

## CONSTITUTIONAL COURT PROCEDURE AND CONSTITUTIONAL CONTROL IN THE FIELD OF LUSTRATION

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### Summary

The article considers the constitutional court procedure and constitutional control in the field of lustration. These issues are considered through the prism of the rule of law, its understanding by the Constitutional Court of Ukraine in its practice. It is emphasized that the application of the principle of publicity and the requirements of increased publicity is due to the importance of cases heard by constitutional courts, as well as the results of judicial activity. Along with this, the issue of long-term consideration by the Constitutional Court of Ukraine of the law determining lustration is analyzed in detail. The study is updated by the fact that the European Court of Human Rights on the complaints of citizens of Ukraine found a violation of the right of the lustrated to a fair trial due to excessive time of national trials for their release. It is concluded that the Law on Lustration should serve its most important function in establishing the rule of law in the country.

In legal science there is a situation when the views of scholars on the essence of judicial procedure are contradictory, which gives rise to different understandings of this legal phenomenon by representatives of different scientific schools. For a long time, the problem of judicial procedure was inextricably linked with the consideration of the category of the process, the essential idea of which significantly influenced the understanding of the limits of the procedure in law.

The constitutional Court as the only organ of the constitutional-judicial control may be seen as a special (organized on a state basis), the carrier of the intellectual potential of theories of constitutional law.

**Keywords:** constitutional court procedure; Rule of Law; constitutional control; lustration; the right to a fair trial; Ukraine; ECtHR.

### Introduction

The strategic priority of the policy of the modern European state is to establish the right to a fair trial as a real guarantee of protection of human

rights and fundamental freedoms and to restore public confidence in the courts, which requires comprehensive judicial reform at the constitutional, legislative and organizational levels. You

should also note that in the constitutional doctrine of Ukraine, the concept of “lustration” was not the object of research were not applied in practice. But in connection with the change of political regimes there is a need to restore confidence in the institutions of state power, which usually takes the form of legislative restrictions of political rights for supporters of the previous government, first and foremost, the right to hold public office, to vote and to be elected to the authorities. On the issue of lustration, it should be borne in mind that the process of purification of power is complex, controversial and lengthy. This should improve laws solely on the rule of law and to study and introduce international best practices.

### 1. Literature Review

The problem of constitutional judicial procedure was investigated in the works (Ichsan *at. al.* 2020, Shcherbanyuk 2020, Yusa *at. al.* 2020, Boiko *et al.* 2019), but the problem of resolving the constitutionality of the issue of lustration still needs to be solved.

The purpose of the study is to analyze the constitutional court procedures from the standpoint of the European standard of the rule of law and analysis of the complex issue of lustration in Ukraine, which is the subject of constitutional proceedings.

The category of “judicial process” was studied in the XIX century in the scientific legal doctrine and the legislation that is directly related to the emergence of the concept of judicial law. In turn formed by scientists in the second half of the XIX century the doctrine of judicial law should be considered not only as a universal General theory of judicial law and procedural law, and as a theoretical and methodological framework for the development of a unified conceptual apparatus of the judiciary and procedural law and how the development of theoretical and applied problems of justice, including to define the characteristics of judicial procedures. Therefore, it is logical that the doctrine of judicial law was regarded not as a theory of justice, but as a General theory of judicial power and procedural law. Discussion on the allocation process and procedural component of substantive law began in the late 60-ies of XX century. At this time has been scientifically proved theoretical and legal approaches to the major of which include: “wide”, “the theory of

legal process”, the essence of which comes down to a combination of virtually all forms of legal activities, including law-making and enforcement; “intermediate” – “General theory of procedural law”, whereby the process is understood as a jurisdictional activity and of other law enforcement agencies to overcome the abnormal, conflict manifestations of public relations; the “narrow” – “the concept (theory) of the judicial law.”

According to the “broad” approach, the procedure in the legal sphere is understood as a regulated, consistent action aimed at achieving a specific goal. This includes not only law enforcement (both jurisdictional and positive), but also lawmaking and control over the application of law. That is, procedural can be legal institutions in the field of substantive law, as well as legal institutions that have not only protected but also regulatory nature. The essence of the “narrow approach” is to combine the legal regulation of the judiciary and all types of proceedings into a single whole - judicial law. At the same time, proponents of the “broad” and “intermediate” approaches believe that the procedures also cover law enforcement activities in non-judicial bodies, law-making, control and other legal activities, which are called legal procedures - types of process. We are convinced that the proposed opinion cannot be considered indisputable, as it calls into question the purity of the process as such. In the theory of law there is a definition of the legal process through activity, which, in our opinion, is substantively and methodologically incorrect. In modern conditions, approaches to procedural law should be grouped by essential characteristics, in particular: procedural law - the rules that serve the jurisdictional activities of the judiciary, is an instruction for the implementation of substantive law. In our opinion, in modern conditions the concept of procedural law should be derived from the standpoint of pluralism, philosophical consistency and understanding of the concept under study.

Judicial procedures in the modern process are an urgent problem not only as the main criterion for differentiation of the process, but also the main tool for its further development, acquisition of a new quality. It is judicial procedures that can act as a universal way of optimal combination of private and public law principles in the methods of judicial protection. This shows their main applied value. It can be formulated differently: the

actualization of the problem of court proceedings is demonstrated by the materialization of procedural law; judicial procedures provide a way to achieve internal harmony in the process.

It should be noted that the procedure is a mandatory mechanism for the effective functioning of the judicial system, a tool for implementing the provisions enshrined in substantive and procedural rules. Procedures can be more than just court proceedings. But their presence in the judicial process (constitutional, civil, criminal, economic, administrative) is obvious.

Judicial procedure can be defined as a tool that is a measure of democratic society. Judicial procedure - a way to substantialize the law; this is its theoretical value. Procedures are a way of concrete implementation of the law - this is due to their applied value in lawmaking and law enforcement. Thus, judicial procedures become a legal reality, acquire important and independent significance both as an element of process differentiation and as an element of the exercise of judicial power.

