Lustration and constitutional order in Ukraine

Abstract
The article discusses the process of government cleansing (lustration) in Ukraine and its compliance with the Ukrainian constitutional order regarding lustration as a political phenomenon that, nevertheless, generates both political and legal consequences for those public officials, who are responsible for cooperation with previous repressive regime. The main attention is paid to constitutional petitions to the Constitutional Court of Ukraine against the Law of Ukraine «On Government cleansing» (Lustration Law). Three main arguments concerning unconstitutionality are automatic lustration, violation of equal access to public service and permanent character of lustration. However, the detailed analysis of constitutional petitions gives grounds to assume the weakness of such arguments.

Keywords: lustration, constitutional petition, constitutional order, Ukraine

Introduction

After the proclamation of the independence of Ukraine in 1991, the idea of government cleansing in transition from a communist totalitarian regime towards democracy, unlike other post-communist countries of Central and Eastern Europe, didn’t find support in Ukrainian society. However, after the Orange Revolution of 2004, a number of supporters of government cleansing had grown, but their voices and influence still did not go far enough to implement lustration measures. The public request for government cleansing was ultimately formed because of the tragic events of the Revolution of Dignity, when the massacres of protesters took place in January-February 2014. At the same time, the public request for lustration of high-ranking public officials concerned not so much as former representatives of the communist regime, but rather the representatives of the authoritarian regime of the former President of Ukraine Viktor Yanukovych. The desire to punish those who contributed to usurpation of power, establishment of authoritarianism in Ukraine, criminal prosecution for political motives, human rights violations and massacres in the centre of Kyiv was so strong that the wave of «garbage» lustration swept through

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The need for government cleansing arises after the collapse of totalitarian or authoritarian regimes when the state declares its desire to move towards democracy. That is why lustration is considered as an integral element of democratization,
a precondition for the establishment of principles of a law-based state. Taking into account that lustration occurs in the transition period, it is, on the one hand, an instrument to get rid of the horrible heritage of the past, and on the other hand, a mechanism for protecting the delicate sprouts of young democracy. However, lustration is an alternative way of punishing those who are responsible for aggression and repressions. The intention of lustration is to demonstrate to the population that there is a real change in the personnel of post-Communist governments, as well as safeguard against those individuals undermining the democratic reform process. In this case, the systemic human rights abuses of state bureaucracies and the widespread complicity of others are exposed to daylight. Thus, lustration has a dual nature: punitive – purification through the assignment of collective responsibility for the previous regime’s sins and any subsequent collective punishment, and preventive – not to allow persons who disgraced themselves by cooperating with repressive regime to be officials and policy decision makers.

It is worth noting that newly restored democracy is always fragile and vulnerable, therefore it needs its own protection. In a transitional period, the features of the law-based state (legal security, the prohibition of retroactivity of law, etc.), no matter how paradoxical it sounds, become an obstacle to the rapid democratic transformation of society and state institutions. It may be explained by the fact, that after the communist regimes had fallen down, the countries of Central and Eastern Europe declared an establishment of democratic governance based on the rule of law, equality and observance of fundamental human rights. However, it occurred impossible to achieve the defined goals and not to derogate from the above principles. This deviation is reflected in lustration mechanisms: vetting of public officials and those seeking for being a civil servant; prohibition to hold positions in public authorities if the connection with the previous regime is confirmed.

Based on the necessity to protect democratic values, the government cleansing in a transitional period is an urgent need, the failure of which can put young democracy in jeopardy to turn into a farce or even not to be established at all. For this reason lustration is actually an integral part of the concept of «democracy defending itself»

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(in German – *wehrhafte Demokratie*, in French – *démocratie apte à se défendre*) that relies on the principle of political loyalty of public servants to the ideas of democracy formulated at first by the Federal Constitutional Court of Germany. In this case, it is worth pointing out the decision of the Constitutional Court of the Czech Republic adopted on December 5, 2001 on the constitutionality of Czech lustration laws: “The Constitutional Court of the CR, in agreement with its Czechoslovak predecessor, considers the closer connection of persons with the totalitarian regime and its repressive components to still be a relevant circumstance which can cast doubt on political loyalty and damage the trustworthiness of the public services of a democratic state and also threaten such a state and its establishment”.

