

## ARTICLES

### POLITICIZATION OF CONSTITUTIONAL RELATIONSHIPS IN THE CONTEMPORARY PERIOD IN UKRAINE

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*The article examines the phenomenon of politicization of constitutional relations. In particular, three of its aspects are identified and investigated: the impact of social revolutions on the rule of law; the problem of lustration of state employees; and the deepening of the politicization of the judiciary. Social revolutions, including the Ukrainian 2013–2014 social revolution, are viewed as a concept that can have a decisive influence on the reform of the state mechanism and, in many ways, determine its future destiny. The lustration procedure, which is considered in the context of transitional justice – a scientific discipline that studies the functioning of justice in transitional democracies, undergoes special research herein. The classification of lustration according to various criteria is given. The article also shows the practice of a number of states whose judicial systems fall under the concept of political justice. A shocking conclusion is drawn that the percentage of acquittals in Nazi Germany for non-political crimes was higher than in modern Russia or Ukraine.*

*Keywords: lustration; political justice; social revolutions; judiciary in Ukraine; politicization of constitutional law.*

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## Introduction

Recent years have brought many shocks that make it impossible to preserve academic detachment when analyzing the cruel events of reality. However, classification of the changes which are happening and happened in the sphere of constitutional law helps us to meet them with open eyes and understanding.

One of the most characteristic signs of our time is the politicization of constitutional relations and institutions, which increases year by year. Although it was only ever possible to completely separate oneself from politics in theory, recent events have so radically changed the previous course of state and legal life (not only in Ukraine, but throughout the world) that scientists have even started talking about a special type of transitional constitutionalism, which is mainly connected with the consequences of the social revolutions that have taken place throughout the world.

Revolution is too radical a transformation to consider the affected human material. It is as if a giant hand ruffles up constructions, pulls out millions of people from the boundaries of their usual day-to-day activity, but does not give freedom and immediately begins to enclose them in new forms. Therefore, it is more interesting to appeal to the experience of those states in which the transfer of state power has been carried out exclusively within the framework of constitutional and legal procedures for centuries (although there are also “surprises” here).

### 1. Social Revolutions as a Catalyst for the Politicization of State and Legal Life

The 2013–2014 revolution in Ukraine fits into a series of anti-regime actions that have swept much of the world over the past 15 years: the “Bulldozer Revolution” in 2000 in Serbia, the “Rose Revolution” in 2003 in Georgia, Maidan 2004 in Ukraine, the “Tulip Revolution” in 2005 in Kyrgyzstan, “Occupy Wall Street” in 2011 in the United States, the “Arab Spring” which continues to this day in the countries of the Middle East and North Africa... We could continue the list. Therefore, it is not surprising that these events are being collectively described as the fifth “wave of democratization,” and a “global democratic revolution,” in the western transitological literature.

American political scientist Samuel Huntington distinguished four main “waves” of democratization: the first began with the “spring of the people” in the middle of the 19<sup>th</sup> century and lasted until the “campaign against Rome” of Mussolini in 1922; the second began after World War II and resulted in the disintegration of the colonial system; the third commenced in 1974 when Salazar’s dictatorship fell in Portugal (the “Carnation Revolution”); and finally, the fourth began with the crisis in the USSR-dominated socialist system and led to its collapse.<sup>1</sup> It appears that the people of the generation, to which authors of this research belong, who witnessed the fourth wave, have also witnessed a fifth wave of democratization. What are its results?

It should be mentioned that the Ukrainian Revolution of Dignity was not given such a name for nothing. Like any revolution, it is

a way of being of a person in the world. The way of their self-transformation and transition to a new quality. The way of protection from decay in the environment created by them earlier, getting rid of the world which, having exhausted its creative potential, turned into an excessive burden, restraining progress towards a future to which a person is initially oriented.<sup>2</sup>

In fact, Euromaidan, especially in the first months after its victory, gave a real opportunity for participation by the widest sections of the population in governance of the state. The army was significantly reformed and volunteer battalions, which consisted of many courageous and patriotic people, were created.

Obviously, the Revolution of Dignity, as a complex political, legal and socio-psychological phenomenon, deserves a separate study. In the framework of this publication, we would like to consider the problem referred to exclusively from the point of view of the problem of human rights and, more precisely, that invisible competition (and sometimes close relationship) which appears between legitimate elections and various manifestations of people’s anger that ultimately crystallize into a social revolution.

In academic literature, classification of social revolutions was developed long ago. Some authors distinguish four types of revolution: a revolution from below, a revolution from above, a combined coup and a palace coup. Others identify a revolution of masses, a revolutionary coup, a coup-reform and a palace revolution. Still others classify revolutions as a *Jacquerie*, a Millenarian rebellion, an anarchic revolt, a *coup d’état*, a Jacobin communist revolution and an armed mass demonstration.<sup>3</sup>

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<sup>1</sup> Хантингтон С. Третья волна. Демократизация в конце XX века [Samuel Huntington, *The Third Wave. Democratization at the End of the 20<sup>th</sup> Century*] 368 (Moscow: ROSSPEN, 2003).

<sup>2</sup> Баталов Э. Революция. Бунт. Переворот // Независимая газета. 22.03.2011 [Eduard Batalov, *Revolution. Revolt. Coup*, Independent Newspaper, 22 March 2011] (Oct. 2, 2018), available at [http://www.ng.ru/scenario/2011-03-22/15\\_reforms.html](http://www.ng.ru/scenario/2011-03-22/15_reforms.html).

<sup>3</sup> Гавлин М.Л., Казакова Л.А. Современные буржуазные теории социальной революции [Mikhail L. Gavlin & Liliya A. Kazakova, *Modern Bourgeois Theories of Social Revolution*] 41–53 (Moscow: Nauka, 1980).

A newer classification has been developed that is mainly based on realities of the Arab Spring: separate protest actions (Qatar, the United Arab Emirates), several notable anti-government protests (Saudi Arabia, Sudan, Iraq and Palestine), numerous anti-government protests (Oman, Mauritania), populous and protracted anti-government protests with separate violent clashes (Algeria, Kuwait), powerful anti-government protests with bloody clashes which shook power (Morocco, Jordan), civil war (Syria, Libya, Bahrain, Yemen) and, finally, a successful revolution (Tunisia, Egypt).<sup>4</sup>

Modern transitologists also succeeded in revealing various factors that led to anti-regime protests. The first indicator of internal conflicts is represented by the following set of factors: tribal and confessional heterogeneity of the country as well as the level of contradictions within the political elite. The second indicator, which characterizes the level of unemployment among young people and the proportion of people with higher education among them, includes three main components: youth unemployment, the proportion of unemployed youth in the general composition of adult population and the proportion of unemployed young people with a higher education.<sup>5</sup> The third indicator of stability of political regimes is a combination of two main factors: availability of tools for the transfer of power; and political order. The influence from outside on domestic political processes was chosen as an additional indicator of anti-regime protests.<sup>6</sup>

Boris Makarenko mentions that the main characteristic of “color” revolutions is that there is no change of social order under them and the change of elites is limited: power is transferred from one elite clan that dominated the system of power (“donetskiye”) to some spontaneous coalition of other segments of the elite. As a result of such actions, the state system can only undergo partial changes aimed at limiting the possibilities for monopolizing power and creation of frameworks for the functioning of coalition power structures such as the 2004 constitutional amendments in Kyrgyzstan, reanimated ten years later, or an agreement on redistribution of powers between the president and the premier in Kyrgyzstan.<sup>7</sup>

New revolutionary authorities are inevitably faced with the question of constitutional and legal continuity.

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<sup>4</sup> *Исаев Л.М. Политический кризис в арабских странах: опыт оценки и типологизации: Автореф. дис. ... канд. полит. наук* [Leonid M. Isaev, *Political Crisis in Arab Countries: The Experience of Evaluation and Typologization: Synopsis of a Thesis for a Candidate Degree in Political Sciences*] 17–22 (Moscow: IA RAN, 2013).