## **2. Methodology**

The main methodological tool in the constitutional judicial procedure and constitutional control in the field of lustration is a comparative legal approach, due to the problem and the need to understand the nature of the constitutional procedure in the EU; legal pluralism, which involves operating different positions of scientists and practitioners; balancing, as lustration issues are closely linked to the human rights dilemma and values in law. A comparative analysis of the regulation of lustration has shown that the application of specific measures by the state depends on political will, which is not consistent with guaranteeing the rights of everyone. Doctrinal legal analysis is based on a dual method: first of all descriptive and analysis that explains all points of view, and secondly, neutral and critical assessment of some academic debates and legal considerations.

## **3. Case studies/experiments/ demonstrations/ application functionality**

According to Art. 8 of the Constitution of Ukraine, state power in Ukraine is exercised on the basis of its division into legislative, executive, judicial. The implementation of this constitutional principle in legislation and legal practice must

be ensured by the existence of an independent and strong judiciary, which is able to perform its tasks and act as an effective guarantor of human and civil rights and freedoms. This is especially important in the context of Ukraine's European choice, recognition and commitment to guarantee European values, leading among which is the right to a fair trial, proclaimed in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Judicial procedure as a multifaceted concept is a fundamental category of legal science, the study of which requires a systematic structural study as a complex legal phenomenon.

The main purpose of the court as a body of justice is enshrined in the Constitution of Ukraine, imposes an obligation on the state in the face of all its branches, including the judiciary - to affirm and ensure human rights - directly enshrined in Articles 3, 19, 55 (Constitution of Ukraine).

The European Court of Human Rights in its judgment *Ruiz-Mateos v. Spaine* stated on 23 June 1993 that the requirements of a fair trial established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms also apply to the procedural law of the European constitutional courts. This, as well as the fact that these requirements usually apply only to the procedural law of courts of general jurisdiction, to the so-called classical proceedings, allows a new analysis of the proceedings of the constitutional courts of European states.

Procedural relations in constitutional proceedings are pronounced publicly-legal character that can be attributed to constitutional litigation before the so-called inquisitorial and not dispositive, adversarial type of process. The reasons for this are, first, existence as a subject of procedural relations (except the constitutional court) of the public authorities, which can act on the side of the plaintiff and the defendant, and secondly, that constitutional proceedings (with the exception of the consideration of the constitutional complaint) is the guarantee of the Constitution supremacy, not the rights and freedoms of the individual. That is the nature of the constitutional legal proceedings is conditioned by the material law for the protection of which is the constitutional judicial process, namely, public or objective law, and not subjective or private interests of specific individuals. Classic

procedural aspects of the inquisitorial process types are manifested in the distribution of rights and duties between the court, on the one hand, and the parties and other participants that discretionary processes, characterized by the dominant role of the court and not the parties in the administration of the judicial process. Thus, the inquisitorial type of process or method, to which we refer constitutional litigation, characterized by the fact that such classic elements of the judicial process as claims, arguments and causes of action, which is classically determined by the parties and the modification of which is prohibited by the court, is not the exclusive competence of the parties to the process. In this case, the constitutional court has the rights to these elements of the process, and the right to change them. This statement applies not only to the object (in the broad sense) litigation (claims, reasons, evidence, etc.), but also control the trial process. Thus, in contrast to the classical types of dispositive judicial process where parties have the right not only to appeal but also the right to refuse the claim of constitutional justice has the last word belongs to the constitutional court, which is to protect the public interest may deny parties the right to premature suspension of the process by means of rejection of the claim.

Special requirements for the procedure of consideration of cases, which are expressed in the requirement of increased publicity (publicity) of constitutional proceedings are also a feature of constitutional proceedings. This feature is common to all constitutional courts of the European model of constitutional justice, which allows us to assert the existence of a common model of European constitutional justice. The application of the principle of publicity and the requirements of increased publicity is related to the importance of cases heard by constitutional courts, as well as to the results of judicial activity. The result of such activities is the adoption of decisions that have absolute legal force. Based on the above, in European countries there are common features for the constitutional judiciary and based on them models of constitutional justice.

The world practice of constitutionalism since ancient times, in particular in Europe since the early twentieth century, has tried to introduce the institution of constitutional judicial control as the most important function of the judiciary and

formal legal protection of human and civil rights and freedoms. The main purpose of constitutional control is to ensure, both earlier and in the present state, the immutability and stability of the Basic Law, as for the state and society the value of this function is manifested in two aspects.

The first aspect concerns the translation of political conflicts into the plane of law. The second aspect involves the use of the creative potential of judges in identifying the content of constitutional legal relations, which, in our opinion, deal with constitutional principles, in particular, the “rule of law” and the use of the potential of “judicial constitutionalization” in the national legal system.

According to article 8 of the Constitution of Ukraine is recognized and guaranteed by the rule of law that the doctrine is treated as the combination of certain formal and material requirements of legal acts and actions of public authorities. According to the existing *opinio juris* (accepted legal thought), which is expressed in the Report of the Venice Commission from March 24-25, 2010 (Report of the Rule of Law, 2011), the rule of law includes such formal and substantial characteristics: legality, legal certainty, prohibition of arbitrariness, rights and freedoms of the individual, access to justice (justice) before an independent and impartial Tribunal, equality and non-discrimination. Meaningful expression of the rule of law is promotion of human rights and fundamental freedoms, which is the reason of judicial activism, including constitutional courts. According to B. Tamanaha, formal concept focus on the proper sources and form of legality, and the material include, in addition, the quality requirements of the law. As a rule, a substantive theory of the rule are based on the idea of inalienability and inalienability of rights and freedoms, the constitutional consolidation which means their recognition by the state, since they are based on equality of each person. On the other hand, Would. Tamanaha stresses the danger of excessive activation of the courts through review of laws to ensure human rights, because under these conditions may occur interference in the sphere of law (Tamanaha 2007, 107). Balancing the rule (sovereignty) of Parliament and the judicial constitutional control is the Central problem of the modern understanding of the Constitution in the doctrine of continental

Europe. In the jurisprudence of the constitutional Court of Ukraine the rule of law expresses the essence of the judicial constitutional control as it lays down the substantive and formal criteria to verify the constitutionality of legal acts in accordance with paragraph 1 of article 150 of the Constitution of Ukraine. In its Decision in the case of the appointment by the court lighter punishment, the constitutional Court of Ukraine has determined that the rule of law requires the state of its implementation in law-making and enforcement activities, in particular laws, which by their nature must be infused primarily by the ideas of social justice, freedom, equality and the like (Judgment of the Constitutional Court of Ukraine).