Furthermore, under the authoritarian regime, the requirement to act in a legal way becomes a legal fiction. This predictably imposes a cachet on the legal consciousness and activities of a particular civil servant. In fact, he/she doesn’t have any responsibility for his/her unlawful actions. In this case, such civil servant doesn’t realize or has no intention to realize what his/her unlawfulness (non-compliance with spirit of law) is. In the transitional period, the lustration itself is the answer to this injustice. Paragraph 11 of the PACE Resolution No. 1096 (1996) “Measures to dismantle the heritage of former communist totalitarian systems” states the following: “The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now”.

As a conclusion, lustration as a mechanism restricts a defined category of persons (those who doubt about their political loyalty to democratic values) in participating in governance, in the narrower sense, in access to public service. Considering it, the process of government cleansing is entirely conformed to the logic of transitional period. It is an integral element of transitional justice as well.

**II. Lustration Law and Constitution of Ukraine**

The controversial nature of lustration is capable not only to influence its perception as a special mechanism in a special period for the society (transition from...
authoritarianism to democracy), the implementation of which may be completely justified in terms of politics. Lustration provides a specific political responsibility that, nevertheless, generates both political and legal consequences for those to whom it is applied. Thus, lustration has a political and legal nature, and it would one-sided to consider it only as a form of legal liability, and its means – as a form of punishment for violation of the law. Its comprehensive nature has a direct impact on the connection of this phenomenon with constitutional principles of the rule of law and equality. Moreover, it’s not a content of lustration that bears risks for the constitutional order but measures of its implementation, in particular their compliance with constitutional standards. It should be noted that any lustration process always falls out the old legal framework. Therefore, the task of the national legislator is to choose a way of implementing mechanisms for government cleansing that meets the constitutional order and brings on the least possible doubt on its constitutionality.

Every country that applied measures on government cleansing had chosen its own path on. Despite similar approaches (opening archives, vetting, ban on holding positions in the public service), the experience of each country is different. Ukraine is no exception; lustration law contains many controversial provisions. Given this, the question arises whether the application of lustration mechanisms is a risk for the constitutional order in Ukraine. It is possible to answer by analyzing texts of constitutional petitions upon the Law of Ukraine “On Government cleansing”. As of March 29, 2018, the Constitutional Court of Ukraine (hereinafter – CCU) considers four constitutional petitions: one from the People’s Deputies of Ukraine and three from the Supreme Court of Ukraine. However, in three years the Court hasn’t ruled on them yet.

Some arguments deserve thorough consideration in terms of the alleged agreement with them by CCU. Therefore, the main points raising doubts about compliance of Lustration Law with Constitution of Ukraine should be analyzed more closely:

– Lustration because of public position (automatic lustration);
– Collective liability instead of individual one;
– Violation of the principle of equal access to public service and the right to work;
– Permanent character of lustration.

For the purpose of Lustration Law, the prohibition to hold positions for a certain period (five or ten years) can be applied to the following categories of persons:

1) high-ranking officials at the time of Victor Yanukovych (e.g. Prime Minister, Ministers, General Prosecutor of Ukraine etc.) who had been holding positions for at least a year cumulatively between February 25, 2010 and February 22, 2014;

2) civil servants who, by their actions or decisions, undermined the national security and defense, called publicly for the breach of Ukraine’s territorial integrity and sovereignty; stirred up interethnic hostility;

3) judges, prosecutors, law enforcement officers who, by their decisions, actions or inactivity proven by the court judgment, which came into force, have taken measures aimed at interfering with implementation of the constitutional right of citizens of Ukraine to assemble peacefully and hold meetings, rallies, campaigns and demonstrations or leaded to damage to life, health, property of individuals from November 21, 2013 to February 22, 2014.

In addition, the law specifies two more categories of persons under lustration ban:

– Former leadership of the Communist Party of the Soviet Union and Union Republics as well as of the Central Committee of the Komsomol; KGB staff and their informers;

– Officials who provided a false information about property (property rights) and violated the Law of Ukraine “On the Principles of Prevention and Counteraction of Corruption” (property lustration).