<sup>5</sup> *Коротяев А.В. Социальные корни “арабской весны” // Рецепты Арабской весны: русская версия* [Andrey V. Korotayev, *Social Roots of the “Arab Spring” in Recipes of the Arab Spring: Russian Version*] 100–101 (A.M. Vasiliev & N.I. Petrov (ed.), Moscow: Algoritm, 2012).

<sup>6</sup> *Id.* at 15–16.

<sup>7</sup> *Макаренко Б. “Цветные революции” в контексте демократического транзита // Мир перемен. 2005. No. 3. С. 29–37* [Boris Makarenko, *“Colour Revolutions” in the Context of Democratic Transit*, 3 World of Change 29 (2005)].

The new government is not a feudalist who strangled the enemy and inherited people and territories from him,

writes Leonid Golovko with reference to French constitutional law.<sup>8</sup> Consequently, if the constitutional and legal process is interrupted by revolution, then all its more local elements are interrupted, including, e.g. a ban on secession from Ukraine. If the constitutional and legal process has not been interrupted, we have to state that there has been a *coup d'état* in the country with all the ensuing criminal and legal consequences.

The great Russian-American sociologist Pitirim Sorokin drew attention to an interesting pattern: the periods of revolutions and uprisings in Athens and Sparta, Rome at the end of the Republic, in the Byzantine Empire, and in the history of England were not just periods of impoverishment but also starvation. The same may be said of the time preceding the French Jacquerie, the French revolutions, the peasant wars of Yemelyan Pugachev and, finally, the revolutions of 1905 and 1917.<sup>9</sup> That is why all revolutions are, as a rule, the revolutions of urban poor and oppressed peasantry. A peculiarity of revolutions of the 21<sup>st</sup> century is that their driving forces, as Alexander Obolonsky notes,

became not the poorest, most deprived, but the most advanced bearers of civil self-consciousness. In a word, not proletarians, but mainly the middle class.<sup>10</sup>

A certain exception in this respect is, perhaps, Syria. From 2006 to 2011 about 60% of Syrian lands experienced an unprecedented drought. Mismanagement and waste of natural resources of the country led to a shortage of water and desertification of land. In some regions, drought led to the destruction of crops by 75%, and the livestock by 85%, which affected the lives of 1.3 million people. Back in 2009, long before the fighting, the U.N. and the Red Cross reported that, as a result of drought, about 800 thousand people lost their livelihoods. And, in 2010, according to a U.N. estimate, one million people were on the edge of hunger.<sup>11</sup>

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<sup>8</sup> Головкин Л.В. Правовой статус Крыма // Великороссъ. 25.01.2015 [Leonid V. Golovko, *The Legal Status of the Crimea, Velikoross*, 25 January 2015] (Oct. 2, 2018), available at [http://www.velykoross.ru/actual/all/article\\_1459/](http://www.velykoross.ru/actual/all/article_1459/).

<sup>9</sup> Сорокин П.А. Человек. Цивилизация. Общество [Pitirim A. Sorokin, *Man. Civilization. Society*] 275 (Moscow: Politizdat, 1992).

<sup>10</sup> Оболонский А.В. Право на протест // Независимая газета. 21.05.2013 [Alexander V. Obolonsky, *The Right to Protest*, Independent Newspaper, 21 May 2013] (Oct. 2, 2018), available at [http://www.ng.ru/ng\\_politics/2013-05-21/15\\_protest.html](http://www.ng.ru/ng_politics/2013-05-21/15_protest.html).

<sup>11</sup> Гражданская война в Сирии // Википедия [*Civil War in Syria*, Wikipedia] (Oct. 2, 2018), available at [https://ru.wikipedia.org/wiki/Гражданская\\_война\\_в\\_Сирии](https://ru.wikipedia.org/wiki/Гражданская_война_в_Сирии).

Concerning Ukrainian realities, the main difference between the first and the second Maidan is that, if the first Maidan defended an emphatically legitimist style of political struggle, then the second made legal protest impossible and led to violence after the police had dispersed the student rally on the night from 30 November to 1 December 2013. In 2004, the final decision on recognizing the facts of electoral fraud and the legal consequences (a revote) was taken under a special procedure by the Supreme Court of Ukraine. Therefore, in the early 2000s an indispensable condition for successful "color revolutions" was the neutrality of the judiciary (that, by definition, is impossible under purely authoritarian regimes) as well as non-interference (or hidden sympathies for the opposition) on the part of the army or law enforcement agencies. It should be mentioned that such neutrality was not explained by a high level of democratic development, but by the pragmatic calculation of the judiciary and law enforcement, who, in a critical moment, realized the counterproductiveness, and even danger, for the country of any actions aimed at suppressing the opposition.

Among the CIS countries classified as hybrid regimes, Moldova appears to be the most likely platform for a new revolution. The parliamentary elections that took place in 2005 were marked by an active play at "color revolution" on the part of all three main participants (communists, nationalists and centrists).

Since that time, this country has been periodically shaken by political crises and mass protests. A number of other factors (revolutionary Ukraine, the existence of a conflict in the past – Transnistria, a relatively low standard of living and a significant percentage of the urban population having a higher education, etc.) make it a dangerous laboratory for new geopolitical experiments.

Azerbaijan and Kazakhstan are distinguished by the relatively high popularity of the current government and weak opposition, moreover, both countries have solid oil revenues that give the regime freedom of maneuver in mitigating the problem of "relative deprivation." In addition, as experience of anti-government demonstrations in Baku shows, the authorities can go on forcibly suppressing the "color revolution game." Meanwhile, we should take into account the steep drop in oil revenues in the last two years (Russians have a similar problem) that may lead to the necessity to revise the social contract between authorities and population. This, in turn, will lead to the fall of social standards, the slowdown of economic growth, the devaluation of the national currency and, as a consequence, just manifestations of people's anger.

A more impressive set of prerequisites for a "color revolution" can be found in Armenia: a poor country with relatively developed pluralism and experience of mass protests against election results. However, resumption of the conflict in Nagorno-Karabakh between this country and Azerbaijan may cause national mobilization and promote the achievement of domestic political consensus between the elites in the face of the threat of external aggression. This will help to slow down or even eliminate the growth of revolutionary sentiments in the society.

We can only note that the events of November 2013 – February 2014, like other “color revolutions,” helped to reveal a gap in political institutions of our country and showed that politics concerns not only professionals but all members of the society. In our opinion, this is the main lesson of the Revolution of Dignity, the significance of which is imperishable.

## **2. Lustration: Ukrainian Realities; International Experience**

There was a curious ritual in pre-Christian Rome: a man, involved in murder, incest or another crime, had to make a purgatorial sacrifice to the gods in the form of meat from a pig, sheep and bull according to the laws of that time. It was considered that, in such a way, a criminal got rid of moral filth. This ritual became known as *lustratio*, translated as “purgation by means of sacrifice.”<sup>12</sup>

“Velvet revolutions” at the end of the 1980s in Central and Eastern Europe revived the interest in this forgotten practice. However, the term “lustration” became a system of measures used at transition to democratic governance and directed to exposing politically unreliable persons who had sullied themselves in cooperation with the criminal (and, first and foremost, communist) regime. In some countries, lustration was carried out comparatively gently (for instance, Bulgaria and Slovakia), in some countries, like Russia and Ukraine, it was not carried out at all, and, in some countries it was carried with a significant delay like the Polish lustration which only started in 1999. But the long and short of it is that all countries which passed through lustration tended to break with their totalitarian past, i.e. to leave “the path of dependence” on it. This is done not only to punish persons guilty of crimes committed by the regime but to make a point of having a certain stage of development and to progress beyond it.

