ordinary courts.²²

²⁰ *Polyakh and others v. Ukraine*, *supra* note 14.

²¹ *Ibid.*

²² *Deumeland v. Germany*, Application No. 9384/81, Judgment of 29.05.1986, available at: https://european-court.eu/uploads/ECHR_Deumeland_v_Germany_29_05_1986.pdf [last accessed 10.1.2022]; *Ruiz-Mateos v. Spain*, Application No. 12952/87, Judgment of

II. A REASONABLE PERIOD OF TIME OF CONSTITUTIONAL PROCEEDINGS AS THE BASIS FOR THE RULE OF LAW

Thus, according to such a position of the ECtHR, by Article 6 of the Convention the constitutional courts are recognized as “the court established by law”, and constitutional disputes can fall under the effect of this norm if the proceedings of the constitutional court have a considerable impact on the outcome of the dispute before ordinary courts.²³ Hence, it is possible to conclude that if a person believes that the violation of his/her rights is connected with the law (or other legal act) that will be applied in this particular case, the state must guarantee this person the real possibility of establishing its constitutionality. It also concerns the Constitutional Court of Ukraine. In the case *Polyakh and Others v. Ukraine*, the ECtHR reiterated “that it is for the Contracting States to organize their judicial systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time” (§171).²⁴

According to Article 153 of the Constitution of Ukraine (1996), the procedure of the Constitutional Court of Ukraine, the status of the Court’s judges, the causes and the procedure of an appeal to the Court, the procedure of cases examinations by the Court, and the execution of Court decisions are enshrined in the Constitution of Ukraine and the Law. Therefore, the above-mentioned duty of the state in the context of legally ensuring the organization and the activity of the Constitutional Court of Ukraine is imposed on the legislator – the Verkhovna Rada of Ukraine. In Part 2 of Article 75, the current Law of Ukraine No. 2136-VIII “On the Constitutional Court of Ukraine” captures a critical period of time of cases examined in the Constitutional Court of Ukraine – “the length of the constitutional proceedings must not exceed six months if

23.06.1993, available at: [https://hudoc.echr.coe.int/fre#{%22tabview%22:\[%22document%22\],\[%22itemid%22:\[%22001-57838%22\]}](https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],[%22itemid%22:[%22001-57838%22]}) [last accessed 10.1.2022]; *v. Germany*, Application No. 20024/92, Judgment of 16.09.1996, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57999%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57999%22]}) [last accessed 10.1.2022].

²³ Council of Europe, *supra* note 4.

²⁴ *Polyakh and others v. Ukraine*, *supra* note 14.

otherwise it is not established by law”.²⁵ Part 3 of the same article establishes even a shorter a period of time of the constitutional proceedings – not more than thirty calendar days for certain categories of cases.

Similarly, neither the Law of Ukraine “On the Constitutional Court of Ukraine” nor the Procedure of the Constitutional Court of Ukraine provides for the possibility of prolonging a period of time of the constitutional proceeding or enshrines any legal consequences for the failure of the Constitutional Court of Ukraine to comply with them.²⁶ This is although the organization of the Constitutional Court is not an instance which involves the function of control over the court below. Apart from that, the Constitution of Ukraine and the Law of Ukraine “On the Constitutional Court” do not contain a textual consolidation of the principle of a reasonable period of time of the constitutional proceeding, for example, “a reasonable period of time of the examination of the case by the court” as the fundamental principle of legal proceedings (§7 of Part 2 of Article 129 of the Constitution of Ukraine).²⁷ Thus, in the administrative proceedings, a reasonable period of time is the shortest period of hearing and decision-making in an administrative case which is sufficient for providing the timely judicial protection (without undue delays) of the violated rights, freedoms, and interests in public-law relations (Article 4).²⁸

Naturally, the principle of a reasonable period of time is a logical continuation of the principle of the rule of law, which is enshrined in the Constitution of Ukraine and the Law of Ukraine “On the Constitutional Court of Ukraine”, on which the activity of the Constitutional Court of Ukraine should be based.²⁹ Nevertheless, considering the

²⁵ Verkhovna Rada of Ukraine, *Law of Ukraine No. 2136-VIII “On Constitutional Court of Ukraine”*, 2017, available at: <https://zakon.rada.gov.ua/laws/show/2136-19#Text> [last accessed 10.1.2022].

