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# CUESTIONES POLÍTICAS

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## Judicial reforms in Ukraine: polishing procedures and their systemic role

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### Abstract

Using a documentary methodology close to the dialectical method, the objective of the article is to analyze the judicial reforms in Ukraine. Citizen belief in peace, justice and strong institutions is a challenge not only for Eastern Europe, where trust in state bodies has always been low. Meanwhile, the ongoing reforms of the judiciary aim to achieve a significant result using specific methods such as: the purging of judges. After the so-called “revolution of dignity” forceful discussions began on the purification process in Ukraine. For the first time, this question was raised in the early 90s of the last century. Unfortunately, the relevant legislative projects did not even reach the congress of Ukraine. It is concluded that Ukraine is currently experiencing its third attempt to initiate a judicial purge process. Unlike the first two, the third is apparently more productive. This is since a special law was passed, and the “government purification” procedure was started. finally, questions such as what is lustration and in what types does it manifest itself are discussed? How is this phenomenon related to the processes of systemic transformation?

**Keywords:** judicial power; illustration of judges; judicial independence; reforms of the judiciary; citizen fight against corruption.

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## Reformas judiciales en Ucrania: procedimientos de lustración y su papel sistémico

### Resumen

Mediante una metodología documental próxima al método dialéctico, el objetivo del artículo es analizar las reformas judiciales en Ucrania. La creencia ciudadana sobre la paz, la justicia y las instituciones sólidas es un desafío no solo para Europa del Este, donde la confianza en los organismos estatales siempre fue baja. Mientras tanto, las reformas en curso del poder judicial tienen como objetivo lograr un resultado significativo mediante el uso de métodos específicos como: la depuración de los jueces. Después de la llamada “revolución de la dignidad” se iniciaron discusiones contundentes sobre el proceso de depuración en Ucrania. Por primera vez, esta cuestión se planteó a principios de los años 90 del siglo pasado. Desafortunadamente, los proyectos legislativos relevantes ni siquiera llegaron al congreso de Ucrania. Se concluye que Ucrania vive actualmente su tercer intento de iniciar un proceso de depuración judicial. A diferencia de los dos primeros, el tercero es aparentemente más productivo. Esto se debe al hecho de que se aprobó una ley especial y se inició el procedimiento de “purificación del gobierno”. Finalmente se discuten preguntas como ¿qué es la lustración y en qué tipos se manifiesta? ¿cómo se relaciona este fenómeno con los procesos de transformación sistémica?

**Palabras clave:** poder judicial; lustración de jueces; independencia judicial; reformas del poder judicial; lucha ciudadana contra la corrupción.

### Introduction

The issue of judges' lustration has become cluttered with myths and prejudices regarding lustration generally, in the context of the Ukrainian events of recent years. Thus, the 'vagueness' and uncertainty of the concept, a certain mythologization and even demonization of the procedure and consequences of lustration in Ukraine determine the relevance of the current investigation.

Considering the aforementioned reasons, the legal framework for lustration had been drafted and adopted by Ukrainian parliament in 2014, when the Law 'On Restoring Trust into Judicial Power in Ukraine' № 1188-VII was adopted on 8 April 2014, launched two tools of the judiciary control. One of the peculiarities of the Law 'On Restoring Trust into Judicial Power in Ukraine' was a distinct delineation of conduct by a judge, regarded as illegal, listed in article 3. Such judicial rulings, enacted in the time period from November 2013 until February 2014, could become potential objects of screening: Rulings

banning peaceful demonstrations and gatherings; Rulings detaining activists or finding them guilty based on their political or social activities; Rulings detaining or accusing guilty of activists of the ‘Euromaidan’ for actions, committed in the course of the protests; Rulings imputing administrative sanctions upon activists of the ‘Euromaidan’ for actions committed in the course of the protests; Rulings granting permissions on conducting open or secret investigative actions against activists of the ‘Euromaidan’ on pretrial stages of criminal proceedings; Rulings related to the election to the Verkhovna Rada of the seventh convocation that had been allegedly considered vague or unjust; Rulings upon revision of which the UCtHR had found violations of human rights, reportedly admitted by the judge.

Due to those reasons the overall results of vetting, started by the Commission, can be described as a measure, meeting the urging social expectations, but still needing its finalization by the competent judicial authorities.