According to the substantive criterion, the principle of the rule of law expresses the requirements of quality for legislation, administrative and judicial practice. In particular, by decisions of June 29, 2010 № 17-rp / 2010 and October 11, 2011 № 10-rp / 2011 the Constitutional Court of Ukraine recognized as one of the elements of the rule of law the principle of legal certainty, according to which the restriction of fundamental human and civil rights and implementation these restrictions are permissible in practice only if the application of the legal norms established by such restrictions is predictable. Later, the Constitutional Court of Ukraine in its Decision of 11 October 2011 № 10-rp / 2011 stated that the legislation on administrative liability does not meet the requirements of legal certainty and the prohibition of administrative arbitrariness, as it establishes the possibility of administrative detention for longer than Article 29 of the Constitution of Ukraine (up to 72 hours). According to the Constitutional Court of Ukraine, the legislator left out of its scope the issue of deadlines for drawing up a protocol on an administrative offense and sending it to the body or official authorized to consider the case of such an offense and make a decision, leaving it to the bodies (officials), authorized to respond to administrative offenses, the right to determine such deadlines at their own discretion, which created the basis for possible abuse by the latter.

By the way, indirectly, in these decisions the constitutional Court of Ukraine in new ways gave an interpretation of its jurisdiction regarding the decision on the constitutionality of gaps

and conflicts in legislation, recommending that the Verkhovna Rada of Ukraine to amend the current legislation. The Constitution indirectly we are talking about the principle of legal certainty in article 57, according to which everyone is guaranteed to know their rights and responsibilities regardless of this legal act, the act of individual action. The second third of this article establish the procedures for the entry into force of normative legal acts that are necessarily related to their disclosure. While the Constitution obliges the Parliament to adopt a special law that would determine the procedure for publication of normative legal acts, however, that until today is not accepted, it is a violation of the Basic Law. Consequently, the lack of legal regulation, gaps and conflicts in current legislation violate the requirements of article 8 and article 57 of the Constitution, in this context should be interpreted in correlation, because under these conditions any person can know for certain about the content and scope of their rights and duties, and it violates the principles of legal certainty. In turn, the Parliament in such situations, delaying the implementation of its legislative function rather than violate human rights and fundamental freedoms. According to the Final report 14 of the Conference of European constitutional courts in the gaps, conflict and weaknesses of current legislation is a violation of the principles of the rule of law, in particular human rights and fundamental freedoms, and regarded the whole as an anomaly in the law (General Report of the XIV Congress of the Conference of European Constitutional Courts). From the point of view of the supremacy of the Constitution, the gaps in the law exists because the Constitution recognizes that the list of human rights and fundamental freedoms is not exhaustive, and they must be interpreted by the constitutional courts or similar institutions in accordance with social dynamics on the basis of equality, justice and balanced distribution of responsibilities between individuals and public authorities. In such a situation and a dilemma of parliamentary and judicial constitutional control, since, from the point of view of democratic legitimacy, the Parliament, the responsibility of proper legislative regulation. At the same time acts of Parliament is subject to judicial constitutional review, and therefore they must meet the

requirements of the Constitution and constitutional jurisprudence, which expresses the concretization and development of constitutional provisions in the legal acts of the constitutional Court of Ukraine. In order to prevent obstruction and exert any pressure (even under the pretext of formally legal procedures) on the activities of the Constitutional Court of Ukraine, it is necessary to borrow the experience of some European countries (Lithuania, Slovakia, Czech Republic), in which disciplinary chambers (senates) are established. Investigation of the circumstances of violation by constitutional judges of the oath, incompatibility rules or business ethics. A judge under investigation shall be removed from office until the investigation is completed.

The question of removal of a judge is decided at the session of the constitutional court, which shall consider the conclusion of the disciplinary chamber (Senate) in the case of establishing the circumstances of the violation by the judge of the constitutional court to make submissions regarding dismissal of a judge, the authority which appointed him

The constitutional Court of Ukraine can not be a Creator of constitutional reforms in the state, but its unique role is reflected as a subject of constitutional democracy and stability in the state, which must comply with generally accepted standards of government and of government built on democratic principles in the interests of the Ukrainian people. The constitutional Court of Ukraine, constitutional jurisdiction by applying the control, a recognition of the rule of law and the Supreme legal force and direct action of the Constitution of Ukraine, showing the obligation of the state or any officer to obey the Constitution, be responsible for the implementation of its laws of Ukraine. This means that any entity must operate as required by the Constitution (article 19), on the basis, within powers and in a method specified by constitutional law (Selivanov, 2006, 4). The decision of the constitutional Court of Ukraine give an estimate of the acts and actions of a public body, when there is a dispute on the law and law enforcement, a study of the legal conditions and circumstances of implementation of the functions and powers of an entity are always checked for their compliance with the Basic Law of the state.

The rule of law has an independent content

and functional orientation. The content of this principle cannot be considered solely in terms of natural law and legal positivism. We believe that reasonable is an integrative approach to the definition of law in the context of the disclosure of the content of this principle that the rule of law, it is advisable to understand how political and legal state in which public power institutions of the state, civil society and other social actors act solely on the basis of law.

In addition, the rule of law is a dynamic phenomenon that can be filled with new content in connection with possible socially conditioned changes in the content of law itself, ie the emergence of new values, customs and traditions; this process of constant filling and renewal cannot be limited, just as humanity's desire for progress and perfection cannot be limited. In the context of constitutionalism, the rule of law must also act as a constraint on public power in the interests of civil society, human rights and freedoms, ie power in a society in which the rule of law is recognized and functions, limited by law as the embodiment of truth and justice.

The definition of the rule of law through the constant restriction of arbitrary state power is one of the leading and is due to the fact that the rule of law arose to solve the fundamental problem of constitutional law - the proper control of state coercion against individuals.

Based on this understanding, the directions of measures to uphold the rule of law in the context of the implementation of European standards in the modern conditions of the constitutional process in Ukraine are the reform of public institutions and the establishment and protection of human rights and freedoms.