However, this concept of lustration is much wider than its purpose determined by Article 1 of the Lustration Law. The point is that the Ukrainian legislator combined the idea of government cleansing from representatives of the regime of Viktor Yanukovych with the lustration of former Communists, as well as with the fight against corruption. If the first one doesn’t provide any questions of its necessity right after the fall of authoritarianism, the effectiveness of lustration of the Communist Party leaders 25 years after the communist regime had ceased to exist seems to be inexpedient. Regarding the fight against corruption, when the lustration law was adopted, a new special anti-corruption legislation, which created mechanisms for preventing and combating corruption, had been developed. Therefore, it is unclear why civil servants suspected of committing acts of corruption are considered as those to whom lustration is applied.

1. Lustration on the ground of position and collective liability instead of individual one

As it has already been mentioned, in contrast to other Central and Eastern European countries that carried out measures of government cleansing after being released from the occupational communist regime, lustration in Ukraine is mainly aimed at removing from power the representatives of the former authoritarian regime of Viktor Yanukovych. Article 1.2 of the Lustration Law states: “Cleansing of the government (lustration) shall be performed to keep away from public governance those persons who made decisions, took actions or inaction (and/or contributed to their taking) facilitating power usurpation by the President of Ukraine Viktor Yanukovych and
seeking to undermine the foundations of the national security and defense or violate human rights and freedoms […]12”.

According to the authors of constitutional petitions, the only reason for applying lustration measures is a fact of tenure as a civil servant for some time. This approach of so-called automatic lustration does not ensure the fact of individual guilt of every lustrated person in the actions of authoritarian regime. This argument has the right to exist, if paragraph 12 of PACE Resolution 1096 (1996) is taken into account: “[…] guilt, being individual, rather than collective, must be proven in each individual case – this emphasizes the need for an individual, and not collective, application of lustration laws […]13”.

In addition, such arguments in other countries led to the recognition of lustration laws as unconstitutional. For instance, the Constitutional Court of Romania in its decision of 7 June 2010 pointed out that responsibility and sanctions were based on the fact of holding a position in the structures of the previous communist totalitarian regime. In turn, the Romanian lustration law itself didn’t provide an individualization of measures, but established the presumption of guilt and collective punishment14.

At the same time, it is possible to look differently at automatic lustration and its connection with the presumption of innocence and the necessity to determine individual guilt. The undoubted purpose of lustration is to purge government from those public officials who, at the time of authoritarian regime, operated or made decisions that did not meet the spirit of law, although they were formally legitimate at that time. Thus, civil servants of the highest rank did not just perform their functions appropriate to public service, but given the causality, their actions contributed to the strengthening and consolidation of the undemocratic regime. Based on this, lustration is essentially a collective punishment for collective illegal acts, so officials (at least of the highest rank) are a priori found guilty in indulging the authoritarian regime. In this context, the nature of lustration is close not to criminal prosecution, but rather to the administrative liability of a civil servant. By analogy with the doctrine of administrative justice civil servant is considered to be guilty in making certain decisions and he/she is required to prove to the court the lawfulness of his/her actions. Therefore, the requirement to ensure the presumption of innocence of every public official, who is subject of lustration measures contradicts to the very essence of lustration as a process and mechanism of government cleansing.

Nevertheless, taking into account the provisions of the Ukrainian lustration law, it should be noted that automatic lustration applies only to a certain category of officials, namely to the highest-ranking civil servants – the President, Prime Minister, ministers, etc. However, with regard to judges, prosecutors, police officers, officials of local authorities, the Law on government cleansing introduces an additional condition for the application of lustrous prohibition – their decisions, actions or inactivity, aimed at interfering with implementation of the constitutional right of citizens of Ukraine to assemble peacefully and hold meetings, rallies, campaigns and demonstrations and led to damage to life, health, property of individuals from November 21, 2013 to February 22, 2014 must be proven by the court judgment, which came into force (Article 3.5-7 of the Law). Given this, the dismissal because of lustration and the prohibition to hold public positions cannot be applied unless there is a specified court decision. Thus, the principle of individual guilt while lustrating is partially implemented, at least to certain categories of civil servants. The Supreme Court of Ukraine has applied the same argument in its very first petition on the unconstitutionality of the Lustration Law (November 2014).