²⁶ Constitutional Court of Ukraine, *Decree on the Procedure of the Constitutional Court of Ukraine*, 2018, available at: <https://zakon.rada.gov.ua/laws/show/v0001710-18?lang=uk#Text> [last accessed 10.1.2022].

²⁷ Verkhovna Rada of Ukraine, *Constitution of Ukraine*, 1996, available at: <https://zakon.rada.gov.ua/laws/show/254k/96-#p.Text> [last accessed 10.1.2022].

²⁸ Verkhovna Rada of Ukraine, *Administrative Procedure Code of Ukraine*, 2005, available at: <https://zakon.rada.gov.ua/laws/show/2747-15#n12372> [last accessed 10.1.2022].

²⁹ Verkhovna Rada of Ukraine, *supra* note 28; Verkhovna Rada of Ukraine, *supra* note 25.

systemic nature of the problem of delays in the constitutional proceedings in Ukraine, the formalization of the “reasonableness” principle would provide an additional guarantee of the realization of the right to an effective remedy. Currently, there is the Draft Law on Constitutional Procedure No. 4533 under consideration by the Verkhovna Rada of Ukraine, but it does not embrace the principle of a reasonable period of time for the constitutional proceeding.³⁰ This draft law proposes that in its internal acts the Constitutional Court of Ukraine could elaborate on the procedural formalities of the Court’s draft act and introduce them to the judges of the Constitutional Court of Ukraine well ahead of time and within a reasonable time. However, this provision does not relate to a period of time of the constitutional proceedings per se.

Another proposal, which was described in the Draft Law on Constitutional Procedure No. 6427 previously registered in the Verkhovna Rada of Ukraine, seems to be closer to the solution to the problem.³¹ It states that the Constitutional Court of Ukraine should establish a reasonable period of time of legal proceedings; a period of time is reasonable if it provides sufficient time, taking into account the facts of the case, to execute a procedural action and is consistent with the aim of the constitutional proceeding. Despite that, the Committee on Legal Policy and Justice of the Verkhovna Rada of Ukraine recommended that the Verkhovna Rada of Ukraine reject this Draft Law. That is why it is excluded from consideration by the Ukrainian Parliament.

It is worth mentioning that the decision in the case *Polyakh and others v. Ukraine* had a considerable impact on the national mechanism of realizing the right to an effective remedy by the lustrated persons.³² Accordingly, applying this decision of the ECtHR as a source of law in lustration disputes, the administrative courts got more than 1,5 hundred cases moving. They justified their decisions by the fact that the case examination regarding the constitutionality of the Law provisions by the

³⁰ Verkhovna Rada of Ukraine, *Draft Law on Constitutional Procedure No. 4533*, 2020, available at: http://W1.C1.Rada.Gov.Ua/Pls/Zweb2/Webproc4_1?Pf3511=70729 [last accessed 10.1.2022].

³¹ Verkhovna Rada of Ukraine, *Draft Law on Constitutional Procedure No. 6427*, 2017, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61753 [last accessed 10.1.2022].

³² *Polyakh and others v. Ukraine*, *supra* note 14.

Constitutional Court of Ukraine does not create an objective impossibility of hearing cases.³³ The judicial reform of 2017, which was introduced in Ukraine based on the Law of Ukraine No. 2147-VIII “On the amendments to the Economic Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Administrative Procedure Code of Ukraine, and other legislative acts”,³⁴ facilitated such procedural decisions.³⁵

According to this Law, the ordinary courts were entitled to more opportunities to decide cases in line with the Constitution of Ukraine than they had had before. Thus, in the renewed Administrative Procedure Code of Ukraine, the fundamental norm of the source of law application was changed.³⁶ Now if the court concludes that the law or other legal act contradicts the Constitution (in the previous version of the Code – if the court has doubts), the court does not enforce such a law or a legal act, but applies the norms of the Constitution of Ukraine that are directly applicable.³⁷

As the Ukrainian scholar Serhii Riznyk suggests, this updating/innovation did not cause any revolution because, even earlier the principle of direct applicability of the Constitution of Ukraine had been each judge’s duty, without any legislative support.³⁸ Nevertheless, it is worth highlighting that the case law had another direction, while in the previous versions of procedural codes the principle provided for in Article 8 of the Constitution of Ukraine was hardly developed, so paralyzing considerably the activity of the inert enough judges in enhancing the rule of the Constitution of Ukraine.