Given that the phenomenon of the rule of law is a terra incognita in jurisprudence, the Constitutional Court of Ukraine in its Decision of November 2, 2004 № 15-рп / 2004 (case on imposition of a milder punishment by a court) formulated a legal position: "The rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, the content of which must be permeated primarily by the ideas of social justice, freedom, equality, etc" (Judgment of the Constitutional Court of Ukraine, № 2-рп / 2005 ).

Based on this legal position on the definition of the principle of the rule of law, the Con-

stitutional Court of Ukraine specifies it in subsequent decisions, thus formulating the signs of the rule of law even without a textual reference to the basic definition.

Thus, the signs of the rule of law, based on the analysis of the decisions of the Constitutional Court of Ukraine, include: justice and dimension as a criterion of the ideology of justice in a democratic state (tax lien case); “Respect and inviolability of human rights and freedoms” (the case of permanent use of land) (Judgment of the Constitutional Court of Ukraine of September 22, 2005 № 5-rp / 2005); “Establishment of law and order, which should guarantee everyone the establishment and protection of rights and freedoms” (the case of permanent use of land); “Certainty, clarity and unambiguity of the rule of law, as otherwise can not ensure its uniform application, does not preclude unlimited interpretation in law enforcement practice and inevitably leads to arbitrariness” (the case of permanent use of land; the admissibility of “By applying legal means, if” it aims not to narrow the scope of rights and freedoms, but to clarify the content and regulation of procedural issues and to outline the general boundaries of fundamental rights “(the case of the formation of political parties in Ukraine), etc.

However, the analysis of the European approach to understanding the rule of law and the practice of the Ukrainian body of constitutional justice suggests that the implementation of the fundamental principles of European constitutionalism, in particular through the interpretation of these principles, has not always been effectively carried out by the Constitutional Court. Thus, as of June 1, 2020, the Constitutional Court of Ukraine adopted a total of 358 decisions. The case law of the European Court of Human Rights was cited and analyzed during this period in 5 decisions: one - in 2007 and 2011, in two decisions - in 2010, 2012 and 2016.

It should be noted that references to the Convention and the case law of the European Court of Human Rights were given in separate opinions of Judges V. Horodovenko, V. Kamp, D. Lilak, V. Lemak, M. Markush, V. Shishkin, S. Shevchuk. However, the events of recent years indicate positive changes in the relevant statistics. If we analyze the activity of the Constitutional Court of Ukraine in the direction of Europeanization of constitutional legislation, a very favorable

trend emerges. Decisions have been taken in recent years, each of which contains, in particular, references to European standards (Judgment of the Constitutional Court of Ukraine of March 14, 2014 № 2-rp / 2014, Decision of the Constitutional Court of Ukraine of March 20, 2014 № 3-rp / 2014, Decision of the Constitutional Court of Ukraine of April 22, 2014 № 4-rp / 2014), ratified by Ukraine, and two of them also refer to the relevant case law of the European Court of Human Rights.

In our opinion, increasing the activity of the Constitutional Court of Ukraine as an important participant in the constitutional process and focusing judges on European standards and practice of the European Court of Human Rights can significantly accelerate democratic transformations in the state and increase the effectiveness of the rule of law at the current stage of the constitutional process.

However, it is necessary to pay attention to rather long consideration of the case on lustration. On September 16, 2014, the Parliament of Ukraine - the Verkhovna Rada of Ukraine adopted the Law of Ukraine «On the Purification of Power» (Law of Ukraine «On the Purification of Power», 2014).

In November 2014, the Supreme Court of Ukraine and people’s deputies appealed to the Constitutional Court of Ukraine with constitutional petitions on the constitutionality of the provisions of paragraph 6 of part one, paragraphs 2, 13 of part two, part three of Article 3 of the Law of Ukraine «On the Purification of Power» September 16, 2014 № 1682-VII.

The subjects of the constitutional petition asked to open proceedings on the constitutional petition on the constitutionality of certain provisions of the Law of Ukraine of September 16, 2014 № 1682-VII «On the Purification of Power» and check for compliance with the requirements of part one of Article 8, Article 61, part one, item 5 of part five of Article 126 of the Basic Law of Ukraine and recognize as unconstitutional (are unconstitutional), the provisions of item 6 of part one, item 2 of part two, item 13 of part two, part three of Article 3 of the Law of Ukraine of September 16, 2014 № 1682-VII «On the Purification of Power».

October 23, 2015 the constitutional Court of Ukraine has postponed indefinitely consideration of a question on constitutionality of certain provisions of the Law of Ukraine «On the Purification of Power». The first session in this case on

two constitutional concepts and Supreme Court of Ukraine and representation of 47 people's deputies of Ukraine in the constitutional Court of Ukraine held on 16 April 2015, however, the trial was postponed. The next meeting of the constitutional Court of Ukraine on this issue began on 22 October 2015, but on October 23, 2015 the consideration of the question postponed again. This decision the Chairman of the constitutional Court of Ukraine Yuriy Baulin explained that the CCU should examine the question of admissibility of the petition of the representative of the Verkhovna Rada of Ukraine, people's Deputy. Sobolev, 22 October 2015 about removal of the Chairman and six judges of the constitutional Court from reviewing this issue because they themselves fall under the lustration law. Only after that, on the date of consideration by the Constitutional Court of Ukraine the case will be announced later. The constitutional Court of Ukraine should review the provisions of the law of Ukraine «On the Purification of Power», which refers to the prohibition to hold public office, the authorities of the presidency. Yanukovich, including the judges who took action against participants Bromide in late 2013 or early 2014 At the conclusion of the Supreme Court of Ukraine of 20 November 2014, part of the lustrating the provisions of the act reverses the effect of the legislation, which is a violation of the Constitution. In addition, representatives of the Supreme Court of Ukraine is also concerned about establishing the fact of work of a civil servant in a position as grounds for dismissal without consideration of the lawfulness or unlawfulness of actions of the official in the performance of their official powers, that is, without proof of a crime. The Judge Of The Constitutional Court Of Ukraine N. Chaptala noted that these provisions of the law indicate a part of Ukrainian lawyers who were interviewed, the constitutional Court of Ukraine. Another part of them refers to the European practice: in the Czech Republic and in some EU countries, the lustration law had the opposite effect: it provides for liability for itself only through the cooperation with the previous government, that is called in the law the offense committed, when this law did not exist.