Some models of lustration have been successfully used in the international and legal practice. The first type (Germany, the Czech Republic and Macedonia) was represented by the existence of two lists: a list of positions “protected” from unreliable elements and a list of grounds for considering a person an unreliable element. Therefore, a president of the country (the first list) could not be a person who had served in the KGB (the second list). The second type of lustration (Poland, Lithuania and Estonia) also has two lists, but their meaning differs. In this case the holder or contender for a “protected” position is obliged to declare whether he falls within the criteria of unreliability (for example, whether he cooperated with of the secret services of the previous regime). Persons who make a false declaration are

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<sup>12</sup> Шевчук С. Європейські стандарти обмеження люстраційних заходів: правовий аспект // Вісник Академії правових наук України. 2006. No. 2. С. 32 [Stanislav Shevchuk, *European Standards of Restriction of Lustration Measures: Legal Aspect*, 2 Bulletin of the Academy of Legal Sciences of Ukraine 32, 32 (2006)].

prohibited from “protected” positions. For instance, the Polish Minister of Finance, Zita Gilevskaya, lost her position because she concealed her cooperation with PRP state security bodies. Finally, lustration of the third type (Hungary) means exposure of unreliable citizens, making and publishing lists of them without any legal consequences for them.<sup>13</sup>

Lustration manifested itself in the Resolution of the Parliamentary Assembly of the Council of Europe 1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems. The resolution emphasizes that lustration measures “can be compatible with a democratic state under the rule of law if several criteria are met” (para. 12). These criteria are as follows: guilt (personal and not collective) must be proved in each individual case; the right to protection must be guaranteed as with the presumption of innocence and the right to a judicial review of the decision; various functions and objectives of lustration, namely, the protection of newly established democracy, and the criminal law, that is, the punishment of guilty people, should be supervised; also, lustration should have a tight time limit, both in the application period and in the period for which the inspection is carried out. More detailed criteria are explained in the report annexed to the PACE Resolution 1096 (1996), which contains guidelines for ensuring that lustration laws and similar administrative measures meet the requirements of a democratic state based on the rule of law. These guidelines were adopted to formulate a policy aimed at eliminating the legacy of the communist period, which ended in 1991. The basic principles of these guidelines can be applied with the necessary changes to the legacy of the Yanukovich regime.

After tragic events on the Maidan square in 2013–2014, Ukraine applied the said mechanism. Two lustration laws were quickly adopted – the Law on Renewal of Trust in Judicial Power of 8 April 2014 (hereinafter the Law on Lustration of Judges), and the Law on Government Cleansing of 16 September 2014, which concerns other workers of state apparatus. Their “zest” was that they combined different grounds for lustration, i.e. working in senior state posts during the presidency of Viktor Yanukovich (“automatic lustration”), and obvious discrepancies between expenses and incomes of officials under review and their communist past. However, the results of these innovations turned out to be more than modest. According to data of the Ministry of Justice, in October 2016 about 40 judges were dismissed under the lustration procedure. Altogether 936 officials were dismissed. Several thousand officials had left their posts voluntarily before the inspections began. These officials will not have access to state positions until 2024.

It is estimated by the Ukrainian “Respublika” Institute – a non-governmental organization which controls fulfillment of lustration legislation – that circa 80% of

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<sup>13</sup> Бобринский Н. Международные стандарты в области люстрации: реальность или благопожелание? // Сравнительное конституционное обозрение. 2015. No. 6. С. 15 [Nikolay Bobrinsky, *International Standards in the Field of Lustration: Reality or Benevolence?*, 6 Comparative Constitutional Review 13, 15 (2015)].

dismissed officials lost their positions because they were in senior positions during the presidency of Yanukovich, circa 15% lost their jobs because of property lustration and only 5% were dismissed under decommunization criteria (due to work in the CPSU, Komsomol or KGB).<sup>14</sup> As you can see, the figures are rather modest. They are so modest that some activists avail themselves of the opportunity to speak about the “breakdown of lustration.”

It is also symbolic that, on 1 March 2016, the Higher Administrative Court of Ukraine considered impossible further punishment of judges who passed unlawful sentences on activists of Euromaidan. In the opinion of the representatives of the Higher Court, the Law on Lustration of Judges had a controversial formula, simultaneously stipulating one-year and three-year periods of limitation. The court preferred to limit the period of bringing to liability to one year.

The question is why? We will try to determine the main reasons.

Firstly, the Ukrainian Law on Lustration of Judges was adopted much later than in the majority of Ukraine’s European neighbors: 27 years had passed since the disintegration of the Soviet Union. Therefore, it is no wonder that party functionaries, who preserved their power in 1991 and held it up to the beginning of the 2000s, left the political scene in 2014. So, there were actually no candidates for decommunization (except Lenin monuments). The exceptions were those persons who, at the end of the 80s and beginning of the 90s, studied at the higher educational establishments of the KGB system or worked there in junior positions, for instance, a lustrated servant of the Main Department of Internal Affairs of Kyiv, Mykola Serhienko, who started his career in the KGB as plumber.

Secondly, the focus of civil society’s attention shifted to the annexation of the Crimea and then to combat operations, unleashed in summer 2014 at Donbas and continuing till the present moment. There is a persuasive version of events according to which Anti-Terrorist Operation was cunningly used by the powers that be in order “to pump over” to protest energy of Ukrainians from lustration and control over the regime of Petro Poroshenko to battle fields, from which many activists of Euromaidan were not fated to come back.

Thirdly, lustration did not occur due to the downfall of a communist dictatorship, but because of revolution in a country which was formally considered a democratic and law-governed one. Therefore, the new government had to prove that the old regime was actually an undemocratic one, and introduce a mainly artificial construction of “abuse of power” in order to justify lustration. This justification actually did not always seem persuasive, both in the eyes of the international community and in the eyes of the citizens. Especially when the position of international institutions is characterized by inconstancy.

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<sup>14</sup> Statistics taken from Лёзина Е. Украинская люстрация. Два года спустя // Вестник общественного мнения. 2016. No. 3–4. С. 175 [Evgenia Lyozina, *Ukrainian Lustration. Two Years Later*, 3–4 Bulletin of Public Opinion 170, 175 (2016)].

In the case of *Ždanoka v. Latvia*,<sup>15</sup> a decision was made by the European Court of Human Rights (ECHR) in 2004, the Court held that the applicant's rights had been violated since, though she was a member of CPSU during the disintegration of the Soviet Union, her removal from parliamentary elections on that basis was not justified since her actions did not threaten the constitutional order of Latvia after independence. However, two years later the Grand Chamber of the Court reviewed the primary decision with the opposite result: emphasis was placed on the concept of "democracy able to protect itself" and "the field of discretion" of states when establishing criteria of lustration. A judge from Slovenia Zupančič who voted against this decision gave the following explanation for the authorities' refusal to register candidature of Ždanoka:

The reason for this denial was that Mrs Ždanoka had a real chance of being elected. So much for democracy.<sup>16</sup>

Finally, it cannot be forgotten that certain counteraction comes from the state apparatus itself, which does not feel any guilt. This reproach may be especially addressed to representatives of the judiciary: from the Constitutional Court which was unable during four years to reach a final verdict on whether the Law on Lustration of Judges is constitutional or not, to district courts which reinstated persons, liable for lustration, to office.

When analyzing Ukrainian lustration, one cannot help but touch on the contradictory and rather inconsistent position taken by the Venice Commission in relation to the Ukrainian Law on Lustration of Judges, in its "Interim" (approved on 12–13 December 2014) and "Final" (adopted on 19 June 2015) Opinions. The Interim Opinion stressed that the fact of the adoption of the Law under the pressure of protesters, as well as numerous procedural violations committed during the voting thereon in Parliament, raised doubts about the legitimacy of that Law and its compliance with the rule of law principle (paras. 13 and 14 of the Interim Opinion). In addition, the Venice Commission made an important conclusion that lustration measures were not the most appropriate means of combating corruption, which the new Ukrainian government has traditionally qualified as *conditio sine qua non* of the "Revolution of Dignity" 2013–2014 (para. 34 of the Interim Opinion). Repeated criticism from the commission also suffered from a lack of implementation of the principle of individual guilt in the Ukrainian Law on Lustration of Judges. The Interim Opinion stressed that the lustration of officials in many positions was implemented automatically as a result of only finding of certain persons in the corresponding positions, without realizing

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<sup>15</sup> *Ždanoka v. Latvia*, Judgment, No. 58278/00, 17 June 2004.