The aforementioned PACE Resolution 1096 (1996), Opinions of the Venice Commission regarding lustration laws of the Central and Eastern European countries and judgments of the European Court of Human Rights in lustration cases give grounds to criticize the approach of automatic lustration of high-ranking officials chosen by the Ukrainian legislator. The arguments of these powerful institutions that lustration can be used as a crackdown on political opponents also deserves attention. However, according to paragraph 50 of the Final Opinion No. 788/2014 on «The Law On Government Cleansing (Lustration Law) Of Ukraine» (CDL-AD(2015)012) Venice Commission stressed out: “The disqualification based solely on the position is not a priori contrary to international standards, provided that it is reserved for the high positions within organizations responsible for serious human rights violations and for serious cases of mismanagement. The Venice Commission is not completely persuaded that all the positions listed in Article 3(1)-(2) meet this condition. It notes however that the Ukrainian authorities are better placed to assess which public institutions played a prominent role, engaging in non-democratic processes, in the two relevant periods.

While implementing lustration mechanisms, the Ukrainian authorities, on the one hand, have tried to make it in compliance with international standards specified in PACE documents, Venice Commission’s opinions, etc. On the other hand, it is

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impossible to apply such mechanisms in terms of strict adherence to those recommendations. It seems that even if the process on government cleansing is allowed to countries that have survived the cruelty and repression of totalitarian regimes, the high requirements for implementing lustration make it impossible to carry out.

2. Violation of equality to access to public service and the right to work

The parliamentarians and the Supreme Court of Ukraine made another argument in favour of the Lustration Law’s unconstitutionality. In their opinion, the Law might violate the constitutional principle of equality (Article 24 of the Constitution of Ukraine), the constitutional right to access to public service and the right to work. The prohibition to hold public positions for a specified period was the basis for this conclusion. Furthermore, due to the Article 4 of the Law persons being in high state positions must submit a personal written statements whether they are subject (not subject) to the lustration bans, as well as a consent to vetting. Failure to submit this statement, as well as the notification that a lustration ban is applied, entails the dismissal of public official. According to Article 6 of the Law candidates for a civil servant position must submit the same statement.

In its latest petition to the CCU (December 2015) the Supreme Court of Ukraine interprets such requirements regarding the right to access to public service as part of the right to work, the right to freely choose a profession and activities. In support of its position, the Supreme Court of Ukraine notes that public service is a type of work and the state should provide equal opportunities to implement it. However, such an argument is manipulative. Firstly, by the reason that public service and other types of work in this case are equated. It is incorrect, because public service belongs to public sphere, and other types of work activity stay in a private, where the state may interfere only in individual cases. Secondly, even if equal opportunities for the labour rights implementation and to access to public service must be really provided by the state, concerning public service as its exclusive jurisdiction, it has a wide discretion to establish additional requirements, restrictions or grounds for dismissal. Public service is related to the participation of Ukrainians in governance, if they do, they have a duty to be devoted to their state. This follows both from the nature of the last one and from the concept of “democracy defending itself” that is based on the principle of political loyalty: “[...] Democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded [...]”.

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18 The constitutional petition of the Supreme Court of Ukraine (December 2015), <http://www.ccu.gov.ua/sites/default/files/43.pdf>, [access: 30 March 2018].
Otherwise, the state has the right to refuse such a person to access to public service, and lustration ban is just one of the grounds. In addition, the aforementioned right is not fundamental, it is granted by state and may be limited after all.

In case of Ukraine, lustration doesn’t interfere in any way with the person’s right to professional activity, primarily because public service is not a profession in its classical sense. In addition, professional activities can be carried out both in the public sphere and in private one. The Constitution of Ukraine regulates separately the right to take part in public governance (Article 38) and the right to work (Article 43). Thus, a lustrated person has other possibilities to exercise his/her right to choose freely his/her professional activities. In return, the Ukrainian lustration law contains no provision that would hinder a person’s professional development in private sector.