³³ Verkhovna Rada of Ukraine, *supra* note 1.

³⁴ Verkhovna Rada of Ukraine, *Law of Ukraine No. 2147-VIII “On the amendments to the Economic Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Administrative Procedure Code of Ukraine and other legislative acts”*, 2017, available at: <https://zakon.rada.gov.ua/laws/show/2147-19/ed20171215#n6636> [last accessed 10.1.2022].

³⁵ L.M. Belkin, *The problem of the constitutionality of the Law of Ukraine “On Purification of Power” in the context of the position of the Venice Commission*, “Constitutional and Legal Academic Studies”, Issue 2, 2019, pp. 15-23.

³⁶ Verkhovna Rada of Ukraine, *supra* note 29.

³⁷ I. Pozigun, *Rule of law implementation into the administrative process in Ukraine*, “Journal of International Legal Communication”, Issue 1, Vol. 1, 2021, pp. 73-80.

³⁸ S. Risnyk, *Constitutionality check of the laws of Ukraine by courts of general jurisdiction as an intermediate form of the constitutional control (in the context of the person’s right to constitutional complaint)*, “Law of Ukraine”, Issue 12, 2018, pp. 163-177.

After the fall of communism in Ukraine, judges did not undergo lustration, which allowed oligarchs and politicians to take control of the judiciary and use it to their advantage. In 2015, the level of public confidence in the courts was the lowest in Europe and one of the lowest in the world – 7%. Judicial reform, which began in 2016, has become the largest in the history of independent Ukraine. It was necessary to restart the judicial system of Ukraine, for which appropriate measures were developed and special procedures were introduced, and a competition was held for the positions of judges of the new Supreme Court. Such actions were in fact of a lustration nature. This is evidenced, for example, by the fact that during the competition for the new Supreme Court, much attention was paid to the issue of integrity.

If we talk about the consequences of the judicial reform in 2016, one of the great successes of judicial reform is the abolition of the four-tier judicial system, when the role of cassation (third) instance was performed by higher specialized courts, but their decision could be revoked or changed by the Supreme Court). Under the new judicial reform, the High Specialized Courts did cease to exist, but only *de jure*. These courts continued to hear cases in cassation, but did so as the Administrative Court of Cassation, the Commercial Court of Cassation, the Criminal Court of Cassation, and the Civil Court of Cassation within the Supreme Court.³⁹

However, abolishing “on paper” the High Specialized Courts as courts of cassation (which consists only in changing their name and affiliation), the Law “On the Judiciary and the Status of Judges” provided for the establishment of other High Specialized Courts, including the High Court of Intellectual Property and the Supreme Anti-Corruption Court, which will act as courts of the first instance.⁴⁰ With the creation of these specialized courts, it can be concluded that to protect the right, for example, to a trademark, a resident of the Odesa region must apply for protection of his/her rights to Kyiv, where the Supreme Court

³⁹ S.G. Denisyuk, *Lustration in Ukraine: political and legal analysis*, “Bulletin of Kharkiv National University named after VN Karazin. Series: Questions of Political Science”, Issue 1132, 2014, pp. 41-46.

⁴⁰ Verkhovna Rada of Ukraine, *Law of Ukraine No. 1402-VIII “On the Judiciary and the Status of Judges”*, 2016, available at: <https://zakon.rada.gov.ua/laws/show/1402-19#Text> [last accessed 10.1.2022].

of Intellectual Property is located. Cases were considered either by a local court (district) or by an administrative district court, which operated in each oblast (depending on the category and features of the case). Such a situation can hardly be called the convenience and concern of the state. In addition, in Ukraine, compared to other categories of cases, there are a small number of anti-corruption and intellectual property cases, a situation which generally calls into question the feasibility of establishing these courts in Ukraine.⁴¹

Also, one of the “cardinal” changes in the reform of the judiciary was the change of the name of local general courts, and, in particular, instead of the district, interdistrict, or district in cities, city and city courts, local district courts were introduced, which will have the same jurisdiction as the previous courts. In fact, there is only a “change of nameplate”). In addition, one of the significant changes is the increase in the age limit for holding the position of the judge from 25 to 30 years, which could ensure that judges with more life experience, which in turn will provide better court decisions. At the same time, in fact, before the introduction of judicial reform, there were very few cases of judges under the age of 30. In addition, practice shows that individuals under the age of 30 can be much better qualified than 30-year-old or even 40-year-old judges.