<sup>16</sup> *Ždanoka v. Latvia*, Judgment, No. 58278/00, 16 March 2006, Summary of the dissenting opinion of Judge Zupančič.

their actual guilt in the crimes of the Yanukovych regime (para. 67). Moreover, in the Interim Opinion, the commission noted that the responsibility for the lustration procedure should be removed from the Ministry of Justice and assigned to a specially created independent commission, with the active participation of civil society.

However, in its Final Opinion, the Venice Commission was no longer so categorical. In particular, it initially came to the conclusion that the 10-year period foreseen in the Law on Lustration of Judges was at odds with the requirement of the 1996 Guidelines on Lustration, in accordance with which (para. "g")

disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated.

However, referring to the position of the Constitutional Court of the Czech Republic that "the determination of the degree of development of democracy in a particular state is a social and political question, not a constitutional law question," the Venice Commission decided that, in Ukraine, some margin of appreciation should be left to the national authorities to determine the period for which lustration was required (para. 74 of the Final Opinion).

Furthermore, the Final Opinion was that the Ukrainian authorities argued that the five-year period of exclusion was not sufficient for some of the categories of lustrated positions because it corresponded with the usual length of a political term (parliamentary elections take place in five-year cycles). The period of exclusion could therefore end at the moment when the next parliamentary elections would be held, bringing about the risk of a political change. In the opinion of the Venice Commission, this argument was plausible. It was also noted that several of the countries of Central and Eastern Europe which resorted to lustration have opted for a period of disqualification longer than five years. This development suggested that the ten-year period of disqualification foreseen in the Law on Government Cleansing should not *per se* be seen as unreasonable and disproportionate (para. 76 of the Final Opinion).

Therefore, fulfillment of lustration in Ukraine is characterized by inconsistency and the absence of genuine political will, which also may be said of other reforms which have been expected from the new powers by the Ukrainian people for three years. At present, it is necessary to concentrate not only on fulfillment of full-scale lustration but on effective investigation of numerous new abuses. Otherwise, all this looks like modern populism.

From the legal point of view, populism (from the Latin *populus* – the people) is not of interest. Populism, *per se*, to a greater extent, is the domain of political scientists and political analysts. It is interesting how populism is significant for the constitutional and legal sphere. After all, populism, as Valery Zorkin aptly noted, is merely the manipulation of mass consciousness, using a completely natural human desire for well-being. More specifically, this manipulation, which is based on the

promise of a simple solution to complex problems, is addressed to the ordinary person. Populism intensifies at critical moments in history when active elites and existing political and legal institutions cannot cope with new challenges and are not able to solve problems facing people.<sup>17</sup>

Modern populism is represented by at least two varieties: right-wing populism (in the USA and EU countries) and left-wing populism (mainly in the countries of Southern Europe and Latin America) that of course does not mean that in traditionally "left" Latin America there are no right-wing populists, and in "right" America no group such as the New York Trotskyists. However, the dominant type of populist consciousness in the capitalist world is still the market one, not the statist type, while, in Latin America, the situation is different.

According to market populism, it is necessary to return to the state of the "night watchman" (*laissez-faire*) or the "invisible hand of the market." The main idea of this kind of populism is the following: ensuring social and economic rights as they are currently understood means, in fact, to produce loafers; it reproaches the Obama administration for its insufficient attention to small and medium-sized business. It is important that the right-wing populist believes that the federal government should spend less money to help foreign countries and help only those ones that regularly support America in the international arena (isolationism). In some ways, the bearers of this ideology are undoubtedly right.

This ideology is considered populist because it offers not some impeccably designed plan of political and economic transformations but tends to solve all problems with the help of very simple, apparently obvious, but at the same time radical, decisions (like Donald Trump's promise to "build a wall at the border with Mexico"). However, later, during the very process of public administration, it turns out that real problems, as a rule, do not concern proposed radical solutions, primarily because of their complexity, lack of the necessary tools, including legal tools. As German researcher Frank Decker remarked ironically,

as a rule, solutions to problems proposed by populists do not deserve to be called solutions.<sup>18</sup>

And then a dilemma arises before a populist politician: either to turn into a cheap demagogue, disguising his inability to cope with emerging problems with formidable

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<sup>17</sup> Зорькин В.Д. Конституционная идентичность России: доктрина и практика // Журнал конституционного правосудия. 2017. No. 4. С. 3 [Valery D. Zorkin, *The Constitutional Identity of Russia: Doctrine and Practice*, 4 *Journal of Constitutional Justice* 1, 3 (2017)].

<sup>18</sup> Декер Ф. Популизм как вызов либеральным демократиям // Актуальные проблемы Европы. Правый радикализм в современной Европе: Сборник научных трудов [Frank Decker, *Populism as a Challenge to Liberal Democracies in Actual Problems of Europe. Right Radicalism in Modern Europe: A Collection of Scientific Works*] 56, 67 (S.V. Pogorelskaya (ed.), Moscow: INION, 2004).

words, or take a more moderate path by means of becoming an average European centrist politician, who causes the voter disappointment.<sup>19</sup> Left populism, on the contrary, stipulates another extreme, calling for open revolutionary action for the sake of the “common good,” fairer, as its ideologues believe, redistribution of national wealth for the benefit of the poor, limitation of the power of private monopolies (here they are in complete solidarity with right-wing populists) and so on. Let us dwell on these two types in more detail, paying special attention to the question of what their consequences for constitutional construction are.

It should be mentioned that, in the United States, the term “populism” first appeared in the 1890s as a result of a broad people’s movement to create a third major political party, i.e. the Populist Party. Despite the fact that the populist movement lasted less than 10 years and that, by the end of the 19<sup>th</sup> century, the party had disintegrated, the importance of tasks, set by the movement, led to the stability of populist ideas and sentiments in the American public’s consciousness. As American historian J. Hicks noted,

the party itself did not survive, nor did many of its leaders, but Populist doctrines showed an amazing vitality.<sup>20</sup>

Subsequently, right-wing extremists, in fact, the same populists, only desperate and embittered, addressed the populist slogans and programmatic attitudes of American populists. The Ku Klux Klan, popular in the 1930s, preacher Charles Coughlin and Louisiana governor Huey Long (about whom Franklin D. Roosevelt said his legendary phrase “a plague on your two houses”), an ardent supporter of segregation, governor of Alabama George Wallace and the “hawk” senator Barry Goldwater prepared a solid ground for the rooting of certain values and attitudes in certain social strata of American society.<sup>21</sup> Donald Trump also had his forerunner – scandalous millionaire Ross Perot, who ran in the U.S. presidential election in 1992 as an independent candidate and scored a record 19% of the vote.<sup>22</sup>

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<sup>19</sup> Eric A. Posner, *Can It Happen Here?: Donald Trump and the Paradox of Populist Government*, University of Chicago Public Law & Legal Theory Paper Series No. 605 (2017) (Oct. 2, 2018), also available at [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2056&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2056&context=public_law_and_legal_theory).

<sup>20</sup> Новинская М.И. Что такое популизм? (популистская традиция в США) // Рабочий класс и современный мир. 1990. No. 2. С. 138 [Maya I. Novinskaya, *What is Populism? (Populist Tradition in the USA)*, 2 Working Class and the Modern World 138, 138 (1990)].

<sup>21</sup> Борисюк В.И. Правый экстремизм и партийно-политическая система // Политические партии США в новейшее время [Viktor I. Borisjuk, *Right-Wing Extremism and the Party-Political System in Political Parties of the USA in Contemporary History*] 246 (N.V. Sivacheva (ed.), Moscow: MSU Publishing House, 1982).

<sup>22</sup> Антонова Л.А. Итоги съездов двух партий // США: экономика, политика, идеология. 1992. No. 10. С. 60–62 [Lyudmila A. Antonova, *The Results of the Congresses of Two Parties*, 10 USA: Economy, Politics, Ideology 56, 60–62 (1992)].

It would be a serious mistake to equate populists with radical rebels, grouped in the 2016 elections around one of the candidates from the Democratic Party, i.e. Bernie Sanders. On the contrary, the populist, especially in the United States, often returns to the “old order.” For this reason, Trump’s pre-election rhetoric has always had a response from a part of the population that is nostalgic for former times.