The law ‘On Purification of Government’ N<sup>o</sup> 1682-VII was adopted on 16 October 2014 and, according to international expert Agnieszka Piasecka, provided four major instruments of lustration of state servants. First, all the public officials, who had maintained significant posts in state agencies during the rule of Yanukovych government, should be dismissed from their offices and similar posts for a term from 5 up to 10 years. The second instrument was the assessment of all the revenues and financial obligations of all public officials (Kondratova and Korotenko, 2020). The third point of purification was the disclosure and dismissal from public offices of former KGB agents and former Communist Party of the Ukrainian SSR leading functionaries. Finally, the judges, holding posts in judicial system, should undergo deep integrity checks (Piasecka, 2015).

## 1. Notion of Lustration

One of the widespread term for this process is vetting, defined as ‘the process of performing a background check on someone before offering the employment, conferring an award, or doing factchecking prior to making any decision.’ As U.S. Department of State defines those two terms, ‘*Lustration* is a policy put in place by post-conflict or post-authoritarian governments to remove from public institutions personnel, who have been implicated in activities that call into questions their integrity and professionalism, such as human rights violations or abuses, violations of international humanitarian law, or related crimes, as a way to build confidence in the public sector’ while ‘*Vetting* is the process by which a lustration policy is put into effect.’

The modern interpretation of this concept is as follows: ‘lustration (from the Latin “Lustratio” – purification through sacrifices) can be understood

as the process of purification the authorities from the old personnel, the prohibition for the functionaries of the previous government from holding posts in the state apparatus, from election to representative bodies, from serving as judges, and sometimes even from exercising the profession of a teacher, etc' (Kostiuchenko, 2019)

Such a delineation seems very appropriate, as in most academic sources both terms are used as synonyms.

According to the Parliamentary Assembly of the Council of Europe No. 1096 (1996) 'On Measures to Dismantle Communist Totalitarian Systems' the independence of the lustration commission should be safeguarded, while European standards of judicial independence contain a perception, according to which 'in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of the office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers, within which at least one half of those who sit, are judges elected by their peers following methods guaranteeing the widest representation of the judiciary' (para. 1.3 of the European charter on the statute for judges).

The Venice Commission in the aforementioned Opinion expressed a concern that the Ministry of Justice and the Temporary Specialized Commission of Vetting of Judges of the General Jurisdiction Courts are not providing the necessary guarantees of procedural independence (para. 87-95). In this opinion, the High Council of Justice (2017) was unlightened as a body who 'may not be bound by this proposal and should assess itself the substance of each case' (para. 95).

In our view, some loopholes of the vetting procedures can be found; however, the Commission was comprised of the majority of judges and final decisions in all cases concerning judges are undertaken by the High Council of Justice, which holds all relevant instruments when disciplining judges. This can definitely be concluded from provisions of the Law.

## **2. The Procedural safeguards for lustrated judges**

The controversial issue of vetting the judiciary covers procedural safeguards for lustrated judges. In the case *Rasmussen v. Poland* the Court 'reiterated that, if a State adopts lustration measures, it must ensure that the persons affected thereby enjoy all the procedural guarantees of the Convention' (para. 50). As Venice Commission noted in its Opinion on lustration measures in Albania on the question of the constitutional and legal guarantees of judges and prosecutors, these guarantees consisting reasons for termination of their mandate, and in procedures for these terminations,

which should be the constituent elements of the state's constitutional status replacing the procedures with less protective ones.

From this angle some aspects of lustration of judges in Ukraine have been challenged by experts (Zaharov, 2014). It is necessary to point out that European authors have put forward similar doubts on the legitimacy of lustration procedures in the Czech Republic, Hungary, and Poland, claiming that lustration in those countries: (a) condemns the acts / facts that have taken place in the past; (b) provide for the establishment of collective guilt; (c) are discriminating concerning a certain category of persons (Choi and David, 2012).

It should be noted that the Venice Commission stands for implementing basic safeguards of the due process of law in the lustration procedure, emphasizing:

The following four key-criteria summarize the essence of the standards pertaining to lustration procedures: (a) guilt must be proven in each individual case; (b) the right of defense, the presumption of innocence and the right to appeal to a court must be guaranteed; (c) the different functions and aims on the one hand of lustration, namely the protection of the newly emerged democracy, and on the other hand of criminal law, i.e. punishing people proven guilty, have to be observed; (d) lustration has to meet strict limits of time in both the period of its enforcement and the period to be screened (European Commission For Democracy Through Law, 2014: 14).