Along with the above disadvantages, there are several positive factors. Thus, in particular, according to the new judicial reform, the Verkhovna Rada is deprived of the right to appoint and dismiss judges. As of September 30, 2016, the President of Ukraine has the right to appoint judges, provided that the relevant proposal is submitted by the High Council of Justice. The right to dismissal also belongs only to the High Council of Justice. In addition, following Art. 49 of the Law of Ukraine “On the Judiciary and the Status of Judges” provides for the possibility of detaining a judge in case of a criminal or administrative offence,⁴² which contributes to bringing a judge to justice for his offence.⁴³

⁴¹ V. Kravchuk, *Lustration as a mechanism of purification of power: theoretical and deontological aspects*, “Current Issues of Jurisprudence”, Issue 3, Vol. 27, 2022, pp. 25-30.

⁴² Verkhovna Rada of Ukraine, *supra* note 28.

⁴³ S.V. Bondarenko, I.A. Zaychenko, T.L. Nagornyak, Yu.V. Pachos, M.A. Polovoy, *Lustration in Ukraine as a means of legitimizing the new political regime*, “Political Life”, Issue 2, 2018, pp. 14-18.

Another positive aspect of judicial reform is the exclusion from the list of grounds for dismissal of a judge of the wording “in connection with the violation of the oath.” This wording previously allowed both the President of Ukraine and the Verkhovna Rada to dismiss a judge from office only on formal grounds, including in violation of procedure. Although this judicial reform had several positive aspects, it did not lead to radical changes in the current judicial system.⁴⁴

The main difference between the old and the new judicial system is the elimination of the redundancy of the old higher specialized courts (administrative, commercial, civil, and criminal) between the courts of appeal and the Supreme Court, to which almost all cassation powers have been transferred. The main idea of the new Supreme Court is high-quality personnel renewal on a competitive basis and full exercise of cassation powers. The new Supreme Court has four courts of cassation (administrative, commercial, criminal, and civil) and a Grand Chamber, which will largely deal with the uniform application of the law of causation, but also acts as a court of appeal when the Supreme Court heard the case as a court of the first instance.

In its decision of 18 February 2020 in the case №2-r / 2020 (2016), the CCU considered that there were no differences between the legal status of a judge of the Supreme Court of Ukraine and a judge of the Supreme Court. As for the powers of judges of the newly formed Supreme Court, the CCU noted in its decision that removing the word “Ukraine” (the state’s name) from the verbal construction “Supreme Court of Ukraine” did not affect the constitutional status of this body of state power. Thus, according to the Constitution of Ukraine, the Supreme Court of Ukraine, having undergone only semantic changes in the name, but without changing its constitutional and legal status, remains the highest judicial body.⁴⁵

⁴⁴ A. Mitko, *Lustration in Ukraine: conflicts, achievements and prospects*, “Scientific Bulletin of the Lesia Ukrainka East European National University. International Relations”, Issue 6, 2017, pp. 187-192.

⁴⁵ Law and Business, *One hundred percent compromise and palliative care of the Constitutional Court will provoke violations of citizens’ rights*, 2020, available at: <https://zib.com.ua/ua/142703.html> [last accessed 10.1.2022].

III. THE INDIVIDUAL RESPONSIBILITY AND THE PRESUMPTION OF INNOCENCE AS REMEDIES

It is also necessary to highlight that the constitutional principles of individual responsibility and the presumption of innocence are other important aspects of the realization of the right to an effective remedy from the viewpoint of the domestic legal doctrine and practice. They are enshrined in Part 2 of Article 61 (legal responsibility of a person is individual) and in Part 1 of Article 62 of the Constitution of Ukraine (a person is presumed innocent of the crime and cannot be punished until proved guilty by due process of law and established guilty by the court's verdict).⁴⁶