To ensure that the promises of the current authorities in Ukraine do not resemble populism, concrete actions should be undertaken thereby as soon as possible.

Concerning lustration, we need not forget that it, together with hybrid courts, commissions on establishment of truth and other non-typical mechanisms of institutional transformation of the law enforcement function of the state, is an element of “transitional justice” or justice of the transitional period. This concept is used under fulfillment of transition from non-democratic governance and/or one burdened with war, to democratic governance and/or a state of peace. Therefore, it is not a coincidence that many elements of transitional justice, for example, courts with participation of foreigners (hybrid courts) are almost impossible in established, stable democracies, since they challenge normal legal regulation, breaking the principles of state sovereignty and non-discrimination, create a threat to the preservation of “institutional memory” in the state mechanism, etc. But during regime transformations in “partial democracies” (according to the terminology of Freedom House), to which Ukraine also belongs, they are an effective tool for introducing the principle of the supremacy of the law and the inevitability of further democratic development.

In this respect, vetting is not an exception. It is a system of measures, applied under political transformation and aimed at exposing persons who are not loyal to the new democracy, and also at limitation of access to public positions for such persons. It is necessary to emphasize that it is not a question of punishment of willful criminals who cooperated with the former regime (if there is a proof of crimes committed by them, measures of judicial, in particular criminal, responsibility should be applied), but disqualification of certain categories of state official only owing to the fact of their being in top-echelon government positions – as a rule, it is that power which was overthrown in the result of social revolution (“Velvet Revolution,” “Euromaidan,” “Rose Revolution,” etc.). In the language of law, it is named “presumption of complicity of the organization’s worker in serious human rights abuses committed by it.” In other words, it is a question of almost exceptional political responsibility of officials of the state apparatus. This circumstance, without an understanding of which it is impossible to adequately assess the Law on Government Cleansing, should be emphasized because almost all constitutional submissions to the Constitutional Court stated that, due to lustration, a great number of people were put outside the law only because of their official position and without evidence of guilt in specific crimes. This is the very essence of lustration as an extraordinary institution of transitional justice.

Lustration may be compared with revolution: undesirable and unnecessary under the conditions of real democracy, qualified as a *coup d’état* with all known criminal

and legal consequences; revolution under the conditions of hybrid regimes may play a big positive role, open “the window of opportunities” for new social strata, improve the rating of the country in the world index of democratic development, etc.

As it is emphasized in the methodological guide of the U.N. Office of the High Commissioner for Human Rights that “[c]ontrol is the basis for practical activity,” under post conflict and post authoritarian conditions, lustration may fill “a lacuna of impunity” – inability of the state to punish all criminals due to a lack of resources and legal limitations. In other words, this institute is a forced substitution of criminal prosecution, “a partial measure of non-criminal responsibility” which makes a “punitive treatment.”<sup>23</sup> Therefore, it is notable that a range of outstanding politicians, humanists, contemporary human rights activists, including Vaclav Havel and Nelson Mandela, were categorical opponents to lustration, considering that all of us were responsible for what had happened.

It is significant that the main opponent of lustration is the International Labour Organization (ILO). It considers lustration prohibitions as illegal discrimination. Its position means that limitations of a general character, not connected with the peculiarities of a specific profession, contradict ILO Convention No. 111. The committee of experts of the ILO refuted the concept on which lustration prohibition is based: the more a man is associated with a past repressive regime, the less he deserves to work in a new democratic government.<sup>24</sup>

It should be taken into account (and we are convinced of this after studying international standards of limitation of lustration measures referred to in the PACE Resolution 1096 (1996) and the practice of constitutional courts of foreign states) that, in the contemporary world there are no single judicially obligatory standards acknowledged by the international community for conducting lustration. This is first and foremost connected with the diverse historical paths walked by countries before the introduction of lustration measures, the degree of cruelty of the political regime overthrown by revolutionary events (for example, it is difficult to compare the dictatorship of Ceausescu in Romania with the “gangster capitalism” of Yanukovych in Ukraine), legal traditions and mentality as a whole, reigning in this or that society. But separate attempts to create such standards have already been fulfilled by Professor Herman Schwartz in 1994 in his famous article “Lustration in Eastern Europe,” some provisions from which were later used as a basis of the aforementioned PACE Recommendation.

The professor pointed out the following: 1) lustration of a definite circle of persons who earlier fulfilled management activity should be fulfilled exclusively on the basis

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<sup>23</sup> Инструменты обеспечения господства права в постконфликтных государствах: Проверка: основа для практической деятельности / Управление верховного комиссара организации объединенных наций по правам человека. 2006 [U.N. Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework (2006)] (Oct. 2, 2018), available at <http://www.ohchr.org/Documents/Publications/RuleoflawVettingru.pdf>.

<sup>24</sup> Bobrinsky 2015, at 20.

of law, corresponding with the national constitution and other laws but, in any case, not on the bases of administrative and other customs; 2) the lustration process should be managed by a specially created commission which consists of distinguished citizens who are proposed by the head of the state and approved by the parliament; 3) lustration may be applied only for elimination or considerable reduction of danger to which the subjects of lustration give rise as a result of usage of their position for further human rights abuses or to stop the process of democratization; 4) lustration may not be used for punishment or revenge; 5) a risk that persons liable to lustration may be blackmailed by this procedure cannot be considered a sufficient argument against lustration; 6) lustration should be aimed only at substitution of such positions in respect of which there are grounds for believing that a person may use them for the purpose of creating considerable threats to human rights or democracy, that is those positions in the bodies of state power through which state policy is developed and implemented, national security is provided, or positions in law-enforcement bodies, the security service, intelligence service, judicial power and the public procurator's office, which may be used for human rights abuses; 7) lustration cannot be applied to elective offices, since voters are entitled to vote at their discretion; 8) lustration cannot be applied to private sector or semi-private companies, establishments or organizations; 9) the process of lustration should be finished by 31 December 1996; 10) only those persons who were organizers, executors or accomplices in relation to serious human rights abuses may be deprived of the right to take certain positions; 11) nobody is liable for lustration purely by virtue of membership of an organization, or activity in favor of any organization which was considered to be lawful during the existence of such organization or fulfillment of such activity, or regarding personal views or beliefs; 12) lustration should not be applied to persons who were under 18 years of age at the moment of perpetration of the relevant actions; 13) in any case, a person should not be liable for lustration without provision of all guarantees of proper legal procedure, including the right to protection, the right to be familiarized with materials of the case and all evidence related thereto, the right to provide personal evidence, the right to open a trial if it is demanded by the subject of the accusation, the right to appeal to an independent judicial body, etc.<sup>25</sup> "The Schindler factor" should also be mentioned, i.e. lustration will not concern persons who purposely tried to mislead the security services by means of imitation of cooperation.<sup>26</sup>

Actually, this is, without exaggeration, more or less an inherently non-contradictory concept which can be considered to be a peculiar "catechism" of lustration standards, which has an exclusively advisory nature and is related to "soft" inter-

<sup>25</sup> Herman Schwartz, *Lustration in Eastern Europe in Transitional Justice. Vol. 1: General Considerations* 461, 476–482 (N.J. Kritz (ed.), Washington, D.C.: United States Institute of Peace Press).

