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Research Article

Polyakh and Others v. Ukraine: The Latest Standards of Applicability of Article 8 of the European Convention of Human Rights in Lustration Cases

Olena Polivanova, Kateryna Nykolyna, Kyrilo Stepanenko, Serhii Myroslavskiy, and Alla Puktetska

Abstract: The article analyzes the 2019 case “Polyakh and Others v. Ukraine” and the European Court of Human Rights’ latest standards regarding the applicability of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in lustration cases. In its judgment on the Polyakh case, the Court found a violation of all applicants’ right to respect for private life due to the application of lustration measures by Ukraine. Based on the Court’s previous practice regarding lustration in Central and Eastern European states and the Council of Europe’s practice, it was concluded that the application of lustration measures, such as dismissal coupled with a ban on holding public office for ten years, along with the premature inclusion of the lustrated person’s name into a publicly available lustration list, significantly impacts the person’s private life. Consequently, Article 8 of the Convention is deemed applicable. If, instead of dismissal, the applicants had been offered a transfer to other less responsible positions or afforded the possibility of employment in the civil service, the Court, due to the reduced impact of the applied lustration measures on the applicants’ privacy, would not have invoked Article 8 of the Convention.

Keywords: right to respect for private life, European Court of Human Rights, lustration measures, Polyakh.

Introduction

When political events lead to changes in regimes and structures, it is often deemed necessary to prevent specific individuals from the previous state administration from assuming top positions in order to facilitate the transformation of the country's political landscape. This process is known as lustration in world politics. Lustration aims to remove individuals who supported, organized, and held managerial or state positions under the overthrown regime from participating in state activities. These measures, both political and legal, seek to mitigate the consequences of acts of previous authorities that were perceived as hostile to the people. These authorities often exerted control over all branches of power, engaged in illegal actions, and disregarded the rule of law and human rights.

In the modern history of mankind, the process of lustration commenced with denazification in Germany following the decision of the Potsdam Conference.¹ After the collapse of the USSR, several countries, including the Czech Republic, Hungary, Estonia, Latvia, Romania, and Poland, initiated lustration processes. However, in Ukraine, the concept of lustration was not publicly discussed or considered relevant because the new political class largely consisted of former members of the Soviet Communist Party. L.L. Kravchuk, the first President of Ukraine, had previously served as the Chairman of the Verkhovna Rada of the Ukrainian SSR. Despite changes in rhetoric, Soviet ideals persisted in government discourses at all levels.

Although conflict was avoided, the issue of lustration gained prominence in 2014 following the overthrow of the "Yanukovych regime." It should be noted that despite the usurpation of power and violations of freedom of speech, the "Yanukovych regime" governed similarly to its predecessors: corruption was not unique to his administration, nor was the inefficiency of state institutions solely attributable to his actions. The regime lacked any ideology beyond strengthening ties with Russia and the CIS countries (Ukraine has never been a member of the CIS), which can be seen as a "democratic" equivalent of the Soviet Union (upon detailed analysis of internal political events in each CIS member state).

In 2014, the issue of lustration emerged as a response to the legacy of secret Communist rule that had persisted for three decades. Society sought not just pseudo-democracy, but a constructive dialogue with elected authorities, adherence to the rule of law, and improved democratic relations on the global stage. Ukrainians repeatedly expressed their desire for the rule of law through rallies, protests, and revolutions. The society reacted strongly to human rights violations. Therefore, lustration in Ukraine serves not only a psychological function but has also become a significant aspect of political life. Consequently, in 2015, the Law on Government Cleansing was enacted.

¹ O.V. Stogova, "Lustration as the Precondition of Effective Fight against Corruption," *Modern Society* 1, no. 11 (2016): 167-177, 170, <http://dx.doi.org/10.5281/zenodo.51248>.

During the discussion on the draft law, concerns were raised that it lacked individual procedures, failed to consider criteria for malicious activity or inactivity, violated personal data protection, promoted interference in private life, and did not ensure a fair trial.² In the post-revolutionary rush, the new government hastily adopted the Law on Government Cleansing, perhaps to avoid losing credibility or due to populist aims, without giving it due attention. While the law aimed to uphold the rule of law and purge the government of officials, law enforcement officers, and judges who abused their positions and contributed to exerting pressure on political opponents and activists, it lacked legal coherence and appeared driven by political expediency, as noted by lawyers, political experts, and Ukraine's international partners. Suggestions were made to amend the law to extend lustration to officials and law enforcement officers who facilitated human rights violations during the Euromaidan and the Revolution of Dignity. Such amendments would enhance the law, demonstrating a commitment to human rights while preserving its essence with minor adjustments.

On February 24, 2020, the European Court of Human Rights (ECtHR) declined to transfer the case "Polyakh and Others v. Ukraine" to the ECtHR Grand Chamber.³ As is required under Article 44 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,⁴ the judgment in the case of Polyakh and others v. Ukraine (Polyakh) unequivocally confirmed Ukraine's violation of the right to respect for private life for all applicants and the right to a fair trial within a reasonable time for the first three applicants.⁵ The Polyakh case is the latest in the list of ECtHR cases on the violation of the right to respect for private life by the application of lustration measures, and it may be considered the case setting the Court's latest standards for the possibility of applying Article 8 of the Convention in such cases. The main drawback of the Law on Government Cleansing is that it is impossible to prove the personal role of officials in any undemocratic activity that took place during the presidency of former President Viktor Yanukovich.⁶ It would be even more difficult to prove whether their actions were intentional. If so, it is necessary to determine how their responsibility in the events of 2013-2014 can be measured.

