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THE INFLUENCE OF THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE “POLYAKH ET AL. V. UKRAINE” ON THE DEVELOPMENT OF LUSTRATION AS AN INDEPENDENT TYPE OF CONSTITUTIONAL AND LEGAL RESPONSIBILITY IN UKRAINE

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Homonay V.V. The influence of the decision of the European Court of Human Rights in the case “Polyakh et al. v. Ukraine” on the development of lustration as an independent type of constitutional and legal responsibility in Ukraine.

The article is devoted to the analysis of lustration as an independent type of constitutional and legal liability in Ukraine and its evolution under the influence of the decision of the European Court of Human Rights in the case “Polyakh et al. v. Ukraine” (became final on February 24, 2020). It is noted that lustration, in view of its principles - presumption of innocence, individual responsibility, guaranteed right to defense - and in view of the consequences for the person subject to lustration, is an “instrument” that leads to the restriction of the rights and freedoms of a person and a citizen. This is an independent type of constitutional and legal responsibility that is developing in Ukraine and is an integral part of the development of Ukraine as a democratic state. It is noted that since lustration limits the rights and freedoms of a person and a citizen, it must meet the following criteria: be established by law; have a legitimate purpose; to be necessary in a democratic society.

The decision of the European Court of Human Rights in the case “Polyakh et al. v. Ukraine” was analyzed. As for the legitimate purpose, when applying lustration as an type of constitutional and legal responsibility in Ukraine, it was applied to a very wide range of persons, which did not correlate with the legitimate purpose and legal purpose, which was to protect a democratic form of government. This large circle of lustrated persons included persons for whom the application of lustration did not pursue a legitimate goal, and the interference with their rights was not proportionate.

Since the decision of the European Court of Human Rights is a source of law in Ukraine, and Ukraine has an obligation to implement the decisions of the European Court of Human Rights,

taking measures of a general nature to implement the decision “Poliakh et al. persons subject to lustration and its clear definition. As for the measures that were applied to all persons subject to lustration, such measures were as restrictive as possible, as broad as possible in scope, and no individual assessment of the behavior of the person subject to lustration was carried out. When improving the legislation on lustration, it is necessary to provide for an individual assessment of the person subject to lustration; to apply restriction measures, which are characterized by different degrees of restriction and to establish the criteria for their measurement and application.

Key words: constitutional responsibility, lustration, human rights, restriction of human rights, legitimate purpose, decision of the European Court of Human Rights, implementation of the decision of the European Court of Human Rights, national legislation.

Гомонай В.В. Вплив рішення Європейського суду з прав людини у справі «Поліах та інші проти України» на розвиток люстрації як самостійного виду конституційно-правової відповідальності в Україні.

Стаття присвячена аналізу еволюції люстрації як самостійного виду конституційно-правової відповідальності в Україні під впливом рішення Європейського суду з прав людини у справі «Поліах та інші проти України» (24 лютого 2020 року набуло статусу остаточного). Зазначається, що люстрація з огляду на її принципи – презумпція невинуватості, індивідуальність відповідальності, гарантованість права на захист – та з огляду на наслідки для особи, яка підлягає люстрації, завжди веде до обмеження права і свобод людини і громадянина. Це самостійний вид конституційно-правової відповідальності, який розвивається в Україні і є невід’ємною складовою розвитку України як демократичної держави. Зазначається, що оскільки люстрація обмежує права і свободи людини і громадянина, то має відповідати таким критеріям: бути встановлена

законом; мати легітимну мету; бути необхідною у демократичному суспільстві.

Проаналізовано рішення Європейського суду з прав людини у справі «Полях та інші проти України». Що стосується легітимної мети, то при застосуванні люстрації як самостійного виду конституційно-правової відповідальності в Україні вона застосовувалась до дуже широкого кола осіб, яке не корелювало з легітимною метою і законною ціллю, яка полягала у захисті демократичної форми правління. В це велике коло люстрованих осіб було включено осіб, щодо яких застосування люстрації не переслідувало легітимну мету, а саме втручання в їх права було не пропорційне.