The decision of the constitutional Court of Ukraine on this issue today, expect all sectors of society. Those who endorses and strongly con-

tributes to the process of lustration, waiting for the constitutional Court of Ukraine support their efforts along the way. Those who oppose (not so much the process of lustration as such, as the forms and means of its implementation) – believe that the constitutional Court of Ukraine should make the decision that will be the basis for protection from “such” lustration. And even ordinary members of society who are most deeply imbued with the process of lustration, hope to hear the decision of the constitutional Court of Ukraine is a clear message as to which direction will come into the process of cleansing of power in Ukraine.

March 2, 2020 became aware of the planned review of the constitutionality of the Law «On the Purification of Power», but its consideration was again postponed. The situation is complicated by the fact that individuals who got under lustration, began to challenge this decision in administrative court. Moreover, the European court of human rights has found a violation of the rights lustrated to a fair trial due to excessive timing of the trials relative to their release. Five Of The Claimants (V. Would. Fields – the First Applicant, D. V. Bacalov – the Second Applicant, A. A. Yas – Third Applicant, G. A. Jakubowski – the Fourth Complainant, S. I. Bondarenko – the Fifth Applicant) had applied to the European court of human rights complaining of violations with respect to them of article 8 of the Convention due to the dismissal from office of the public service in the course of lustration; the first three Applicants further complained of a violation of article 6 of the Convention due to failure to observe the reasonable time of court proceedings; the Second Applicant also complained under article 13 of the Convention. Despite the similarity of the statements, the European court of human rights has considered them in the same solution.

The applicants dismissal according to the law of Ukraine «On the Purification of Power» he held the positions of public service. At the time of the dismissal of the First Applicant held the position of head of the organization of work with documents of the Prosecutor General of Ukraine, the Second Applicant is the first Deputy chief of investigative management of financial investigations of regional management of the Ministry of revenue and duties of Ukraine, the Third Applicant – the Deputy Prosecutor of the region, the Fourth Applicant - the position

of chief of city Department of the State tax inspection of Ukraine, the Fifth Applicant, the post of Deputy head of Department of agroindustrial development of regional state administration.

On the basis of according to the law of Ukraine «On the Purification of Power» the first three Applicants were dismissed in 2014, Fourth and Fifth Applicants in 2015, the Applicants turned to the courts with claims for reinstatement; proceedings of the first three Complainants was suspended until the Constitutional Court of Ukraine the question of the constitutionality of the law of Ukraine «On the Purification of Power»; in satisfaction of the claims of the Fourth and Fifth Applicants were denied.

The European court of human rights stressed that an effective remedy should function without excessive delay, and acknowledged that in the cases of the first three Applicants for the submission of claims in the administrative courts in conjunction with the procedure of the constitutional Court of Ukraine was an effective remedy. According to the national legislation, the constitutional Court of Ukraine had to consider the constitutionality of the Law of Ukraine «On the Purification of Power» for 3 months.

The European court of human rights found that the interference in the private lives of all the Applicants (article 8 of the Convention) was not necessary. The European court of human rights noted that the basis for the dismissal of the Applicants was the fact of working in the public service during Viktor's Yanukovich presidency; in addition to the dismissal of the Applicants were prohibited from holding positions of public service for a period of 10 years, and information about them was made public on the Internet registry. The European court of human rights stressed that these measures had a very serious impact on social and professional reputation of the Applicants, who worked many years in public service, lost existing awards and future prospects; these measures were extremely restrictive and broad in scope.

The European court of human rights stressed that the lustration may not be used for punishment, retribution or revenge, and had to restore the credibility of public institutions. The European court of human rights stated that enshrined in the Law of Ukraine «On the Purification of Power» principles (including the presumption of innocence and individual responsibility) off-

set by other provisions. The European court of human rights has expressed doubts as to the legitimate purpose of the intervention, and after analyzing all the circumstances, found that the perfect interference was not necessary in a democratic society, was not proportional (in particular, the European court of human rights drew attention to the fact that the basis for the dismissal of the Applicants was not a specific criminal actions, and that they occupied positions of public service during Viktor's Yanukovich presidency).

According to article 2 of the Law of Ukraine «About implementation of decisions and application of practice of the European court of human rights» (Law of Ukraine «On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights», 2006), the decision is binding on Ukraine under article 46 of the Convention.

In this case, the constitutional Court of Ukraine can not get together and resolve this issue.

Such processes in post-Soviet countries lustration (lat. *lustratio* – “purification by sacrifice”). Similar processes occurred in Western Europe after the second world war (denazification), which aimed to limit the legal status of certain categories of citizens to protect public interests.

The Lustration means “purification”, and it allows “to exclude persons who lack integrity (even judges) from public institutions”. Lustration is a tool of transitional that applies after the transition from dictatorship to democracy to protect democracy against a possible return trip.

Lustration is to limit the rights of certain categories of persons to hold certain positions in state public service, including the limitation of the right to be elected to a certain position.

The problem also arises when it comes to people who hold “protected” positions in independent authorities. A clear definition of the narrow range of grounds for dismissal in this case is a guarantee of independent and objective activity of such a body. This applies to judges. The grounds for their dismissal are exhaustively defined by the Constitution, and therefore the procedure defined in this law does not meet the criteria of independence and raises doubts. This procedure essentially undermines the functioning of such independent oversight institutions and creates a clear conflict between the executive, the legislature and the judiciary.

According to the Venice Commission, “Lustration procedures, despite their political nature, should be designed and carried out only by legal means, in accordance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights. If this is followed, lustration procedures can be compatible with a democracy based on the rule of law” (CDL-AD(2009)044, § 149).