² Larysa Denisenko, "Lustration Should Not Turn into Political Revenge," *Deutsche Welle*, October 18, 2019, <https://www.dw.com/uk/коментар-люстрація-не-має-перетворюватися-на-політичну-помсту/a-50891070>.

³ "Grand Chamber Panel's Decisions" (European Court of Human Rights, September 9, 2019), <https://hudoc.echr.coe.int/?i=003-6499586-8573502>.

⁴ "European Convention for the Protection of Human Rights and Fundamental Freedoms," as amended by Protocols nos. 11 and 14, ETS 5 (European Court of Human Rights, 1950), <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>.

⁵ "Case of Polyakh and Others v. Ukraine" (Strasbourg: European Court of Human Rights, October 17, 2019), <https://hudoc.echr.coe.int/fre?i=001-196607>.

⁶ Oleksandr Radchuk, "Instead of Lustration: Is There an Alternative to the Law on the Cleansing of Power," *Slovo i Dilo*, October 22, 2019, <https://www.slovoidilo.ua/2019/10/22/kolonka/aleksandr-radchuk/polityka/lyustraciyi-chy-isnuye-alternatyva-zakonu-pro-ochyshhennya-vlady>.

Therefore, this article examines the case of Polyakh and the Court's previous practice on lustration to define and analyze the latest standards of the applicability of Article 8 of the Convention. The study confirms that lustration measures, such as a person's dismissal combined with a ban on holding public office for ten years, along with premature inclusion in a publicly available lustration list, constitute sufficient grounds for the ECtHR to recognize the impact of the lustration measure on the person's private life, warranting the application of Article 8 of the Convention. However, a lower level of significance could have led to a different conclusion.

The study primarily focused on analyzing the judgment in Polyakh and the Court's previous practice in addressing the application of lustration measures that infringe upon the right to protection and respect for private life as outlined in Article 8 of the Convention in the CIS countries undergoing transition from a totalitarian communist regime to democracy.⁷ However, the scientific foundation for this article draws upon the works of Arai-Takahashi,⁸ Cameron,⁹ Gomez-Arostegui,¹⁰ Feldman,¹¹ Kilkelly,¹² Loucaides,¹³ Merrills,¹⁴ Ost,¹⁵ Roagna,¹⁶ and van Dijk and van Hoof.¹⁷ These works delve into specific aspects of the Court's practice related to Article 8 of the Convention. Additionally, it is imperative to

⁷ "Case of Polyakh and Others v. Ukraine."

⁸ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002), 320 p.

⁹ Iain Cameron, *An Introduction to the European Convention on Human Rights* (Uppsala: Iustus Förlag, 2002), 200 p.

¹⁰ H. Tomás Gómez-Arostegui, "Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations," *California Western International Law Journal* 35, no. 2 (2005): 153-202, <https://scholarlycommons.law.cwsl.edu/cwilj/vol35/iss2/2/>.

¹¹ David Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights," *European Human Rights Law Review* 3 (June 1997): 265-274.

¹² Ursula Kilkelly, "The Right to Respect for Private and Family Life. A Guide to the Implementation of Article 8 of the European Convention on Human Rights," *Human Rights Handbooks*, No. 1 (Strasbourg: Council of Europe, August 2003), <https://rm.coe.int/168007ff47>.

¹³ Loukis G. Loucaides, *Essays on the Developing Law of Human Rights* (International Studies in Human Rights) (Brill-Nijhoff, 1995), 240 p.

¹⁴ John G. Merrills, *The Development of International Law by the European Court of Human Rights* (New York, NY: Manchester University Press, 1993), 265 p.

¹⁵ F. Ost, "The Original Canons of Interpretation of the European Court of Human Rights," in *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, ed. Mireille Delmas-Marty and Christine Chodkiewicz (Dordrecht: Martinus Nijhoff Publishers, 1992), 238-318.

¹⁶ Ivana Roagna, *Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights*, Council of Europe Human Rights Handbooks (Strasbourg: Council of Europe, 2012), 1-96, <https://rm.coe.int/16806f1554>.

¹⁷ Pieter van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998).

consider the contributions of Crossley-Frolick,¹⁸ David,¹⁹ Dosti,²⁰ Finci,²¹ Grosecu,²² Halmai,²³ Horne,²⁴ Killingsworth,²⁵ Letki,²⁶ Markešić,²⁷ Milardović,²⁸