European standards of due disciplinary procedures are applicable to existing Ukrainian regulations, in particular the rights of a judge: to be promptly informed of the complaints filed against him/her; to have knowledge of all the evidence, collected against him/her; to be heard (orally and in writing) by the disciplinary authority at all levels of the disciplinary proceedings and to be present there; to legal assistance; to appeal an unfavorable disciplinary decision (Federco, 2012).

In spite of the fact, that preliminary proceedings in the Temporary Specialized Commission of Vetting of Judges of General Jurisdiction Courts or Ministry of Justice do not maintain the whole list of procedural guarantees of the due disciplinary proceedings, all of the decisions of those agencies on lustration of judges, are subject to additional obligatory revision by the High Council of Justice, as this body is exclusively entitled by the Constitution to rendering decisions on dismissing judges in disciplinary procedures (Borkowski and Sovgyria, 2019).

Ukrainian legislation envisages significant safeguards of the rights of a judge to a fair trial in the disciplinary proceedings which verify the imposition of all the lustration sanctions by the High Council of Justice (Izarova, 2018). Those guarantees are provided by articles 48 and 49 of the Law 'On High Council of Judges' and include:

- the publicity of disciplinary proceedings, accompanied by minor exclusions.
- the obligation of the officials of the High Council of Justice to research all the relevant evidence.
- the right of a judge to make up detailed explanations in the course of the investigation, present his/her arguments personally during the hearing in the High Council of Justice and provide all the appropriate evidence to defend himself/herself.
- the right of a judge to be informed about the hearings of his/her case in the High Council of Justice and to review the evidence, collected against him/her.
- the right of a judge to have a representative in the disciplinary proceedings.
- the right to appeal the decision of the High Council of Judges in the Supreme Court of Ukraine.

Finalizing the issue of procedural guarantees for judges, we can refer to the recent events in Poland, where several judges of the Supreme Court were forced to resign on adoption of a special law, that had come in force on 3 July 2018. The new law changed the initial age of resignation of judges (from 70 to 65 years) and allowed the President to arbitrarily remove or reassign part of judges of the Supreme Court. To remain in positions, the judges were obliged to file a petition to the President and provide a valid health certificate.

The term of a judge's position could have been extended by 3 years, while the criteria for the President's decision was quite vague; a mechanism to appeal this decision wasn't envisaged by the aforementioned legislation. In our opinion, this was an example of a direct discrimination of judges by their age, prohibited by the UN Basic Principles on the Independence of the Judiciary, as well as a severe breach of basic safeguards of judicial tenure, outlawed by the same document.

In an EU-country, an attempt to dismiss judges of the Supreme Court regardless of basic guarantees of the due process of law, developed by the European Court of Human Rights, cannot be tolerated. Therefore, several institutions of the European Union have immediately, upon adoption of the relevant law in Poland, come up with official statements, criticizing those initiatives and calling on the Polish authorities to amend the Law (BBC NEWS, 2018).

In October 2018, the European Court of Justice suspend that the provisions of national legislation concerning the lowering of the retirement age of the Supreme Court Judges. On 19 November 2019, the Court decided

that there are doubts concerning the independence of a new Polish judicial chamber that monitors and potentially punishes other judges (AP NEWS, 2019). However, the determination of whether the new Disciplinary Chamber is independent of the influence from the nation's legislative and executive powers was left to highest Polish court. It could be thus concluded that the main EU Court stood up for standards of judicial independence in Poland, granting to the national sovereignty key issues of organization of judiciary at the local level.

In the case *Rasmussen v. Poland* the applicant lost the entitlement to a special retirement pension due to her status as a 'retired judge' according to the Lustration Act 1997' (para. 72), but the Court decided, that this loss is a result of a false lustration declaration submission, which was not count by an interference with the property rights of the applicant under Article 1 of Protocol No. 1. (76).

### **3. Is lustration a type of responsibility?**

National traditions of legal theory (Abramovych, 2015) as well as the Constitutional Court of Ukraine, presume that any liability measure cannot be established retroactively. According to the ruling of the Constitutional Court of Ukraine, delivered on 13 May 1997, 'laws are applicable only to those relations that arose after the law or other normative legal act had come into force. The consolidation of this principle at the constitutional level serves as a guarantee of the stability of social relations, including relations between the state and its citizens, providing citizens with confidence that their current status would not be aggravated by the adoption of a new law or other normative legal act (that would alter the current state – authors).'