Оскільки рішення Європейського суду з прав людини є джерелом права в Україні, а Україна має зобов'язання з виконання рішень Європейського суду з прав людини, то вживаючи заходи загального характеру на виконання рішення «Полях та інші проти України» необхідним є звуження в законодавстві України кола осіб, які підлягають люстрації, та чіткого його визначення. Щодо заходів, які застосовувались до всіх осіб, які підлягали люстрації, такі заходи були максимально обмежувальними, максимально широкими за обсягом, а індивідуальної оцінки поведінки особи, яка підлягала люстрації – не здійснювалося. При вдосконаленні законодавства про люстрацію необхідно передбачити індивідуальну оцінку особи, яка підлягає люстрації; застосовувати заходи обмеження, які характеризуються різним ступенем обмеження і закріпити критерії їх виміру та застосування.

Ключові слова: конституційна відповідальність, люстрація, права людини, обмеження прав людини, легітимна мета, рішення Європейського суду з прав людини, виконання рішення Європейського суду з прав людини, національне законодавство.

Formulation of the problem.

The Ukrainian people strive to build Ukraine as a democratic state, in which the rule of law is a constitutional value, and ensuring the rights and freedoms of a person and a citizen in reality is the main duty of the state. As K. Kotelva rightly points out, "The war, the occupation of part of the Ukrainian territory, the criminalization of collaborative activities and the facts of the cooperation of Ukrainian officials with the occupation authorities caused a new wave of discussions about the need to conduct lustration in Ukraine. Cases of cooperation with the enemy and support for the actions of the aggressor country by representatives of the Ukrainian authorities cause special indignation of the population. Today, cleansing the government of officials with anti-state views and potential traitors is a question

of the future of our state" [1]. In Ukraine, the institute of lustration is not new, it is developing. Undoubtedly, there were shortcomings - both in legislation and in practice, which were indicated in the decision of the European Court of Human Rights in the case "Polyakh et al. v. Ukraine" [2] and which must be eliminated by Ukraine in order to comply with international obligations according to the Convention on the Protection of Human Rights and Fundamental Freedoms [3].

In legal science, the works of V. Fedorenko [4], N. Batanov [5] and other scientists are devoted to the issue of constitutional responsibility and lustration as a measure of constitutional responsibility. The work of Y. Bysag [6; 7], L. Deshko [8-11] and other scientists. But the latest decision of the European Court of Human Rights in the case of the European Court of Human Rights in the case "Polyakh et al. v. Ukraine" in the context of lustration was not comprehensively analyzed by scholars.

The purpose of this article is to analyze the impact of the decision of the European Court of Human Rights in the case "Polyakh et al. v. Ukraine" on Ukrainian legislation on lustration.

Presenting main material.

On September 16, 2014, the Parliament of Ukraine adopted the Law of Ukraine "On Purification of Power" [12]. This Law states that it "... defines the legal and organizational principles for conducting purges of power (lustration) for the protection and affirmation of democratic values, the rule of law and human rights in Ukraine" [12] and provides a definition of the concept of "purification of power (lustration)" – it is a prohibition established by this Law or a court decision for certain natural persons to hold certain positions (be in service) (hereinafter – positions) (except for elected positions) in state authorities and local self-government bodies [12].

Article 2 of this Law defined the range of positions for which measures to clean up power (lustration) are carried out: 1) Prime Minister of Ukraine, First Deputy Prime Minister of Ukraine, Deputy Prime Minister of Ukraine, and also the minister, heads of central executive bodies that are not part of the Cabinet of Ministers of Ukraine, the Chairman of the National Bank of Ukraine, the Chairman of the Antimonopoly Committee of Ukraine, the Chairman of the State Property Fund of Ukraine, the Chairman of the State Committee of Television and Radio Broadcasting of Ukraine, their first deputies, deputies; 2) The Prosecutor General, the Head of the Security Service of Ukraine, the Head of the Foreign Intelligence Service of Ukraine, the head of the State Security Office of Ukraine, the head of the central executive body that ensures the formation and implementation of the state tax and/or customs policy, the head of the tax