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- ¹⁸ Katy Crossley-Frolick, "Sifting through the Past: Lustration in Reunified Germany," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, ed. Vladimira Dvořáková and Anđelko Milardović (Zagreb: Political Science Research Centre, 2007), 197-213.
- ¹⁹ Roman David, *Lustration and Transitional Justice: Personnel Systems in the Czech Republic, Hungary, and Poland* (Philadelphia: University of Pennsylvania Press, 2011).
- ²⁰ Neviana Dosti, "Dealing with the Past: The Limited Opening of the Files in Albania," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 223-224.
- ²¹ Jakob Finci, "Lustration and Vetting Process in Bosnia and Herzegovina," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 217-221.
- ²² Raluca Grosecu, "The Role of Civil Society in the Romanian Transitional Justice Failure," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 183-195.
- ²³ Gábor Halmai, "Lustration and Access to the Files of the Secret Police in Central Europe," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 19-46.
- ²⁴ Cynthia M. Horne, "International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context," *Law & Social Inquiry* 34, no. 3 (Summer 2009): 713-744, https://cynthiamhorne.weebly.com/uploads/8/9/9/8/8998042/lsi-horne_legal_rulings.pdf.
- ²⁵ Matt Killingsworth, "Lustration after Totalitarianism: Poland's Attempt to Reconcile with Its Communist Past," *Communist and Post-Communist Studies* 43, no. 3 (September 2010): 275-284, <https://www.jstor.org/stable/48609722>.
- ²⁶ Natalia Letki, "Lustration and Democratisation in East-Central Europe," *Europe-Asia Studies* 54, no. 4 (2002): 529-552, <https://doi.org/10.1080/09668130220139154>.
- ²⁷ Ivan Markešić, "The Catholic Church in Croatia: From Tending to Lustration to Lustration Crisis," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 111-126.
- ²⁸ Anđelko Milardović, "Elite Groups in the Waves of Democratization and Lustrations," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 85-110.

Misztal,²⁹ Petrescu,³⁰ Rakić-Vodinelić,³¹ Ravaitytė,³² Ray,³³ Ursachi,³⁴ Vuks,³⁵ and Williams.³⁶ These works primarily explore theoretical and conceptual approaches to lustration and the establishment of the rule of law and democracy in Central and Eastern Europe, particularly in Ukraine. They also address problematic aspects of the post-communist application of lustration legislation in the region. However, the latest standards regarding the application of Article 8 of the Convention in lustration cases have not yet been analyzed comprehensively, as these standards were established by the Court toward the end of 2019. The article aims to elucidate these standards, as delineated in Polyakh, and to offer rules, recommendations, and insights to prevent lustration practices that infringe upon the right to respect for private and family life, as stipulated in the Convention, in future cases.

Materials and Methods

This article utilizes descriptive qualitative research methodology to examine the case law of the ECtHR concerning the application of lustration measures, along with documents from the Council of Europe on lustration. The focus is primarily on commentary related to the application of lustration measures based on the Law on Government Cleansing (LGC) in Ukraine. The research approach involves comparative contextual analysis of Court judgments pertaining to the applicability of Article 8 of the Convention, which safeguards the right to respect for private life.

²⁹ Barbara A. Misztal, "How Not to Deal with the Past: Lustration in Poland," *European Journal of Sociology/Archives Européennes de Sociologie* 40, no. 1 (1999): 31-55, <https://doi.org/10.1017/S0003975600007268>.

³⁰ Dragoş Petrescu, "Dilemmas of Transitional Justice in Post-1989 Romania," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 127-151.

³¹ Vesna Rakić-Vodinelić, "An Unsuccessful Attempt of Lustration in Serbia," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 169-182.

³² Julija Ravaitytė, "Evaluation of the Lustration Policy in Lithuania," *Politologija* 77, no. 1 (2015): 49-100, <https://doi.org/10.15388/Polit.2015.77.7374>.

³³ Larry Ray, "At the End of the Post-Communist Transformation? Normalization or Imagining Utopia?" *European Journal of Social Theory* 12, no. 3 (2009): 321-336, <https://doi.org/10.1177/1368431009337>.

³⁴ Raluca Ursachi, "In Search of a Theoretical Framework of Transitional Justice Toward a Dynamic Model," in *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe*, 65-83.

³⁵ Ya.V. Vuks, "Lustration Legislation in Eastern Europe and Its Meaning for the Western World," Master's Thesis (Texas: The University of Texas at Arlington, 2014).

³⁶ Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, "Explaining Lustration in Central Europe: A 'Post-communist Politics' Approach," *Democratization* 12, no. 1 (2005): 22-43, <https://doi.org/10.1080/1351034042000317943>.

The research methodology employed in this study encompasses general scientific, group, and special scientific research approaches, methods, and techniques. At its core, the study adopts a dialectical general scientific approach, which facilitates the understanding of the genesis of human rights in lustration cases, the examination of legal positions taken by the Court in such cases, and the application of Article 8 of the European Convention on Human Rights. A systemic method is also utilized extensively, allowing for the analysis of ECHR provisions and Court decisions, exploration of the right to respect for private life within the human rights framework, and elucidation of the interplay between human needs and interests in the context of lustration.