The statement of the discrepancy between the Law and the provisions of Part 2 of Article 61 and Part 1 of Article 62 of the Constitution of Ukraine made up claimant's administrative cases *лягли* – legal subjects of a constitutional complaint (particularly, Plenum of Supreme Court, people's deputies), the applicants in the case *Polyakh and others v. Ukraine*.⁴⁷ At the same time, Article 2 of the Law also provides for the principles of individual responsibility and the presumption of innocence.⁴⁸ However, their scope for the government cleansing purposes, such as a denial of access to the public administration of persons who carried out measures (or/and encourage them) aimed at the usurpation of power, undermining the foundations of national security and defense of Ukraine or violating human rights and freedoms by their decisions, actions or inactions, is not revealed.⁴⁹

For all that, in the Law, the principle of individual responsibility does not contain a direct indication of its form although some provisions of the Law point quite directly to the features characteristic of a retrospective (negative) legal responsibility.⁵⁰ It has led to the ambiguous understanding of the nature of responsibility that is established by Law (legal,

⁴⁶ Verkhovna Rada of Ukraine, *supra* note 28.

⁴⁷ *Polyakh and others v. Ukraine*, *supra* note 14.

⁴⁸ Verkhovna Rada of Ukraine, *supra* note 1.

⁴⁹ P.P. Shlyakhtun, G.M. Malkina, *Lustration in Ukrainian in the context of European experience*, "Gileya: Scientific Bulletin", Issue 144, 2019, pp. 142-146.

⁵⁰ Verkhovna Rada of Ukraine, *supra* note 1.

political, etc.), and accordingly, the issue of the applicability of Article 61 of the Constitution of Ukraine to the lustration disputes.⁵¹ As the analysis of the lustration case materials and legal decisions in this category of disputes demonstrated, the arguments for understanding the lustration as a type (form or manifestation) of legal responsibility prevailed. Particularly, it was underlined in the constitutional requests to the Constitutional Court of Ukraine by the Plenum of the Supreme Court.⁵²

To underpin this statement, the Plenum of the Supreme Court asserted that legal responsibility is a law-stipulated negative impact on the offender by the public authorities entrusted with a duty of official enforcement. Following the Law, the government cleansing is the prohibition of certain natural persons' occupying some positions in government and local authorities, which is established by this Law or the court judgments.⁵³ It is worth noting that this prohibition is to be applied to the persons who carried out measures (or/and encouraged them) aimed at the power usurpation, undermining the foundations of national security and defense of Ukraine, or violating human rights and freedoms. Consequently, the lustration is applied to the public employee who committed a certain offence under Articles 1, 2, and 3 of the Law.⁵⁴ As a result of this prohibition, the termination of a person's civil service by dismissal from office occurred.⁵⁵

Therefore, the Plenum of the Supreme Court interpreted the individual responsibility principle, provided for in the Law, through the prism

⁵¹ Verkhovna Rada of Ukraine, *supra* note 28.

⁵² Plenum of Supreme Court, *Resolution No. 3 "On the recourse to the Constitutional Court of Ukraine with constitutional submission regarding the compliance (constitutionality) of Part 3 Clause 1, Articles 7, 8, 9 of Part 1, Article 4 of Part 2 Clause 3, Article 2 of the section 'Final and transitional provisions' of the Law of Ukraine of 16/09/2014 No. 1682-VII 'On Purification of Power' with Part 3 Clause 22, Clauses 38, 58, Part 2 Clause 61, Part 1 Clause 62, Part 1 Clause 64 of the Constitution of Ukraine"*, 2015, available at: <https://ccu.gov.ua/sites/default/files/44.pdf> [last accessed 10.1.2022]; Plenum of Supreme Court, *Resolution No. 25 "On the recourse to the Constitutional Court of Ukraine with constitutional submission regarding the compliance (constitutionality) of Part 3 Clause 4 of the Law of Ukraine 'On Purification of Power' with Clause 38, Part 2 Clause 61, Part 1 Clause 62 of the Constitution of Ukraine"*, 2015, available at: <https://ccu.gov.ua/sites/default/files/43.pdf> [last accessed 10.1.2022].

⁵³ Verkhovna Rada of Ukraine, *supra* note 1.