police, the head of the central executive body, which ensures the formation and implementation of state policy in the field of civil protection, their first deputies, deputies; 3) military officials of the Armed Forces of Ukraine and other military formations formed in accordance with the laws, except for conscript military servicemen and conscripted servicemen during mobilization; 4) members of the High Council of Justice, members of the High Qualification Commission of Judges of Ukraine, judges, the Head of the State Judicial Administration of Ukraine, his first deputy, deputy; 5) Heads of the Administration of the President of Ukraine, the Head of the State Administration of Affairs, the Head of the Secretariat of the Cabinet of Ministers of Ukraine, the Government Commissioner for Anti-corruption Policy, their first deputies, deputies; 6) the senior staff of the internal affairs bodies, the central executive body that implements state policy in the field of execution of criminal punishments, the State Service for Special Communications and Information Protection of Ukraine, the central executive body that ensures the formation and implementation of the state tax and/or customs policy, tax police, the central body of executive power, which ensures the formation and implementation of state policy in the field of civil protection; 7) officials and employees of the prosecutor's office of Ukraine, the Security Service of Ukraine, the Foreign Intelligence Service of Ukraine, the State Security Office of Ukraine, the National Bank of Ukraine; 8) members of the Central Election Commission, the National Council of Ukraine on Television and Radio Broadcasting, heads and members of national commissions that carry out state regulation of natural monopolies, state regulation in the fields of communication and informatization, securities markets and financial services; 9) heads of state-owned, including state-owned, enterprises of the defense-industrial complex, as well as state-owned enterprises belonging to the sphere of management of the entity providing administrative services; 10) other officials and civil servants (except elected positions) of state authorities, local self-government bodies.

Article 3 of this Law defined the criteria for the purification of power (lustration).

All information about the listed persons was systematically published in an online database publicly available for each person - a special Unified State Register of persons to whom the provisions of the Law of Ukraine "On Purification of Power" are applied. We completely agree with K. Kotelva, who singles out the following periods covered by the Law of Ukraine "On Purification of Power": 1. Soviet communist regime. 2. The period of usurpation of power by the President of Ukraine Viktor Yanukovich [1].

The criteria for the application of the ban on the occupation of positions, in respect of which

lustration measures were carried out, were: 1. "One-year rule", that is, the fact of occupying one of the positions specified in the list for a total of at least one year in the period from February 25, 2010 to February 22, 2014 year; 2. The fact of occupying one of the positions from the list during the events on the Maidan in the period from November 21, 2013 to February 22, 2014; 3. The fact of occupying leadership positions in the Communist Party of the USSR, the fact of cooperation with the KGB; 4. Involvement in the usurpation of power by the President of Ukraine Viktor Yanukovich, criminal prosecution of protesters on the Maidan or the ban on peaceful assemblies, etc. [1].

Therefore, lustration, in view of its principles - presumption of innocence, individual responsibility, guaranteed right to defense - and in view of the consequences for the person subject to lustration, is an "instrument" that leads to the restriction of the rights and freedoms of a person and a citizen. This is an independent type of constitutional and legal responsibility that is developing in Ukraine and is an integral part of the development of Ukraine as a democratic state.

Since lustration limits the rights and freedoms of a person and a citizen, it must meet the following criteria: be established by law; have a legitimate purpose; to be necessary in a democratic society.