The method of convergence from the concrete to the abstract was employed to identify the fundamental objects of legal protection within the realms of private life under Article 8 of the Convention. Conversely, the method of convergence from the abstract to the concrete was utilized to elucidate the provisions of the ECHR and to apply the Court's legal stance in its judgments. Additionally, the socio-legal group research method was instrumental in uncovering the social context influencing the manifestation of inherent human rights in public life and in identifying the core values of private life that are subject to legal protection under Article 8 of the Convention. In this study, special scientific methods played a crucial role, including the method of interpreting legal norms to analyze the content of the Convention and the case law of the Court. The comparative law method was also employed to identify similarities and differences in the treatment of private life in lustration cases, while the method of generalization of judicial practice helped draw conclusions from the accumulated case law. Moreover, formal-logical general scientific techniques such as induction, deduction, analysis, synthesis, comparison, abstraction, extrapolation, and typification were utilized to clarify terminology and construct relevant classifications. Content analysis and interpretation of statistics were additional techniques employed in the study. The empirical foundation of the research comprised the Convention and other international legal acts concerning human rights and fundamental freedoms, as well as the Court's case law.

Article 8 of the Convention enshrines the right to respect for and protection of an individual's private and family life, home, and correspondence. To invoke this article, the applicant must demonstrate that their complaint pertains to at least one aspect covered by Article 8, such as personal life, family life, home, or correspondence. Consequently, the Court initially assesses whether the applicant's claim aligns with the provisions of Article 8 and fully respects its principles. Subsequently, the Court initiates an examination to determine whether there has been a breach of the law or whether the state has fulfilled its obligations to safeguard the infringed right. Paragraph 2 of Article 8 of the Convention delineates instances where the state and its authorities are entitled to restrict the exercise of the rights safeguarded by the Convention. These include scenarios pertaining to public, national, and economic security, the prevention of and com-

batting crime, as well as the protection of life, health, and the rights and freedoms of others. State intervention in the rights outlined in Article 8 is permissible if it aligns with the principles of legality and necessity in a democratic society, aimed at upholding the objectives of the Convention.³⁷

In Polyakh, the applicants raised concerns about violations of their right to protection and respect for private and family life.³⁸ The first applicant contended that the State had infringed upon his rights by dismissing him from his post, imposing a ten-year ban on holding public office, and publicly disclosing his identity solely based on his tenure during the period specified by the Law on Government Cleansing (LGC). The applicant experienced uncertainty regarding both his personal and professional life due to the inability to challenge the constitutionality of the LGC at the Constitutional Court. The inclusion of his name in the Lustration Register tarnished his reputation, as he was unable to have the entry removed until the case was heard in court. The second, third, fourth, and fifth applicants cited repercussions on their personal and professional relationships due to their dismissals. Losing their jobs had adverse financial implications for them and their families. Moreover, the reasons given for their dismissals, namely their alleged involvement in the “usurpation of power” by the former President and their supposed undermining of national security, defense, and human rights, negatively impacted their professional standing. The Government of Ukraine acknowledged the violation of Article 8 of the Convention and the interference with citizens’ rights and freedoms.³⁹

Results and Discussion

The conformity of the measures applied to the applicants by the authorities of the signatory states in accordance with the legislation on lustration adopted by them is violated not only in the case of Polyakh. The case law of the Court confirms that the application of lustration measures provided for in the lustration laws of Slovakia (*Turek v. Slovakia*, 2006),⁴⁰ Estonia (*Sõro v. Estonia*, 2015),⁴¹ Northern Macedonia (*Karajanov v. the former Yugoslav Republic of Macedonia*,

³⁷ *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (Council of Europe/European Court of Human Rights, 2022), www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

³⁸ “Case of Polyakh and Others v. Ukraine.”

³⁹ “Case of Polyakh and Others v. Ukraine.”

⁴⁰ “Case of Turek v. Slovakia,” Case No. 57986/00 (Strasbourg: European Court of Human Rights (ECtHR), 2006), <https://hudoc.echr.coe.int/fre?i=001-72354>, <https://globalfreedomofexpression.columbia.edu/cases/turek-v-slovakia/>.

⁴¹ “Sõro v. Estonia,” Case No. 22588/08 (Strasbourg: European Court of Human Rights (ECtHR), 2015), <https://hudoc.echr.coe.int/eng?i=002-10689>, <http://melaproject.org/node/526>.

2017),⁴² Romania (Naidin v. Romania, 2014),⁴³ Lithuania (Sidabras and Džiautas v. Lithuania, 2004),⁴⁴ Latvia (Ždanoka v. Latvia, 2006),⁴⁵ and Poland (Matyjek v. Poland, 2007)⁴⁶ has already been challenged in the Court. In several cases, the Court held that lustration measures involved respect for the applicants' privacy as enshrined in law (Rotaru v. Romania, 2000),⁴⁷ as they affected their reputation and/or professional prospects. In the Turek case, the European Court of Human Rights stated that the initial registration of the applicant by the State Security Agency (StB) as a collaborator had various consequences. This included the continued existence of a file in which the applicant was registered as an agent of the former StB. This registration led to the issuance of a negative security clearance, which the applicant unsuccessfully challenged in court. The Court found that this registration arguably affected the applicant's private life. In the Soro case, the publication of information about the applicant's past service in the KGB impacted his reputation. This publication violated the Court's interpretation of the right to respect for private and family life. Regarding the Sidabras case, the Court observed that the application of section 2 of the KGB Act resulted in a ban on professional activity in the private sector for the applicants, lasting up to 19 years due to their status as "former KGB officers." This restriction hindered their ability to communicate with the outside world and posed significant challenges to their livelihoods, thus impacting their private lives. The prolonged status of being labeled as "former KGB officers" further exacerbated the difficulty in establishing communication with the public and affected their reputation and societal standing. The ban imposed significant limitations on the applicants' capacity to engage in various professional activities and to exercise their right to privacy and private life as guaranteed by Article 8 of the Convention.