⁵⁴ *Ibid.*

⁵⁵ Plenum of Supreme Court, *supra* note 52.

of Article 61 of the Constitution of Ukraine.⁵⁶ Accordingly, it regarded the constitutional principle of individual responsibility as applicable to the lustration disputes. This decisive approach was made allowance for by the administrative courts in the lustration disputes. However, in 2018, in case No. 800/186/17, the Supreme Court formed the opposite conclusion to that of the Plenum of the Supreme Court, that is, that the lustration as legislative restraint differs from legal responsibility and cannot be equated with it owing to its legal nature. From this perspective, the Supreme Court stated that the guarantees, which are enshrined in Articles 61 and 62 of the Constitution of Ukraine, do not extend over the legal relations unrelated to the legal responsibility.⁵⁷

The obligatory nature of this Supreme Court's decision has led to changes in the court decisions of other instances regarding their motivation. Thus, reviewing the cases of this category on cassation, the Supreme Court excluded the conclusions on the violation of Article 61 of the Constitution of Ukraine from the motivation for the lower courts' decisions (see Resolution in case No. 826/17794/14 by the Supreme Court).⁵⁸ At the same time, it means dismissing the elements of the claim that were founded on Part 2 of Article 61 of the Constitution of Ukraine as one of the main legal grounds for their administrative claim. This example of the Supreme Court's conclusion casts doubts on the support of the Plenum of the Supreme Court's position by the Supreme Court, which was stated in its constitutional application in 2015. However, the Supreme Court can answer this question during the constitutional proceedings in a case regarding the compliance of the Law provisions with the Constitution of Ukraine.⁵⁹

Apart from that, it is necessary to mention that this Supreme Court's decision was taken into consideration by the ECtHR in the case *Polyakh*

⁵⁶ Verkhovna Rada of Ukraine, *supra* note 28.

⁵⁷ Supreme Court, *Resolution in case No. 800/186/17*, 2018, available at: https://protocol.ua/ua/postanova_vp_vs_vid_17_05_2018_roku_u_spravi_800_186_17_1/ [last accessed 10.1.2022]; Grand Chamber of the Supreme Court, *Resolution in case No. 800/186/17 of 31.01.2019*, available at <https://reyestr.court.gov.ua/Review/79776400> [last accessed 10.1.2022].

⁵⁸ Supreme Court, *Resolution in case No. 826/17794/14*, 2020, available at: <https://reyestr.court.gov.ua/Review/92385046> [last accessed 10.1.2022].

⁵⁹ Verkhovna Rada of Ukraine, *supra* note 1.

and Others v. Ukraine.⁶⁰ In §158 of Resolution, it referred directly to the Supreme Court's assessment, namely, the aim of lustration measures is not to punish the officials, but to restore public confidence in the governmental institutions. Considering this, the ECtHR recognized that only the "civil" part (§1) of Article 6 of the Convention applies to the Ukrainian lustration, while the "criminal" part (§2) of this Article is not applicable because the applicants' behaviour was not classified as "criminal", according to Ukrainian legislation, and so was not analogical to any form of criminal behavior, and its character and severity as provided for by the Law were not considered "criminal" for the Convention (§§151, 156, 159).⁶¹

Moreover, it led to changes in the national courts' decisions in administrative cases in the category of lustration disputes, that is, the exclusion of the conclusions on the violation of Article 62 of the Constitution of Ukraine from the motivation for the lower courts' decisions.⁶² Similarly, it means dismissing the elements of the claim that were founded on Part 1 of Article 62 of the Constitution of Ukraine as one of the main legal grounds for their administrative claim. Consequently, a doubt arises over whether the newly formed Supreme Court supports the Plenum of the Supreme Court's position that was described in the constitutional applications regarding the applicability of Article 62 of the Constitution of Ukraine to the lustration disputes.⁶³

Thus, referring to article 62 of the Constitution of Ukraine, the Plenum of the Supreme Court indicated that adherence to the presumption of innocence during the lustration is a fundamental principle of ensuring the democratic government cleansing. As the plenum of the Supreme Court underlined, in a democratic country, the presumption of innocence is based on the idea of the ways to enforce government power in a democratic society (by contrast with a totalitarian one). Moreover, the presumption of innocence is a constituent element of the right to a fair trial, because of which a person is protected against being found guilty by mistake, while the charges cannot be grounded on evidence

⁶⁰ *Polyakh and others v. Ukraine*, *supra* note 14.

⁶¹ Council of Europe, *supra* note 4.

⁶² Supreme Court, *supra* note 57.