<sup>26</sup> Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, University of Chicago Public Law & Legal Theory Working Paper No. 40 (2003), at 43 (Oct. 2, 2018), also available at [https://chicagounbound.uchicago.edu/public\\_law\\_and\\_legal\\_theory/356/](https://chicagounbound.uchicago.edu/public_law_and_legal_theory/356/).

national law. In all other cases, attempts to elaborate the said standards without consideration of national context never led to success. Even the practice of the ECHR in this respect is not consistent. In the case of *Ādamsons v. Latvia*,<sup>27</sup> the Court stated that a disproportionate limitation of the right to free elections on the ground that a social group (former officials of the KGB) limited in passive elective law is “characterized by signs that are too general” and, consequently, “any limitation on voting rights for its members have to be based on an individual approach which allows mention of their actual behavior.” At the same time, in the case *Ždanoka v. Latvia*, where the point was about removal from elections of the former CPSU member Ždanoka, the Court acknowledged prohibition on the basis of membership of a political organization (the Communist party) in order to be consistent with the European Convention. It was pointed out in the judgment that

While such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.<sup>28</sup>

The issue of lustration criteria always arises for the new power carrying out lustration measures. Here are some possible approaches: either there is a set of formal criteria for prohibition referred to in legislation, for instance, membership of the governing party or the taking of certain positions during a clearly defined period of time, which, in turn, is an objective and easily proved fact and, therefore, the guilt of a lustrated person is not taken into account, as it was done in our country, or a more complicated attempt is made as to individual assessment of the degree of the official's involvement in the illegal practices of the former power and the motivation for such involvement. Bosnia and Herzegovina chose the latter way. However, in this case it is necessary to take into account, first of all, the limited state apparatus of this country since the entire population of Bosnia comprises less than 4 million people, secondly, lustration in this country was first and foremost directed at persons who committed war crimes during the 1991–1995 war in Yugoslavia, which can be more easily proved than corruption actions, professional incompetence, etc.

So, in the contemporary world, lustration is either excluded altogether due to being a discriminatory practice (ILO) or qualified as an instrument of assessment of a person's acceptability for state service on the basis of their personal characteristics, first and foremost, competence and honesty (U.N.), or it is understood as a way of

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<sup>27</sup> *Ādamsons v. Latvia*, Judgment, No. 3669/03, 24 June 2008.

<sup>28</sup> *Ždanoka v. Latvia*, *supra* note 16, para. 133.

overcoming a totalitarian past and protecting democratic order from its recurrence (European countries).

Now something should be said about specific provisions of the Law on Government Cleansing, which are challenged by applicants under the procedure of constitutional judicial procedure.

First of all, according to constitutional submissions, the model itself of conducting lustration, stipulated by the said law, is criticized. Three types of lustration have been applied around the world. The first type (Czech Republic, Germany, Lithuania in respect of former KGB officers, Latvia, Bosnia, Macedonia and Ukraine) stipulates the use of two lists, one of which includes positions and professions “protected” from disloyal elements (Art. 2 of the Law on Government Cleansing), and one containing grounds for considering persons to be such disloyal elements (Art. 3 of the mentioned Law). The second type (Poland, Lithuania and Estonia) stipulates the existence of two lists, but their content is a little different. In this case a contender for a “protected” position is obliged to disclose whether they are covered by the disloyalty criteria (for example, whether they cooperated with intelligence services of the former regime). For a false declaration there is liability which is characterized by a prohibition on taking “protected” positions. Finally, the third type of lustration (Hungary, Lithuania, Estonia and Slovakia) is aimed at exposing disloyal citizens, and making and publishing lists thereof without any consequences for them at all. Therefore, in the first case, lustration is a prohibition on certain persons taking certain positions, in the second case, obligatory declaration of personal data under threat of responsibility for false declaration, in the third case, official establishment and publication of facts about specific persons. The choice of this or that model of lustration *per se* relates to the exclusive competence of the legislator and is a question of political expedience, which, in its turn, is determined by a range of political, historical, social, economic, cultural and other factors, which one cannot influence by means of constitutional control.

Moreover, the constitutionality of part 4 of Article 3 of the Law on Government Cleansing relating to functionaries of the Soviet regime is disputed with regard to constitutional submissions. That is why the ambiguity of these provisions should be mentioned. On the one hand, it is recommended in the international documents to hold lustration measures during the first five years from the moment of overthrow of the communist regime but, on the other hand, an appropriate norm has appeared in Ukrainian legislation 23 years after the moment of proclamation of independence. Moreover, the Venice Commission noted that

persuasive reasons of justification for lustration in respect of persons who were connected with communist regime have to be given.

In its Final Opinion concerning the Law on Government Cleansing of 19 June 2015, the Commission made a reference to the decision of the ECHR in the case of *Ādamsons v. Latvia* and reiterated that

the measures of lustration are, by their nature, temporary and the objective necessity for the restriction of individual rights resulting from this procedure decreases over time... the need to use lustration measures with respect to the representatives of this regime, almost 25 years after its fall, seem controversial.

And further:

It might well be that some of the representatives of the communist regime still constitute a threat to the democratic regime in Ukraine. Yet, this should not be presumed based simply on the position they held prior to 1991. Their behaviour and activities in the period posterior to that date should be taken into account as well.<sup>29</sup>

It is also necessary to take into account the legal position of the ECHR, stipulated in the *Ždanoka v. Latvia* case, which reads

the fact that the impugned statutory measure was not introduced by Parliament immediately after the restoration of Latvian independence does not appear in this case to be crucial, any more than it was in... It is not surprising that a newly established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements.<sup>30</sup>

We consider that the argument *mutatis mutandis* may be used by the national Constitutional Court if it is concluded that the disputed provision is constitutional. Moreover, in this judgment, the Court emphasized that

the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order. Those authorities should therefore be left sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions...<sup>31</sup>

In its turn, the national authorities of Ukraine more than once demonstrated a negative attitude to the Soviet past, trying to remove it from the contemporary

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<sup>29</sup> European Commission for Democracy Through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, Opinion No. 788/2014, CDL-AD(2015)012, Venice, 19 June 2015, para. 70 (Oct. 2, 2018), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2015\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2015)012-e).

<sup>30</sup> *Ždanoka v. Latvia*, *supra* note 16, para. 131.

<sup>31</sup> *Id.* para. 134.

political context. This is attested to particularly by adoption of the Law of Ukraine on Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of their Symbols, and also prohibition of the Communist Party of Ukraine by the Kyiv District Administrative Court, to which the state is entitled, regarding the concept of “armed democracy” (see judgment of the ECHR on the *Refah Partisi (the Welfare Party) and Others v. Turkey* case<sup>32</sup>). From this point of view, a prohibition on former officials of the Soviet regime taking up positions in today’s Ukraine seems quite natural.

Doubts were also raised by applicants as to the constitutionality of part 3 of Article 1 of the Law on Government Cleansing, according to which, during 10 years from the day of entry into force of this Law, positions which are lustrated cannot be taken up by officials from the communist epoch or persons from the Yanukovych regime, who took high office during the Maidan events, and persons found guilty of corruption.

It is obvious that the 10-year period stipulated in the disputed Law contradicts the requirements of the PACE Resolution 1096 (1996), since

Disqualification for office based on lustration should not be longer than five years, since the capacity for positive change in an individual’s attitude and habits should not be underestimated.

At the same time, in 2001 the Constitutional Court of the Czech Republic pointed out that

the determination of the degree of democracy’s development in a specific country is a social and political question, but not a constitutional one.

Since the countries of Central and Eastern Europe underwent development in different ways and at different speeds after the 1990s, and the risk of a renewal of a totalitarian/authoritarian regime is more real in some of them, including Ukraine, then, in compliance with the opinion of Venice Commission (para. 74 of the Final Opinion of 19 June 2015),

some margin of appreciation shall be left to the national authorities to determine the period for which lustration is required.

From this perspective, a 10-year period of disqualification may be considered quite constitutional, taking into account contemporary Ukrainian realities.

As we can see, during a constitutionality review of the Law on Government Cleansing, the Constitutional Court of Ukraine will have to choose one of two

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<sup>32</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey*, Judgment, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

mutually exclusive alternatives, both of which are constitutional and may be easily strengthened by the same convincing arguments. Therefore, when the body of Constitutional jurisdiction makes a final decision in this case, the personal professional position of every judge, their legal and, to some extent, political beliefs, and personal understanding of events in Ukraine which occurred over the last three years will have a decisive impact as never before.