A similar conclusion was reached by the Court in the Ivanovski case, where the applicant complained about the impact of the domestic authorities' decisions in lustration proceedings on his reputation, dignity, and moral integrity. The European Court of Human Rights emphasized that the broad employment

⁴² "Case of Karajanov v. The Former Yugoslav Republic of Macedonia," No. 2229/15 (Strasbourg: European Court of Human Rights, 2017), <https://hudoc.echr.coe.int/eng?i=001-186294>, <http://biroescp.gov.mk/wp-content/uploads/2017/04/CASE-OF-KARAJANOV-v.-THE-FORMER-YUGOSLAV-REPUBLIC-OF-MACEDONIA-.pdf>.

⁴³ "Naidin v. Romania," Case No. 38162/07 (Strasbourg: European Court of Human Rights, 2014), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4910840-6007274&filename=003-4910840-6007274.pdf>.

⁴⁴ "Sidabras and Džiautas v. Lithuania," Cases No. 55480/00 and 59330/00 (Strasbourg: European Court of Human Rights, 2004), <https://hudoc.echr.coe.int/eng?i=001-173086>.

⁴⁵ "Case of Ždanoka v. Latvia," Case No. 58278/00 (Strasbourg: European Court of Human Rights, 2006), <https://hudoc.echr.coe.int/eng?i=001-61827>.

⁴⁶ "Case of Matyjek v. Poland," Case No. 38184/03 (Strasbourg: European Court of Human Rights, 2007), <https://hudoc.echr.coe.int/fre?i=001-80219>.

⁴⁷ "Case of Rotaru v. Romania," Case No. 28341/95 (Strasbourg: European Court of Human Rights, 2000), <https://hudoc.echr.coe.int/eng?i=001-58586>.

restrictions imposed on the applicant, including a five-year ban on public service employment and severe limitations on opportunities for private-sector employment corresponding to his professional qualifications and experience as a lawyer, had a profound impact on his ability to practice his profession. Furthermore, the stigmatization of the applicant in society as an informer of the former oppressive regime's secret police (thus inherently unworthy of performing any public function in a democratic State based on the rule of law) significantly hindered his ability to establish relationships within society. This not only affected his reputation but also severely hampered his ability to lead a normal personal life and earn a livelihood. Therefore, the Court concluded that the decision in question had far-reaching implications beyond mere reputation damage; it fundamentally infringed upon his right to a private life.

In the Karajanov case, the applicant lodged a complaint alleging that the publication of the Commission's decision of May 27, 2013, on its website before it became final had significantly harmed his reputation, dignity, and moral integrity, thus violating his rights under Article 8 of the Convention. The European Court of Human Rights acknowledged that the publicity surrounding the Commission's decision exacerbated its impact on the applicant's enjoyment of his right to respect for his private life.

However, the Polyakh case differs from the other cases on lustration in the Court's practice. As formulated by the Venice Commission in its final opinion, the LGC, the lustration law, the application of lustration measures, which the Court deemed as interfering with the right to respect for private life incompatible with Article 8 of the Convention in the Polyakh case, had a broader scope than lustration laws adopted in other countries of Central and Eastern Europe. Explaining the difference between them, it should be emphasized that after the fall of Communism (1989-1991),⁴⁸ lustration evolved into an instrument for de-communization and the transformation of regimes from non-democratic ones (scholars define four types of non-democratic regimes in Eastern and Central Europe—authoritarianism, totalitarianism, post-totalitarianism, and sultanism)⁴⁹ to democratic ones. In Resolution 1096 of 1996, the Parliamentary Assembly of the Council of Europe outlined that the legacy of former communist totalitarian systems, characterized by traits such as (over)centralization, the militarization of civilian institutions, bureaucratization, monopolization, over-regulation, and collectivism, among others, needed to be dismantled and overcome.⁵⁰ It should have been

⁴⁸ Mark S. Ellis, "Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc," *Law and Contemporary Problems* 59, no. 4 (Fall 1996): 181-196, <https://scholarship.law.duke.edu/lcp/vol59/iss4/14>.

⁴⁹ Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (London: Johns Hopkins University Press, 1996), 3-6.

⁵⁰ PACE Resolution 1096 "Measures to Dismantle the Heritage of Former Communist Totalitarian Systems" (Council of Europe, Parliamentary Assembly, June 27, 1996), <https://assembly.coe.int/nw/xml/xref/x2h-xref-viewhtml.asp?fileid=7506&lang=en>.

done, inter alia, by opening secret service files for public examination in some former communist totalitarian countries and introducing lustration or de-communization laws. These administrative measures targeted individuals who did not commit any crimes under the standard code, as per the Resolution, but who supported the totalitarian regime and held leadership positions. Such laws were intended to prohibit individuals from exercising governmental power, as they had previously acted against the democratic principles of state governance.