European standards in the field of lustration mainly stem from three sources: the European Convention for the Protection of Human Rights and Fundamental Freedoms (in particular Articles 6, 8, 10 and 14, Article 1 of Protocol No. 12) and the case law of the European Court of Human Rights. The European Court of Human Rights in a number of cases relating to the relevant legislation adopted in Slovakia (ECtHR, *Turek v. Slovakia*, application № 57986/00, 14 February 2006), Poland (ECtHR, *Matiek v. Poland*, application № 38184/03, 30 May 2006, ECtHR, *Luboch v. Poland*, application № 37469/05, 15 January 2008, ECtHR, *Bobek v. Poland*, application № 68761/01, 17 July 2007, ECtHR, *Schultz v. Poland*, application № 43932 / Lithuania, ECtHR, *Sidabras and Jiautas v. Lithuania*, applications №№ 55480/00 and 59330/00, 27 July 2004, ECtHR, *Rainis and Gasparavičius v. Lithuania*, applications №№ 70665/01 and 74345 / 01, 7 April 2005, ECtHR, *Žičkusi v. Lithuania*, application № 26652/02, 7 April 2009, Latvia (ECtHR, *Ždanok v. Latvia*), 58278/00, 16 March 2006, ECtHR, *Adamsons v. Latvia*, application № 3669/03, 24 June 2008) and more recently in Romania (ECtHR, *Naidin v. Romania*, application № 38162/07, 21 October 2014); case law of national constitutional courts (Lustration case law in the Venice Commission’s); Resolutions of the Parliamentary Assembly of the Council of Europe, namely Res. 1096 (1996) on measures to eliminate the legacy of the former communist totalitarian systems and Res. 1481 (2006) on the need for international condemnation of totalitarian communist regimes. PACE in Res. 1096 (1996) cited the Guidelines for Compliance with Lustration Law and Similar Administrative Measures with the Rule of Law-Based State (“Lustration Guidelines” or “Guidelines”) as a reference. Thus, the right of equal access to (or equal opportunities to serve in) public office as such is not guaranteed by the ECtHR, but follows from the right not to be discriminated against on

the basis of political conviction (Article 14 in conjunction with Article 10 of the ECHR or Article 1 of Protocol 12). In addition, the right of access to the civil service is recognized in international law (Article 21 (2) of the Universal Declaration of Human Rights - “Everyone has the right to equal access to the civil service in his country” - and Article 25 lit. c.) ICCPR - Every citizen must have the right and the opportunity, [...] without unreasonable restrictions: [...] to have access on general terms of equality to the civil service in his country”. The right to participate in the management of state affairs, in all all-Ukrainian and local referendums, to freely elect and be elected to public authorities and local self-government bodies, as well as the right to access civil service and service in local self-government bodies are also enshrined in Article 38 of the Constitution of Ukraine.

European standards for lustration procedures are, in particular: guilt must be proved in each case; the right to defense, the presumption of innocence and the right to appeal to a court must be guaranteed; on the one hand, the various functions and objectives of lustration must be respected, namely the protection of the new democracy, and on the other hand, criminal law, which means the punishment of the people of persons whose guilt has been proved; lustration must meet strict time limits for both the period of its validity and the period to which it applies.

Of course, Lustration Laws are always a mixture of a legal act and a political document. An appropriate balance needs to be struck between these two elements if the Lustration Law is to serve its important role in establishing the rule of law in the country.

It should be noted that the constitutional and legal responsibility is realized in the field of political relations, which confirms the relationship between law and politics. Constitutional and legal responsibility should be imposed only in the case of recognition of the existence in the action of the subject of constitutional and legal relations of the legally established composition of the constitutional tort. This is the basis for distinguishing between constitutional and political responsibility.

Political responsibility has no signs of legal responsibility. In particular, the constitutional and legal responsibility is subject to the basic principles common to all types of legal respon-

sibility: justice, humanism, legality, inevitability of punishment, guilt of an act that is not inherent in political responsibility.

Third, compliance with the rules of political responsibility is ensured not by means of state coercion, but by measures of public, including political influence, negative public assessment, and so on.

Fourth, the constitutional-legal liability may occur only if the act of the subject has all the elements of a constitutional tort. If there is no fault, then the use of constitutional and legal responsibility is impossible, however, to such entity it is possible to apply the measures of political responsibility.

Fifth, the application of constitutional law sanctions always strictly regulated and takes place according to the statutory procedure, the deviation from the requirements of procedural rules is not allowed. Political responsibility may be imposed in a more simple manner, without complying with legal formalities.

So, the political and constitutional-legal responsibility are not identical. Political responsibility for the scope is broader than the constitutional-legal responsibility and relates to the last both generic and specific phenomenon.

Constitutional and legal responsibility, political responsibility, but not any, but one that acquires constitutional forms. To avoid the transformation of the constitutional and legal responsibility of the legal institution into an instrument of political struggle, the implementation of measures of constitutional and legal responsibility should be limited to a constitutional legal order.

The idea of democracy involves a constant, continuous relationship between civil society and government. The peculiarity of this relationship lies in the fact that civil society in a democracy is primary, the total premise of the legitimacy of state power (article 5 of the Constitution of Ukraine), which is designed to perform a variety of functions to meet his needs and requests. Otherwise, the civil society addresses the ruling political forces from power, replacing them with others. It looks like the institution of the political responsibility of those in power to civil society.

What kind of responsibility is mentioned in the Law of Ukraine «On the Purification of Power»: political, constitutional and legal or some other? The Law of Ukraine “On Purifica-

tion of Power”, which is being considered by the Constitutional Court of Ukraine, has its effect on top officials of the presidency of V. Yanukovych and judges. But judges, according to the principle of separation of powers, must be held accountable under a special procedure. Since the independence and fairness of justice are ensured by independent judges, their independence, in turn, as provided by the legislature, is largely the result of granting immunity. The form of responsibility of judges should in no way restrict the independence of the judiciary.

The Law on the Purification of Power places the responsibility for inspecting judges on the chairmen of the respective courts. For the sake of division of powers, the procedure of scrutiny by decentralized supervisory bodies should not apply to judges. However, if the information provided by a judge in accordance with Article 13, paragraph 13, is inaccurate, the body must send a report to the Minister of Justice, who submits it to the High Council of Justice (now the High Council of Justice) and the High Qualifications Commission of Judges. However, according to the Constitution, the High Council of Justice may not be bound by this proposal and must assess the merits of each case.