### 3. Politicization of the Judiciary

The term “political justice,” applied to one of the obvious tendencies of development of the judiciary in different historical periods of its existence, including constitutional justice, has been used in academic discourse for a relatively long time. Suffice to recall the work, which appeared in 1961 and became a classic, of Professor Otto Kirchheimer from Columbia University.<sup>33</sup> At approximately the same time, separate aspects of the said phenomenon were considered by Hanna Arendt, covering the trial, in Israel, of SS-Obersturmbannführer Adolf Eichmann, who was responsible for the “final solution to the Jewish question.”<sup>34</sup> In these very works, there was first formulated a general definition of political justice as usage of judicial procedure for achievement of political goals. Considering the question in this way, the following trials were qualified as political ones: the trial of Socrates, the judicial proceedings against the royalists during the French Revolution, the trials of communists conducted in the Weimar Republic and, later, in Nazi Germany, including the process of arson of the Reichstag, the 1936–1938 Moscow Trials, etc.

Then came several other major works, written mainly with regard to Nazi Germany and Stalin’s Russia,<sup>35</sup> after that the concept of “political justice” was firmly entrenched in global legal science, being today universally recognized by any expert in the field of judicial law and no longer requiring any special justification. There are conferences and round table discussions held on this topic; books and articles are being written,<sup>36</sup> but these are a matter of research of the meaning and content of the phenomenon, its limits and consequences, but not about the need to prove the existence of the phenomenon as such.

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<sup>33</sup> Otto Kirchheimer, *Political Justice* 454 (Princeton, N.J.: Princeton University Press, 1961).

<sup>34</sup> Арендт Х. Банальность зла [Hanna Arendt, *The Banality of Evil*] 328 (Moscow: Znanie, 2008).

<sup>35</sup> Hannsjoachim W. Koch, *In the Name of the Volk: Political Justice in Hitler’s Germany* 326 (London: Tauris, 1989); Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* 350 (D.L. Schneider (trans.), Cambridge: Harvard University Press, 1991).

<sup>36</sup> Klaus Bachmann et al., *When Justice Meets Politics: Independence and Autonomy of Ad Hoc International Criminal Tribunals* 404 (Frankfurt am Main: Peter Lang, 2013); Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* 197 (New York; Cambridge: Cambridge University Press, 2012); Загреддинов В. Конституционное орудие политической борьбы // Сравнительное конституционное обозрение. 2015. No. 5. С. 104–119 [Vasily Zagretdinov, *The Constitutional Instrument of Political Struggle*, 5 Comparative Constitutional Review 104 (2015)].

It seems that, in a few years, the concept of political justice will be as universally recognized in Ukraine, as in the West, and may even be considered banal. In this regard, it is enough to name two doctrinal articles of judges of the Constitutional Court of Ukraine, who analyze the influence of the political process on fulfillment of constitutional legal proceedings in our country.<sup>37</sup>

It is easy to notice that the term of “political justice” consists of two words. But if everything is more or less clear as regards “justice,” then the best minds of mankind have been working over the definition of politics for more than one century.

We take, for a starting point, the classical definition given by Max Weber, who calls us to understand politics as “only leadership or influence on leadership by a political union, that is, in our time, by the state,” and then defines the state itself as “the human community, which, within a certain sphere, (successfully) claims to monopolize legitimate physical violence,” and finally concludes that politics is therefore

the desire to participate in power or influence on the distribution of power... inside the state between groups of people that are a part of it.<sup>38</sup>

Thus, the main content of politics, the core of political activity, is the question of the conquest, retention and use of state power. It is obvious that a dialectical contradiction arises implicitly between politics in this sense and judicial power: on the one hand, the judicial power is integrated into the state mechanism and is an element of state activity and, on the other hand, its main purpose is precisely restriction of prerogatives of political branches of power, in other words, restriction of state arbitrariness.

Therefore, it is not a coincidence that a substantial part of Western literature does not consider judicial and political action as interconnected at all; they are described as separate ideal types: judicial action is defined as “normatively loaded,” while political activity is “guided by interest”; judges are supposed to argue, while politicians bargain; court decisions are made by voting, while political decisions are based on the “majority principle.”<sup>39</sup>

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<sup>37</sup> *Сліденко І. Політизація конституційних судів: причини та наслідки // Вісник Конституційного Суду України. 2016. № 6. С. 211–213 [Igor Slidenko, *Politicization of Constitutional Courts: Causes and Consequences*, 6 Bulletin of the Constitutional Court of Ukraine 211 (2016)].*

<sup>38</sup> *Григорьев И.С. Внутрисудебные институты как инструмент адаптации конституционного суда в процессе консолидации политического режима (на примере КС РФ): Дис. ... канд. полит. наук [Ivan S. Grigoryev, *In-Court Institutions as an Instrument of Adaptation of the Constitutional Court in the Process of Consolidation of a Political Regime (Using the Example of the RF Constitutional Court): Thesis for a Candidate Degree in Political Sciences*] 26 (Moscow: National Research University Higher School of Economics, 2017).*

<sup>39</sup> *Хованская А. Политическая юриспруденция: постклассический анализ судебных решений и идея легитимности // Сравнительное конституционное обозрение. 2010. № 1. С. 15 [Anna Khovanskaya, *Political Jurisprudence: Postclassical Analysis of Judicial Decisions and the Idea of Legitimacy*, 1 Comparative Constitutional Review 5, 15 (2010)].*

When trying to discover a scientific analysis of the concept of “political justice,” for example, in the newest U.S. literature (a kind of symbol of modern constitutionalism), a programmatic article, written by Professor Eric A. Posner of University of Chicago, immediately catches the eye.<sup>40</sup>

Posner defines political justice as an organization of judicial power in which the guilt of the subject and, as a consequence, the questions of their acquittal or conviction, are put in direct dependence on the political views and former political activity of the accused. In a traditional political process, a person is brought to responsibility (either explicitly or implicitly) because of their political beliefs that threaten the state or the government and the following measures are applied in respect of them: extremely broadly formulated law or law that is applied in exceptional cases or is applied severely, or provides a disproportionately severe punishment.<sup>41</sup>

It is symptomatic that elements of politicization of justice are seen even at the international level. The same Posner, whom it is difficult to accuse of sympathy for non-liberal models of rule, nevertheless directly considers the activity of the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY) to be a political one, since

the defendants were brought to responsibility because they were also political and ideological enemies of Western democracies.<sup>42</sup>

On the other hand, because of political considerations, subjects of international law can distance themselves from the institutions of international justice, as happened with the USA, which first joined and then withdrew its signature from the Rome Statute of the International Criminal Court, or with Ukraine, which also did not ratify the Rome Statute even in spite of the war in the Donbass.

In the most concentrated form, politics manifested itself in the activities of the ICTY. The matter is not about the trial of Serbian leader Slobodan Milošević, who seems to have really stood at the roots of those monstrous atrocities of which he was accused, and not even about the *Gotovina/Markač* case<sup>43</sup>, which ended in complete justification for Croatian generals with whom the USA sympathized. Above all, the matter is about the attempts of the Prosecutor of the Tribunal, Carla Del Ponte, to initiate, in 1999, a lawsuit in connection with the bombing of Belgrade by NATO air forces, during which a significant number of civilian infrastructure objects were damaged and about 2,000 people died. Here is what she wrote about this in her memoirs:

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<sup>40</sup> Eric A. Posner, *Political Trials in Domestic and International Law*, 55 *Duke Law Journal* 75 (2005).

<sup>41</sup> *Id.* at 76.

<sup>42</sup> *Id.* at 77.

<sup>43</sup> *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 2012.