Along with this, in the same resolution, the Parliamentary Assembly set the criteria for the compatibility of measures applied under lustration laws with a democratic state under the rule of law. Compliance with these criteria would have helped avoid complaints about these procedures being lodged with the control mechanisms of the Council of Europe, including the ECtHR, the Committee of Ministers' monitoring procedure, and the Assembly's monitoring procedure under Order No. 508 (1995) on the honoring of obligations and commitments by member states. One of the criteria is that guilt must be individually established in court for each person, and there can be no collective application of this punishment. Another criterion is that the State, in applying lustration measures, must ensure the right of defense; a person's guilt cannot be recognized before the entry into force of a conviction against them, and the right to appeal to the court must be ensured. This prevents and avoids situations where lustration might be used as a means of revenge, political or social misuse, or punishment for people presumed guilty, which is the task of prosecutors using criminal law. The Parliamentary Assembly stressed that the aim of lustration is to protect the newly emerged democracy.⁵¹ Furthermore, to clarify the content of all the criteria of compliance with the rule of law regarding the application of lustration measures, the Resolution included references to special guidelines.⁵²

Considering all the above-mentioned aspects, the aim of lustration laws, which were already applicable in some of the Eastern European states (in Czechoslovakia (in Czech Republic and Slovakia since January 1, 1993), the Great Lustration Act (Act No. 451/1991 Coll) of 1991 (application of which in Slovakia expired in 1996 and is still in force in the Czech Republic)⁵³ and the Small Lustration Law (Act No. 279/1992 Coll.) of 1992 (still applicable and enacted only in the Czech part of Czechoslovakia),⁵⁴ the Law on Banks and Credit Activity of 1992

⁵¹ PACE Resolution 1096 "Measures to Dismantle the Heritage of Former Communist Totalitarian Systems."

⁵² "Guidelines to Ensure that Lustration Laws and Similar Administrative Measures Comply with the Requirements of a State Based on the Rule of Law" (Council of Europe, 1996), <http://assembly.coe.int/nw/xml/xref/x2h-xref-viewhtml.asp?fileid=7506&lang=en>.

⁵³ Veronika Bílková, "Lustration: The Experience of Czechoslovakia/ the Czech Republic," report presented at the Conference on "Past and Present-day Lustration: Similarities, Differences, Applicable Standards" (Strasbourg: European Commission for Democracy through Law, 2015), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2015\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)028-e).

⁵⁴ Bílková, "Lustration: The Experience of Czechoslovakia/ the Czech Republic."

(abolished in 1997), the Law on the Temporary Introduction of Additional Requirements for Members of Executive Bodies of Scientific Organizations and the Higher Certifying Commission of 1992 (the “Panev bill,” which was abolished in 1995) in Bulgaria,⁵⁵ and the Procedure for Registration and Disclosure of Persons who Have Served in or Co-operated with Security Organizations or Intelligence or Counterintelligence Organizations of Armed Forces of States which Have Occupied Estonia Act of 1995 in Estonia) should have been the following: lawfully restrict the former communist regime’s representatives’ access to governmental structures in those states, thus limiting their influence on the democratization processes that emerged in the aftermath of Communism’s fall. Simultaneously, scholars note that de-communization (“the extraction of Communist influence from society”), as the aim of lustration laws, corresponds to the narrower meaning of lustration. Conversely, a wider meaning is where lustration becomes the synonym of a political purge⁵⁶ (for instance, the denazification process in Germany after 1945 and proceedings in the case of former GDR head of state Erich Honecker, because of his criminal order to shoot people for crossing the Berlin Wall, or in the Nazi proceedings in Belgium, France and the Netherlands after World War II are called lustration).⁵⁷ Moreover, the restricted meaning of lustration lies in its covering just a part of the de-communization process in Eastern Europe. The process of raising the issue of a candidate’s or employee’s cooperation with the communist regime may also limit this.⁵⁸

Concurrently, the LGC, as indicated by the Venice Commission or cited by the Court in its judgment in the Polyakh case,⁵⁹ pursues two different aims of lustration. The first one is protecting society from individuals who, due to their past behavior, pose a threat to democracy in the country, according to the traditional meaning of lustration. The second, non-traditional aim, is fulfilled by the kind of lustration that cleanses public administration from individuals who engaged in large-scale corruption. Nevertheless, both the first and second aims of lustration are considered legitimate; this idea was confirmed by the ECtHR in the Polyakh case.

It is noteworthy that the term “private life” cannot be exhaustively defined: it protects the privacy and inviolability of the person and shields his/her life from undue attention. The growth of the individual is also ensured by this right, secur-

⁵⁵ Momchil Metodiev, “Bulgaria,” in *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past*, ed. Lavinia Stan (Abingdon: Routledge, 2009), 166.

⁵⁶ Vuks, “Lustration Legislation in Eastern Europe and Its Meaning for the Western World.”

⁵⁷ Luc Huyse, “Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past,” *Law & Social Inquiry* 20, no. 1 (1995): 51-78, <https://doi.org/10.1111/j.1747-4469.1995.tb00682.x>.

⁵⁸ Williams, Fowler, and Szczerbiak, “Explaining Lustration in Central Europe.”