3. Permanent character of lustration

In their constitutional petition (January 2015)20 People’s Deputies of Ukrainian Parliament stressed out the permanent process of purifying power, given that the law does not set terms of completion. It is difficult to disagree with them, since the Law on government cleansing doesn’t establish any timeframe that would prove the temporal nature of lustration in Ukraine. According to the legal opinion of the European Court of Human Rights in the case Ādamsons v. Latvia, lustration measures have a temporary nature, therefore, the objective necessity of restricting individual rights over time disappears21. However, the authors of the petition did not take into account of Article 1.5 Law on the government cleansing. Due to this provision, a ban of being civil official may be imposed on a person only once. This rule determines indirectly the lustration period, since the grounds for the application of lustration measures can only be detected during a lustration vetting, which civil servants also pass only once – either during the public service or in the stage of admission. Thus, if a person has been subject to the prohibition, it proceeds only for a statutory period – five or ten years depending on the grounds for its application.

At the same time, it is necessary to draw attention to a contradiction of two legislative provisions, namely, mentioned Article 1.5 and Article 1.6 of the Lustration Law. According to the last one, a ban of being public official for ten years shall not be a ground for refusing to apply the prohibition for five years22. This contradiction of two parts of one article, on the one hand, affects the temporal nature of lustration, on the other hand, is not conformed to the principle ne bis in idem – no legal action

21 Judgment of European Court of Human Rights of 24 June 2008, Case Ādamsons v. Latvia, § 166, no. 3669/03.
can be instituted twice for the same cause of action. After all, if just follow this rule literally, the situation will be absurd – the prohibition of access to public service for ten years and another five for the same act. According to the paragraph 73 of its Final Opinion on Ukrainian lustration law, the Venice Commission pointed out: “the possibility of being excluded from public offices for different lengths of time for the same facts raises issues of equality which the Lustration Law does not address properly.”

Thus, the Ukrainian legislator should avoid such internal contradictions between the provisions of one law because it creates an ambiguous situation for their application.

Conclusions

Each of the states, which made the transition from authoritarianism towards democracy, has chosen its own path on government cleansing. Approaches to the purpose of lustration, its mechanisms and methods of implementation depended on internal historical, political and legal context of each country. Somewhere, lustration was perceived as the personalization of the idea of justice and punishment for past cruelty and repression, somewhere it was considered as a way of restoring public trust in government institutions. In any case, lustration is a peculiar type of responsibility for unlawful actions or decisions, i.e. those that do not meet the spirit of law. It is even possible to assume that government cleansing is a specific implementation of the rule of law as the supremacy of justice.

It should be noted, that the experience of other countries in lustrating is ambiguous and diverse. For this reason, it makes no sense to unify it or duplicate it thoughtlessly. The Ukrainian reality of the introduction of lustration is also unique for many reasons. First, while developing and adopting the Law on government cleansing, the experience of other countries, in particular their mistakes, has been studied. For example, the Ukrainian law on lustration doesn`t deprive lustrated persons from engaging in professional activities in private sphere, but restricts exclusively their access to public service. In some countries, lustration procedures are similar to criminal prosecution. In Ukraine, government cleansing is essentially administrative procedure, and therefore the presumption of guilt of an official is used as one of the principles of administrative justice. On the other hand, the Ukrainian legislator made his/her own mistakes mentioned in this article: a controversial approach to automatic lustration, the absence of a timeframe for its implementation,

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violation of the principle *ne bis in idem*. This can have serious consequences for the constitutionality of both certain legal provisions and the law in general.

So, does the Ukrainian approach to the government cleansing threaten to the constitutional order in Ukraine? Three years after the adoption of this law, the answer is obvious – no. Despite the ambiguity of some legislative provisions on lustration, the constitutional order remains stable. Proof is the fact that lustration in Ukraine as process of government cleansing doesn’t jeopardize the values being basis of constitutional order – human life, human dignity, freedom, equality.

**Bibliography**

**Sources of law**
Judgment of European Court of Human Rights of 24 June 2008, Case Ādamsons v. Latvia, no. 3669/03.

**Books, periodicals and other materials**
*Case law of bodies of constitutional jurisdiction and the European Court of Human Rights on lustration*, “Bulletin of the Constitutional Court of Ukraine”, 2015, No 2, pp. 73-82.
I. ARTICLES


The constitutional petition of the Supreme Court of Ukraine (December 2015), <http://www.ccu.gov.ua/sites/default/files/43.pdf>, [access: 30 March 2018].