As rightly pointed out by the European Court of Human Rights, the Law of Ukraine "On Purification of Power" differs from the lustration laws adopted in other countries of Central and Eastern Europe in that it has a wider scope of application. It aims to achieve two different goals. The first is the protection of society from persons who, because of their behavior in the past, may pose a threat to the newly created democratic regime. The second is the cleansing of state authorities from persons involved in large-scale corruption. The term "lustration" in its traditional sense covers only the first process. In its Interim Conclusion, approved in December 2014, the Venice Commission emphasized that, in order to respect human rights, the rule of law and democracy, lustration must strike a fair balance between the protection of a democratic society on the one hand and the protection of individual rights on the other. The Commission also drew attention to some shortcomings of the Law of Ukraine "On Purification of Power" of 2014 regarding the range of persons to whom the Law applies (the need to limit lustration to the most important positions in the state, etc.), the time component (two periods of prohibition, etc.), the management of the lustration process (decentralized procedure, absence of an independent body, etc.) and procedural guarantees (personal responsibility, protection of personal data of persons subject to

lustration, the possibility of appeal in court, etc.)” (§107-108 of the decision of the European Court of Human Rights in the case “Poliakh et al. v. Ukraine” [2]).

The ECtHR stated that there had been an interference with the applicants’ right to respect for their private life, and applied a three-pronged test to determine the legality of such interference.

As to whether the intervention was carried out «in accordance with the law», the European Court of Human Rights noted that «the measures applied to the applicants were based on national legislation, the Law on Purification of Power». The law has been published, so there is no reason to doubt its availability. It was also reasonably predictable for applicants. The Law «On Purification of Power» contained a list of positions, the holding of which involved the application of restrictive measures to the relevant persons in accordance with the Law (§267) [2]. Also, the European Court of Human Rights noted that «... the applicants’ inability to foresee that such legislation would be adopted during their occupation of the positions that became the basis for the application of restrictive measures to them does not call into question the legality of the intervention in the sense of the Convention. Irreversibility of an action in time, as such, is prohibited only by paragraph 1 of Article 7 of the Convention on Criminal Offenses and Punishments ..., while the measures provided for by the Law «On Purification of Power» do not have such a nature ...» (§268) and that «...the fact that at the time of the events, the conduct of the applicants was lawful, is an aspect that may also be taken into account when assessing the need for intervention» (§269) [2].

In the same decision, the European Court of Human Rights noted that it had doubts as to whether the state’s intervention pursued a legitimate goal. According to the European Court of Human Rights, the application to the applicants of the measures provided for by the Law «On Purification of Power» did not involve any individual assessment of their behavior. In fact, it was never alleged that the applicants themselves had committed any specific acts that undermined democratic governance, the rule of law, national security, defense or human rights. They were released on the basis of the Law only because they held certain relatively high positions in the civil service when Mr. Yanukovich was the President of Ukraine (§294 of the decision of the European Court of Human Rights in the case «Polyakh and others v. Ukraine») [2].

As noted by the European Court of Human Rights, «the measures applied to the applicants were very restrictive and extensive in scope. Therefore, very convincing reasons were needed to prove that such measures could be applied in the absence of any individual assessment of the person’s behavior

based only on the conclusion that their tenure in office during the period when Mr. Yanukovich held the position of President of Ukraine sufficiently proved the absence they have loyalty to the democratic principles of state organization or their involvement in corruption» (§296 of the decision of the European Court of Human Rights in the case «Polyakh and others v. Ukraine» [2]).

Conclusions.

As for the legitimate purpose, when applying lustration as an amostasy type of constitutional and legal responsibility in Ukraine, it was applied to a very wide range of persons, which did not correlate with the legitimate purpose and legal purpose, which was to protect a democratic form of government. This large circle of lustrated persons included persons for whom the application of lustration did not pursue a legitimate goal, and the interference with their rights was not proportionate.

Since the decision of the European Court of Human Rights is a source of law in Ukraine, and Ukraine has an obligation to implement the decisions of the European Court of Human Rights, taking measures of a general nature to implement the decision «Poliakh et al. persons subject to lustration and its clear definition. As for the measures that were applied to all persons subject to lustration, such measures were as restrictive as possible, as broad as possible in scope, and no individual assessment of the behavior of the person subject to lustration was carried out. When improving the legislation on lustration, it is necessary to provide for an individual assessment of the person subject to lustration; to apply restriction measures, which are characterized by different degrees of restriction and to establish the criteria for their measurement and application.

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