⁵⁹ “Case of Polyakh and Others v. Ukraine.”

ing for the individual a sphere within which they can freely pursue the development and fulfillment of their personality.⁶⁰ In the Niemietz case, the Court stated that the notion of “private life” : “... should not be limited in this sense to the internal aspect,” where a person excludes from this internal spectrum communication with society and interaction with the outside world. The opportunity to communicate with society and to develop must also be part of the right to respect for private life.

The ability to develop relationships with the outside world is intertwined with the sphere of professional and business life, and there is no inherent reason to separate these spheres. However, it is not always possible to fully distinguish which activities belong to the professional realm and which do not. Consequently, when a person’s profession becomes an integral part of their life, it becomes increasingly challenging to delineate how it operates at any given moment.⁶¹

In the Polyakh case, the Court outlined several typical aspects of private life that could be affected by adverse lustration measures such as dismissal, demotion, or non-admission to a profession. These aspects include the applicant’s “inner circle,” their business reputation, and the development of relations with society. In Denisov v. Ukraine, the Court of Human Rights stated that there are usually two factors for initiating a dispute because of the interference with a person’s privacy: the application of impugned measures (which comprise the platform for the Court’s use of the cause-based approach), or, in some cases, the consequences for the person’s private life (which may become the basis for the Court’s consequence-based approach).⁶² When applying the consequence-based approach, the threshold of severity of the applied measures in all the above-mentioned aspects becomes crucial. The applicant must clearly demonstrate that the threshold was reached in their case and provide evidence supporting the effects of the contested measure. The Court may recognize the possibility of applying Article 8 of the Convention only when these consequences are extremely serious and have a substantial impact on the person’s private life.

The Court of Human Rights employed the consequence-based approach to justify the applicability of Article 8 of the Convention in the Polyakh case. It asserted that the law affected the applicants’ private lives in three key ways: their dismissal from public service, the prohibition from holding public office for ten years, and the inclusion of their names in the publicly accessible online lustration

⁶⁰ “Bruggemann and Scheuten v. Federal Republic of Germany,” Case No. 6959/75, Report of the Commission (European Commission of Human Rights, Council of Europe, July 12, 1977), <https://www.globalhealthrights.org/wp-content/uploads/2013/10/Bruggemann-v.-Germany.pdf>.

⁶¹ “Case of Niemietz v. Germany,” Case No. 13710/88 (Strasbourg: European Court of Human Rights, 1992), <https://hudoc.echr.coe.int/rus?i=001-57887>.

⁶² “Case of Denisov v. Ukraine,” Case No. 76639/11 (Strasbourg: European Court of Human Rights, 2018), <https://hudoc.echr.coe.int/eng?i=001-186216>, <https://law.euro.com/?p=5288>.

register. The cumulative impact of these measures substantially impacted the applicants' reputation and their ability to establish relationships with society.

They were not merely dismissed, demoted, or transferred to other less significant positions. Rather, they were dismissed and barred from civil service, immediately losing all remuneration. The applicants were prohibited from any employment in civil services, an area where they had worked as career civil servants for many years. Additionally, the imposition of the restrictive measures under the LGC was made public before their appeal could be examined.⁶³

Although the LGC did establish criteria for individual culpability, its primary objective was to "cleanse" the civil services of individuals associated with violations of human rights and freedoms and encroachments on national security.⁶⁴ In such circumstances, the implementation of measures outlined in the Act is likely to lead to social and professional stigma, as claimed by the applicants. Furthermore, unlike the Bulgarian Government in the case of *Anchev v. Bulgaria*, the Ukrainian Government failed to demonstrate that, in practice, the LGC had no such influence.

The reference to the *Anchev* case is relevant in this context because it involved a complaint by a lawyer, who happened to be the Minister of Justice and Deputy Prime Minister in a caretaker government for a brief period in 1997. Under section 3(1) of the Access to and Disclosure of Documents and Exposure of the Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian People's Army Act (2006 Act),⁶⁵ government ministers are subject to scrutiny for any ties to the security services of the communist regime. On February 12, 2008, the Commission administering the 2006 Act issued a decision publicly exposing the applicant as having been affiliated with the seventh department of the sixth directorate of State Security between 1982 and 1990. This decision was posted on the commission's website, thereby making the information about the applicant's affiliation with the State Security publicly available. In both the *Anchev* case and the *Polyakh* case, the measures applied to the applicants were not challenged in court, despite constituting interferences with the rights guaranteed by Article 8 of the Convention. In the *Anchev* case, the measure involved publicly exposing the applicant's affiliation with the State Security on the commission's website, while in the *Polyakh* case, it pertained to the lustration measures under the Law on Government Cleansing (LGC). However, the Bulgarian Government argued that the interference with the applicant's

⁶³ "Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine Adopted by the Venice Commission at Its 101st Plenary Session" (Venice, 12-13 December 2014), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)044-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e).

⁶⁴ "Law of Ukraine on Government Cleansing," No. 1682-VII (2014), <https://zakon.rada.gov.ua/laws/main/1682-18>.