The grounds for termination of judicial powers can be divided into two groups: the first group includes objective obstacles to the further performance of official duties of a judge (paragraphs 1, 2, 3, 7, 8, 9, paragraph 5 of Article 126 of the Constitution of Ukraine), the circumstances of the second group are directly related to the offenses committed by the judge (paragraphs 4, 5, 6, paragraph 5 of Article 126 of the Constitution of Ukraine), namely: violation by the judge of the requirements of incompatibility; violation of the oath by a judge; entry into force of a conviction against him.

Evaluating the above situation, it is worth noting that the constitutional responsibility of judges is highly political, which borders the pressure on the court related to the consideration of a particular case. For today the current legislation of Ukraine concerning the application of such measures of constitutional legal responsibility of judges as dismissal from office in connection with violation of oath, failure to comply with the requirements concerning the incompatibility or the entry into force of conviction against a judge, there is uncertainty in the settlement procedures for its implementation.

The Constitution gives the power of dismissal of a judge – including in the procedure of bringing to legal responsibility – the authority which he was elected or appointed.

Moreover, Lustration the law imposes liability for acts which, at the time of its Commission was not wrongful. The prohibition of retroactivity and the principle of *nulla poena sine lege* expressly provided for by the constitutions of most States that adopted the law on lustration. Under those principles, no one can be recognized in the offense, if in accordance with applicable at the time of committing the act of domestic or international law it was not considered illegal. Violation of the principle of non-retroactivity of the law were marked by the bodies of constitutional control in Poland, Czech Republic, Hungary, Slovenia, and Slovakia. The principle of non-retroactivity in time of legal acts contained in article 58 of the Constitution of Ukraine and exalted from the status of doctrinal principle at common law. It implies that you can not have any retroactive effect of legal norms that establish new rights and duties or prohibitions, because the violation of such rights, failure to comply with such obligations, the violation of these prohibitions will always be a new species, a new “composition” of offenses.

In Ukraine, the Law on the Purification of Power was adopted by the Verkhovna Rada on September 16, 2014, signed by President Poroshenko on October 9, 2014, published in the Official Gazette on October 15, and entered into force on October 16, 2014. According to the judgments of the European Court of Human Rights in the cases of *Zdanok v. Latvia*, *Sidabras and Jiautas v. Lithuania*, *Mathieu v. Poland*, and PACE Resolution №1096, lustration is contrary to the legal principle of retroactive effect. In order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between “protecting a democratic society on the one hand and protecting the rights of individuals on the other” (ECtHR, *Zhdanovska v. Latvia*).

The European Court of Human Rights has repeatedly drawn attention to the imperfection of current legislation in Ukraine and the need to adhere to the principle of legal certainty. Thus, the judgment of 6 November 2008 in the case of *Yeloyev v. Ukraine* states as follows: “The Court considers that there is no clear statement of pro-

visions as to whether it is possible to properly continue (if so, under what conditions) the application at the stage judicial review of a pre-trial detention measure chosen for a specified period at the pre-trial stage does not meet the criterion of “predictability of the law” for the purposes of Article 5 § 1 of the Convention. The Court also recalls that a practice which has arisen in connection with a legislative gap which requires a person to be detained for an indefinite and unforeseeable period in circumstances where such detention is not provided for by any specific provision of law or any court decision is itself contradicts the principle of legal certainty, which is implied by the Convention and which is one of the main elements of the rule of law”.

In paragraphs 51 and 56 of the judgment in “*Shchokin vs Ukraine*”, the European Court of Human Rights stated that, referring to “the law”, Article 1 of Protocol No. 1 to the Convention referred to the same concept as in other provisions of the Convention. “*Spaček v. The Czech Republic*” (*Spaceks.ro v The Czech Republic*), № 26449/95, § 54, 9 November 1999). This concept requires the quality of the law, requiring it to be accessible to stakeholders, clear and predictable in its application (see *Beyeler v. Italy*, № 33202/96, § 109, ECtHR 2000). Even assuming that the interpretation of those rules by the domestic authorities was correct, the Court is not satisfied with the general state of national law in force at the time in the present case. The Court notes that the relevant legal acts clearly contradicted each other. As a result, national authorities have, at their own discretion, taken opposing approaches to the correlation of these legal acts. In the Court’s view, the lack of the necessary clarity and precision in national law, which provided for the possibility of differing interpretations of the issue in question, violates the “quality of law” requirement of the Convention.

In the judgment “*Lyubokh v. Poland*”, the ECtHR emphasizes that the lustration procedure cannot serve as a punishment, as it is the prerogative of criminal law. If the provisions of national law allow for the introduction of restrictions on the rights guaranteed by the Convention, such restrictions must be sufficiently individual. In addition, lustration procedures must meet accessibility criteria, and lustration cases must comply with all fair trial standards and the requirements

of Article 6 of the Criminal Procedure Convention. In particular, the person subject to lustration must be provided with all the guarantees inherent in criminal prosecution. Such guarantees must first and foremost be the presumption of innocence.

Thus, in my opinion, certain provisions of the Law of Ukraine “On Purification of Power” contradict the principle of individual responsibility provided for in Article 61 of the Constitution of Ukraine.

In understanding the modern theory of constitutional control in Ukraine, the concretization of terms and concepts that characterize constitutional judicial control gives grounds to characterize it from the standpoint of “divided justice”, when in accordance with the competence of the Constitutional Court of Ukraine its powers are related exclusively to judicial control “Legality”, which is inherent in the jurisdiction of public law disputes in administrative courts. In Ukraine, the volume of critically contradictory public-law relations has grown rapidly in recent years, when the legal acts of the Verkhovna Rada of Ukraine, the Government and the President of Ukraine are challenged.

Conflicts in the field of lustration procedures have exacerbated the question of the boundary between the procedures of constitutional and administrative proceedings, which requires increased attention not only to the proper use of constitutional concepts and terms, as clarified above, but also dictate the need to develop theoretical provisions on the conceptual issue - “presumption constitutionality”, as the practice of legislative regulation of public rule-making does not yet accept this important principle in conducting constitutional judicial review.

What would you like to pay attention to in our study?