No one in NATO prevented me from investigating bombing or accusations. But I realized quickly that it was impossible to conduct such an investigation: neither NATO nor the member states of this organization were willing to cooperate with us. We were denied access to documents. In addition, I found out that I had reached the boundaries of the political universe in which the tribunal was allowed to operate. If I went further in investigating NATO's actions, I would not only fail, but would also make it impossible for my service to continue investigating crimes committed during the wars of the 90s.<sup>44</sup>

Most often, political motives for judicial activity appear in three procedural forms: 1) in international justice; 2) in the case of transition from authoritarian to democratic rule and vice versa; and 3) in the case of intensification of the undemocratic regime, which becomes clearly repressive in nature. Technically, political justice is characterized by: a) the possibility for executive power to influence the process; b) the presence of a judicial body educated in the spirit of obedience; c) the administration of justice, most often in the face of genuine or perceived threat to the state system; and d) the possibility of judges in some cases that do not represent a significant interest for the authorities, to maintain a high degree of independence (for example, in Brazil in the era of the military dictatorship of 1964–1985, the death penalty was not applied at all, and the terms of imprisonment for political opponents of the regime were not excessively large).<sup>45</sup>

Another constituent feature of political justice is the selectivity of judicial repression, which initially manifests itself at the level of bringing to legal, most often criminal, responsibility for those actions that were either not previously punishable or were illegal but at the same time extremely popular practices, and then, at the trial stage, in the absence of genuine equality between the prosecution and the defense. Thus, during the period of the Weimar Republic, right-wing extremist criminals (including Nazis), who committed politically motivated murders like the killings of Clara Zetkin and Karl Liebknecht, often received minor punishments, while the Communists, who broke the law, were, for the most part, persecuted with ruthless cruelty.<sup>46</sup>

According to the judgment of the European Court of Human Rights of 23 February 2016 in the *Navalny and Ofitserov v. Russia* case,

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<sup>44</sup> Дель Понте К. Охота: я и военные преступники [Carla Del Ponte, *The Hunt: Me and the War Criminals*] 106 (Moscow: Eksmo, 2008).

<sup>45</sup> Соломон-мл. П. Суды и судьи при авторитарных режимах // Сравнительное конституционное обозрение. 2008. No. 3. С. 161 [Peter Solomon, Jr., *Courts and Judges Under Authoritarian Regimes*, 3 *Comparative Constitutional Review* 156, 161 (2008)].

<sup>46</sup> Меллер Х. Веймарская республика: опыт одной незавершенной демократии [Horst Möller, *Weimar Republic: The Experience of One Unfinished Democracy*] 150 (Moscow: ROSSPEN, 2010).

The foregoing findings demonstrate that the domestic courts have failed, by a long margin, to ensure a fair hearing in the applicants' criminal case, and may be taken as suggesting that they did not even care about appearances. It is noteworthy that the courts dismissed without examination the applicants' allegations of political persecution which were at least arguable.<sup>47</sup>

Furthermore:

It is obvious for the Court, as it must also have been for the domestic courts, that there had been a link between the first applicant's public activities and the Investigative Committee's decision to press charges against him. It was therefore the duty of the domestic courts to scrutinise his allegations of political pressure and to decide whether, despite that link, there had been a genuine cause for bringing him to justice. The same goes for the second applicant who had an arguable claim that he was only targeted as a vehicle for also bringing the first applicant into the orbit of the criminal case, a reason equally unrelated to the true purposes of a criminal prosecution. Having omitted to address these allegations the courts have themselves heightened the concerns that the real reason for the applicants' prosecution and conviction was a political one.<sup>48</sup>

Moreover, according to expert estimates, in 2014 there were 210 criminal prosecutions in Russia that contained a political motive; in 2015 there were 269.<sup>49</sup> The selectivity of justice in the system of political justice always goes hand in hand with the accusatory bias phenomenon, which first of all manifests itself in an insignificant percentage of acquittals. And the last pathology is inherent in Ukrainian Themis. Let us compare the number of acquittals in Nazi Germany, the true symbol of lawlessness, in respect of political criminals whom the Nazi judges were against from the very beginning, and in whose conviction the state power had a direct and immediate interest, with statistics of acquittals in independent Ukraine.

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<sup>47</sup> *Navalny and Ofitserov v. Russia*, Judgment, Nos. 46632/13 and 28671/14, 23 February 2016, para. 116.

<sup>48</sup> *Id.* para. 119.

<sup>49</sup> Панеях Э. Суды и правоохранительные органы: репрессивное правоприменение // Политическое развитие России. 2014–2016: Институты и практики авторитарной консолидации [Ella Paneyakh, *Courts and Law Enforcement Agencies: Repressive Enforcement in Political Development of Russia. 2014–2016: Institutions and Practices of Authoritarian Consolidation*] 154, 166 (K. Rogov (ed.), Moscow: Foundation "Liberalnaya missiya," 2016).

Table 1: The Number of Acquittals by the People's Trial Chamber, 1937–1944<sup>50</sup>

Year	Number of Accused	Number of Acquittals, %
1937	618	8.4
1938	614	8.79
1939	470	8.5
1940	1,091	7.33
1941	1,237	5.6
1942	2,572	4.16
1943	3,338	5.42
1944	4,379	11.16

As we can see, during the period of the Third Reich, the percentage of acquittals never dropped below 4%. Moreover, even in 1944, during which the number of accused increased enormously in connection with the general tendency of increase of criminal and legal repression after the assassination attempt against Hitler on 20 July 1944, the number of acquittals reached an unprecedented 11%. And this is only for political crimes (the percentage of acquittals for ordinary criminality, to which the ruling elite was indifferent, was even higher)!

Let us turn now to the Ukrainian statistics.

Table 2: The Number of Acquittals in Ukraine, 2007–2014<sup>51</sup>

Year	Number of Accused	Number of Acquittals, %
2007	165,459	0.41
2008	168,300	0.33
2009	146,450	0.19
2010	168,800	0.2
2011	Statistics are absent	Statistics are absent
2012	161,400	0.2
2013	135,800	0.6
1 <sup>st</sup> six months of 2014	54,300	0.8

<sup>50</sup> Koch 1989, at 132.

<sup>51</sup> The table was made by the authors using court statistics which are available on the site of the Supreme Court of Ukraine: [www.scourt.gov.ua](http://www.scourt.gov.ua).

So, comments are superfluous. We can only hope that, after the overthrow of the Yanukovych criminal regime in February 2014, the situation in our country regarding the acquittal of innocent people will change for the better with time.

Another characteristic ploy, to which priests of political justice resort, is to give the law a retroactive effect. In other words, introduction of criminal liability for those acts that, at the time of their commission, were not recognized as criminal offences from a formal or legal point of view. It is curious that, most often, this method is used not by purely totalitarian regimes, but rather, on the contrary, during the transition to democratic rule.

In compliance with the judgment of 22 March 2001 in the case of *Streletz, Kessler and Krenz v. Germany*, the European Court of Human Rights formulated a dominant and legal position which reads:

it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.<sup>52</sup>

At the same time, the Court pointed out that

The broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally... Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. In the order to fire given to border guards they had insisted on the need to protect the GDR's borders "at all costs" and to arrest "border violators" or "annihilate" them... The applicants were therefore directly responsible for the situation which obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989.<sup>53</sup>

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<sup>52</sup> *Streletz, Kessler and Krenz v. Germany*, Judgment, Nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 81.

<sup>53</sup> *Id.* para. 78.

## Conclusion

In our opinion, the factors influencing the depoliticization of justice are:

- New socio-economic and political relations that should be reflected in the proceedings: prevalence of private interest over state interests, “privatization” of law up to its “romanization” (a return to the origins of Roman law, clear of ideology and politics);
- Internationalization of law and judicial procedures, the closer connection of the domestic legal system with international standards of fair justice;
- Improvement of modern technologies of legal proceedings, including mass introduction of electronic media of legal information (electronic registration of cases, posting court decisions on court websites), introduction of teleconferences in the process, especially at the cassation stage;
- Expansion of guarantees of independence of judges at the level of international standards, prompting the authorities to undertake at least some actions in this direction (for example, the ECHR judgment in the case of *Oleksandr Volkov v. Ukraine*<sup>54</sup>).

These and other factors fundamentally change the very paradigm of justice in the modern world. Social revolutions accelerate this transition, but they are not the main determinative factor, no matter how tempting it may seem. In the end, the judiciary itself is extremely conservative, complies with age-old rules and procedures, digesting, as Ukrainian experience shows, any social revolution. However, this is not to say that it may not be reasonably and professionally reformed.

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<sup>54</sup> *Oleksandr Volkov v. Ukraine*, Judgment, No. 21722/11, 9 January 2013.

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