⁶⁵ "Access to and Disclosure of Documents and Exposure of the Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian People's Army Act," <https://lex.bg/bg/laws/ldoc/2135540283>.

rights under Article 8 of the Convention in the Anchev case did not result in serious negative consequences or affect his social standing significantly. They further emphasized that society had the right to be informed about aspects of the public and private lives of individuals holding high-ranking positions. In contrast to the Anchev case, in the Polyakh case, the Ukrainian Government framed the applicants' appeals to the administrative courts as challenges to the constitutionality of the Law on Government Cleansing (LGC), rather than direct challenges to the lustration measures themselves under Article 8 of the Convention. According to the Ukrainian Government, the applicants resorted to the European Court of Human Rights because they were unable to assert their rights before the Constitutional Court of Ukraine.

The conclusions reached by the Court in the Polyakh case affirmed that the implementation of lustration measures, such as dismissal, demotion, or denial of entry into a profession, could indeed trigger the applicability of Article 8 of the Convention. Furthermore, for Article 8 to be applicable, the applicant must demonstrate that the applied measure substantially impacted their private life, including aspects such as their "inner circle," ability to establish and nurture relationships with others, and social and professional reputation. The dismissal, coupled with the 10-year prohibition on holding public office mandated by the LGC, along with the premature listing of the lustrated individual's name in a publicly accessible lustration register, provides a basis for the ECtHR to determine that the extent of the application of the lustration measure significantly impacted the individual's private life. Consequently, this renders Article 8 of the Convention applicable.

Indeed, if the applicants had been offered alternative options such as transfer to less significant positions or opportunities for continued employment within the civil services, the impact of the lustration measures on their privacy would likely have been diminished. In such a scenario, the ECtHR might not have found sufficient grounds to invoke Article 8 of the Convention.

Commenting on the decision of the Grand Chamber of the ECHR, the Minister of Justice of Ukraine, Denis Malyuska noted that the ECHR "did not recognize the lustration to be unlawful as a whole, but only its excessive volume."⁶⁶ It appears that there is a growing consensus within the legal community and the Prosecutor General's Office to amend the current Law on Government Cleansing,⁶⁷ taking into account the recommendations of the Venice Commission. These recommendations emphasize the importance of ensuring that lustration measures do not target elective positions and do not infringe upon human rights and the rule of law. Additionally, there is a suggestion to consider the level of responsibility of officials in their positions and to incorporate the findings of special inspections into the lustration process. It is possible that the National Agency for Prevention

⁶⁶ Denis Malyuska, "Decision of the ECtHR on Lustration," <https://www.facebook.com/people/Denis-Malyuska/100011121947008/>.

⁶⁷ Radchuk, "Instead of Lustration: Is There an Alternative to the Law on the Purification of Power."

of Corruption may play a role in this regard. These proposed changes aim to strike a balance between accountability and the protection of individual rights within the framework of lustration measures.

Indeed, the primary objective of the lustration process should be to safeguard the democratic development of the state rather than to target political opponents or dissenting voices. By focusing on ensuring the security and integrity of democratic institutions, lustration measures can contribute to fostering transparency, accountability, and the rule of law. It is essential that any lustration measures are applied fairly, transparently, and in accordance with the principles of justice and human rights, thereby promoting trust and confidence in the democratic system.

Conclusion

Indeed, the primary aim of lustration should be to safeguard democratic institutions from any unlawful encroachment, rather than to serve as a punitive measure against politicians or officials who may have lost public trust. The violation of Article 8 of the Convention in the Polyakh case highlights the importance of ensuring that lustration measures are necessary and proportionate in a democratic society. Despite this ruling, the Law on Government Cleansing (LGC), which formed the basis for the lustration measures in the Polyakh case, remains in effect in Ukraine. This underscores the need for ongoing scrutiny and potential reforms to ensure that lustration practices align with democratic principles and respect for human rights. Given that the Court's acknowledgment of the potential application of Article 8 of the Convention provides the sole framework for assessing purported infringements on an individual's right to protection and respect for personal and private life, these standards could serve as guiding principles for the authorities of Ukraine and other member states of the Council of Europe. This would help ensure that any lustration measures, if implemented, are designed to avoid triggering Article 8 of the Convention and are applied in a manner that respects the right to respect for private life as enshrined in the Convention.

The scope of lustration extends beyond political considerations and relevance and should encompass those who undermine democratic institutions and values, including the right to protest.

Disclaimer

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About the Authors

Olena Polivanova is a faculty member in the Department of Law at Kyiv University of Law of the National Academy of Sciences of Ukraine. With expertise in legal research and education, she contributes to the academic community through her teaching, scholarly publications, and active engagement in legal discourse.

Kateryna Nykolyna is a member of the Department of Theory and History of Law and State at the Institute of Law, Taras Shevchenko National University of Kyiv. With a focus on legal theory and historical analysis, she enriches the academic landscape through her research, teaching, and scholarly contributions.

Kyrylo Stepanenko is a member of the Department of General Legal Disciplines at the Faculty of Law, Dnipropetrovsk State University of Internal Affairs. His expertise in legal education and general legal principles contributes to the development of future legal professionals.

Serhii Myroslavkyi is a member of the Department of Law and Methods of Teaching Law at Sumy State Pedagogical University named after A.S. Makarenko. With a focus on legal education and pedagogical methods, he plays a vital role in shaping the future of legal professionals.

Alla Pukhtetska is a member of the Department of Administrative Law at the Institute of Law, Taras Shevchenko National University of Kyiv. With expertise in administrative law, she contributes significantly to legal education and research in Ukraine.