⁶³ J. Turchin, *Lustration as a means of democratization of the political system of Ukraine*, "Humanitarian Vision", Issue 1, 2015, pp. 33–38.

obtained illegally and or on assumptions. According to the Plenum of the Supreme Court, the presumption of innocence application involves countering a prosecutorial bias during the lustration and recognizing the prohibition of a wide circle of persons' holding official posts only if they occupied some middle-ranked administrative positions in a period exactly set by law (§16, §22).⁶⁴

Therefore, currently, the national case law in lustration disputes is underpinned by the Supreme Court's and ECtHR's conclusions that the measures applied by the lustration legislation are not measures of legal liability in Ukraine, and thus, only the "civil" part of Article 6 of the Convention (§1) applies to it.⁶⁵ Accordingly, the constitutional principles of the individual responsibility (Article 61 of the Constitution of Ukraine) and the presumption of innocence (Article 61 of the Constitution of Ukraine) are not recognized as applicable in these disputes by the ordinary courts.⁶⁶

However, these and other legal issues connected with lustration in Ukraine remain complex, according to the Constitution of Ukraine, since the national ordinary courts must decide cases, grounding them on the Constitution. In consequence, the question arises as to whether it is not precipitate to consider such case law to be well-established when the Constitutional Court's final decision on the constitutionality of the Law provisions is absent.⁶⁷ In such a case, the Constitutional Court's legal position can influence the court's motivation in this category of disputes. So, if the Constitutional Court of Ukraine does not recognize the Law provisions as not following the norms of Articles 61 and 62 of the Constitution of Ukraine, it will mean that these constitutional norms apply to lustration cases.⁶⁸

⁶⁴ Plenum of Supreme Court, *supra* note 52.

⁶⁵ Council of Europe, *supra* note 4.

⁶⁶ Verkhovna Rada of Ukraine, *supra* note 28.

⁶⁷ Verkhovna Rada of Ukraine, *supra* note 1.

⁶⁸ Verkhovna Rada of Ukraine, *supra* note 28.

CONCLUSIONS

In the Ukrainian context of lustration, the right to an effective remedy appeared to be susceptible to coercive measures of government cleansing. A set of principles (the rule of law, the individual's responsibility, the presumption of innocence, the guarantee of the right to defense), enshrined in the Law of Ukraine "On Government Cleansing", did not become an efficient legal mechanism, but a cliché. Instead, the effective realization of this right is possible only under conditions of ensuring proper legal proceedings.

The Law on Lustration has proved to be legally incomplete, as the provisions of the Law contradict the stated goals and principles of lustration, and do not regulate the procedure and mechanisms that would determine the individual approach when enforcing prohibitions on lustration provided by law. In addition, the Law does not meet international lustration standards and the provisions of the Constitution of Ukraine, and has a legal conflict with the Criminal Code of Ukraine and other laws of Ukraine. This has forced people whose rights and freedoms have been violated by law to turn en masse to national courts.

The Ukrainian lustration experience has revealed the problem of the excessive length of proceedings, which contradicts the requirements of consideration of the case within a reasonable time, and requires a legislative solution. Under Article 6 (§ 1) of the ECtHR Convention and Decision in the *Fields and Others v. Ukraine* case, the length of constitutional proceedings concerning the constitutionality of a legal act to be applied in a case by an ordinary court is taken into account when assessing the merits of the trial.

However, excessive length of constitutional proceedings is not acceptable under Articles 6 and 13 of the Convention, even if the delay is due to the complexity of the case or other reasons. This fact indicates the need for the legal settlement of the issue of compliance with reasonable deadlines for constitutional proceedings and legal mechanisms to avoid, exclude, or minimize such excessive delays.

The article raises the issue of applying the principles of individual responsibility and the presumption of innocence to the Ukrainian context of lustration, which are provided for in Part 2 of Art. 61 (legal re-

sponsibility of the person is individual) and part 1 of Art. 21 (a person is presumed innocent of committing a crime and cannot be punished until his guilt is proved in court and established by a court verdict) of the Constitution of Ukraine. At the same time, this issue remains open to domestic legal theory and practice, as it is complex, according to the Constitution of Ukraine, and requires an official legal position of the Constitutional Court of Ukraine.

Despite some decisions of national courts on the reinstatement of persons subject to automated lustration and decisions of the European Court of Human Rights in the case of *Polyakh and Others v. Ukraine*, the problem of lustration has not been resolved at state level. The Verkhovna Rada of Ukraine, recommended by the Venice Commission, has not revised the Law; and the question of its constitutionality is still unresolved.