The same refers to judges, if we consider lustration as a type of responsibility; when the 'Euromaidan' protests took place, judges did not know that their decisions, delivered in relation to these events, would be subjected to review. On the other hand, the circumstance of an acute social conflict cannot excuse a judge from ignoring such constitutional values as the rule of law, fair justice, basic human rights and neglecting his/her major duty to maintain a balance of public and private interests and accurately apply procedural codes (Izarova, 2019). Therefore, the lustration restrictions that were launched upon judges, 'within the application of all of the existing disciplinary proceedings and the procedure of dismissing a judge for breaches of the judicial oath,' are not contrary to the rule of law principle 'as a democratic state is entitled to require civil servants to be loyal to the constitutional principles on which it is founded.'

For this reason, from the political perspective, lustration provides for the 'cleansing' operations performed by new government from the

regime-connected politicians, who are not allowed to work in government bodies, conduct court proceedings, be elected to representative bodies of government, etc. It is not necessarily carried out in a clear legal framework, since it performs the function of ideological confrontation between the old and the new governing elites. Therefore, lustration laws do not relate to the sphere of criminal law, but are aimed at restructuring the bureaucratic apparatus of the State as well as at dismissing from official posts people who have contributed to the establishment of an undemocratic regime.

However, the legal foundations of lustration are equally important. According to the second concept of lustration, distinguished by I.A. Bezklubyby and I.V. Kochkodan, lustration restrictions are inherently sanctions, an element of the mechanism of a person's responsibility for certain actions. It is obvious that the process of lustration encompasses the mechanisms of various types of responsibility (primarily legal liability), since sanctions – lustration restrictions – are legal in character (Bezklubyby and Kochkodan, 2019). This approach, according to legal thinkers, provides for a number of requirements, the failure to comply with which calls into question the legitimacy of the lustration measures. Thus, an act for which sanctions in the form of restrictions are applied to an individual shall violate the legal rules existing at the time of conduct, since the law establishing liability shall not be retroactive in effect. In addition, lustration restrictions must comply with all principles of legal liability, particularly with the principle of individual liability. We accept the notion that the legal responsibility is one of the features of lustration measures. However, we do not consider the principle of legality as a dominating aspect in legal liability, and the obligation arising from it to comply with the relevant criteria and requirements, as the shortcoming of the aforesaid approach to lustration conceptualization.

The German professor S. Karstedt also considers lustration as the mechanism of an individual's punishment, having identified two of its elements or 'two types of public procedure': first is the criminal prosecution of elite representatives and government officials, who constituted the highest leadership in the system of public administration of the previous regime. Secondly, it is a procedure for mass investigations with regard to those who worked closely with members of the party or employees of public entities (for example, police, security services) of middle or lower ranking positions in the certain bureaucratic hierarchy.

Close attention should be paid to the approach suggested by V. V. Knysh, according to whom lustration is defined as 'a modern, special form of constitutional legal responsibility.' In the author's opinion, lustration (purification of government), in addition to its direct function also has the nature of a preventive (protective) form of responsibility designed to prevent the creation of corrupt power in the future (Knysh, 2014)

## Conclusions

Grounds of responsibility, provided by the Law ‘On Restoring Trust into Judicial Power in Ukraine’ № 1188-VII, and the Law ‘On purification of Government’ №1682-VII, were politically aggravated, while the basic criteria of assessment of judges’ acts was applied on a temporary basis, referring exclusively to decisions, delivered in the course of the ‘Euromaidan’ protests or during the Presidency of Victor Yanukovych.

Moreover, the juxtaposition of legal acts regulating lustration procedures reveals a duplication of grounds in this type of sanctions that could possibly result in double jeopardy of a judge, directly prohibited by the Article of 61 of the Constitution of Ukraine.<sup>4</sup> Such a concept is quite doubtful in terms of formulating grounds of legal liability of judges, that thesis being acknowledged by the Venice Commission. In such a case, if a judge is being charged under two coinciding procedures, sanctions can be cancelled by national courts or European Court of Human Rights.

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4 According to Article 61 of the Constitution of Ukraine, ‘For one and the same offence, no one shall be brought twice to legal liability of the same type’ in Constitution of Ukraine (No. 62).

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