In the theory of constitutional control is not the final opinion with relevant reasoning about the problem, which is dictated by the necessity of selection of the most appropriate (universal) the principle that the “next” or “previous” constitutional control. Judges of the constitutional Court with sufficient scientific research experience of its own judicial competence in his numerous publications give no clear theoretical answers and recommendations (ratings) to this issue. With regard to the existing advantages and disadvantages of one of these types of constitutional con-

trol, because the practical use of this theoretical direction is confirmed by the fact that the practice is ahead of theory, as to the constitutional competence of the Court entered the citizen’s right to appeal in constitutional proceedings unconstitutional a law that abolishes or limits the rights and freedoms of man and citizen. Amendments to the Constitution of Ukraine (Section VIII and Section XII) upgrade (upgrading the status of the constitutional Court of Ukraine) aims to become efficient and effective judicial body of constitutional control. Indeed, this explains the fact that the Verkhovna Rada of Ukraine Law of Ukraine on amendments to the Constitution of Ukraine seized during the reform of justice in 2016 from the competence of the constitutional Court of Ukraine the authority to conduct an official interpretation of the laws of Ukraine. At the same time was provided with a “compensation” to strengthen Supervisory functions in respect of acts of Central bodies of state power and therefore it cannot be excluded that, accordingly, the new Law of Ukraine “On the constitutional Court of Ukraine” is possible will appear among the questions subordinate the constitutional jurisdiction of the control relative to the “important large-scale public events” (we are talking about administrative reform and T. I.). Evaluated in the event of a dispute, it may also be the validation of the results of voting of voters in a national referendum, elections to Parliament, when challenged, their outcomes and other issues. If you take into account this circumstance, when the corresponding case in the Supreme administrative court of Ukraine considers a narrow panel of judges, then it would be time for such a case the constitutional Court would have to be considered in plenary meeting, a complete procedure for oral hearings and procedures of the constitutional proceedings.

Attention should also be paid to the expansion of preliminary constitutional control, when it comes not only to review the constitutionality of proposed amendments to the Constitution in accordance with Articles 157 and 158 of the Constitution of Ukraine, but also the constitutionality of international treaties submitted by authorized legal entities to the Verkhovna Rada of Ukraine. consent to their binding. The analysis showed that only in the fifth year of its activity, ie in 2001, a preliminary constitutional review was carried out and an opinion was issued on

the compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine. In its opinion, the Constitutional Court noted that the reservations directly deserve further clarification, but this requires a stable platform of “constitutional precautions”.

### Conclusions and Further Research

The modern theory of constitutional judicial control indicates such a feature of constitutional proceedings, when the issues of admissibility and sufficiency of grounds, evidence and the existence of a real dispute in their entirety are subject to review in the order of normative control over constitutional submissions and appeals. But this issue is often, as the analysis shows, resolved by the court without the participation of the subjects of the right to make such petitions. At the same time, one circumstance seems paradoxical, when the constitutional control remains outside the adoption of “negative” decisions on formal legal circumstances formulated by judges who are appointed to conduct court cases. Thus, as evidenced by the practice of constitutional judicial review, confirms the generalized legal position for a theoretical conclusion: the effectiveness of the Constitutional Court has not reached the required level of protection of the Constitution of Ukraine.

The scientific doctrine of constitutional control, as a dynamic legal phenomenon should not be deterred by traditional models and institutions of constitutional stability, steel canning views on state-legal relations, which are still perceived as a convenient and useful understanding of power relations. Therefore, it is relevant, we think, in modern conditions for constitutional rights is the problem of “constitutional activism”. We are talking about the orientation of the development of the legal system of the embodiment of the values of the Constitution, as constitutional legal science requires new approaches and ideas that would have enriched the theory of Constitution and constitutionalism, reflected and deepened not only the legal but also the state governance system based on democratic-social orientation. It is impossible to leave without a new understanding of constitutional review, the principle of direct action of norms of the Constitution and its role as the primary source of industry legislative and other legal regulation.

Thus, constitutional judicial control, which is based on the constitutional provisions and must ensure the protection of the Constitution of Ukraine in doctrinal understanding has properties state legal rule, intellectual perfection in the interpretation of the Constitution of Ukraine and of its institutional commitment, which gives grounds to fill the scientific legal doctrine of knowledge regarding the “judicial constitutionalism”.

In our opinion, the lawmakers need to respond to the decision of the European court of human rights and the conclusions of the Venice Commission, to consider the proposals of experts and to revise the provisions of the Law of Ukraine «On the Purification of Power» to eliminated the need for consideration of the case by the Constitutional Court of Ukraine. Otherwise, the constitutional Court of Ukraine should declare the Law of Ukraine «On the Purification of Power» that does not meet the Constitution of Ukraine and to implement the decision of the European court of human rights.

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## КОНСТИТУЦІЙНА СУДОВА ПРОЦЕДУРА ТА КОНСТИТУЦІЙНИЙ КОНТРОЛЬ В СФЕРІ ЛЮСТРАЦІЇ

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### Анотація

У статті розглядається процедура конституційного суду та конституційний контроль у сфері люстрації. Ці питання розглядаються крізь призму верховенства права, його розуміння Конституційним Судом України у своїй практиці. Підкреслюється, що застосування принципу гласності та вимог підвищеної гласності пояснюється важливістю справ, що розглядаються конституційними судами, а також результатами судової діяльності. У юридичній науці склалася ситуація, коли погляди науковців на сутність судового процесу суперечливі, що породжує різне розуміння цього правового явища представниками різних наукових шкіл. Тривалий час проблема судочинства була нерозривно пов'язана з розглядом категорії процесу, суттєва ідея якого суттєво вплинула на розуміння меж процесуального законодавства. Конституційний Суд як єдиний орган конституційно-судового контролю може розглядатися як особливий (організований на державній основі), носій інтелектуального потенціалу теорій конституційного права.

Поряд з цим детально аналізується питання довгострокового розгляду Конституційним Судом України закону, що визначає люстрацію. Дослідження поповнюється тим фактом, що Європейський суд з прав людини за скаргами громадян України встановив порушення права люстрованих на справедливий судовий розгляд через надмірний час національних процесів щодо їх звільнення. Зроблено висновок, що Закон про люстрацію повинен виконувати свою найважливішу функцію у встановленні верховенства права в країні.

**Ключові слова:** конституційна процедура; верховенство права; конституційний контроль; люстрація; право на справедливий суд; Україна; ЄСПЛ.