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ENSURING CONFORMITY OF LUSTRAATION LAWS WITH THE REQUIREMENTS OF THE STATE BASED ON THE RULE OF LAW: EUROPEAN STANDARDS

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Slyusarenko Yu.A. Ensuring compliance of laws on lustration with the requirements of a state based on the principle of the rule of law: European standards.

A range of international acts of a regional nature, which are designed to restore a civilized, liberal state based on the principle of the rule of law, as well as those international acts that regulate social relations arising in the member states of the Council of Europe during the purge of power, have been identified. Resolution of the Parliamentary Assembly of the Council of Europe No. 1096 (1996) "On measures aimed at eliminating the legacy of former communist totalitarian regimes" was analyzed. Attention is focused on such negative phenomena, which are indicated in it and which, despite the fact that regulatory and organizational and legal mechanisms for the purification of power were created, could not be eradicated, which led to threats to the newly created democracy. Attention is drawn to the application of procedural means inherent in such a state, as well as to the balance that must be observed in their application, so that a state with a young democracy does not become no better than a totalitarian regime that must be eliminated. It is emphasized that human rights in themselves are a value and rights should be ensured even to those people who, when they were in power, did not observe them themselves.

The Guiding Principles for ensuring compliance of lustration laws and similar administrative measures with the requirements of a state based on the principle of the rule of law have been analyzed. The following requirements for the national legislation on the purification of power are singled out: 1) lustration is directed at the following two threats: a threat to fundamental human rights and a threat to the democratization process; 2) prohibition of revenge, including political revenge; 3) prohibited by abuse of the results of the lustration process (including – prohibition of police abuse; prohibition of social abuse); 3) the purpose of lustration is to protect the newly created democracy; 4) creation of a special independent commission on lustration,

which includes citizens respected by society; 5) lustration is applied to a subject who holds a specific position and uses this position to commit actions/inactions that pose a threat to the creation of a free democracy – uses the position to violate human rights, block democratic processes; 6) the range of positions to which lustration is applied must be limited; 7) grounds for choosing positions for lustration – civil service positions that involve significant responsibility for defining or implementing state policy and measures related to internal security or civil service positions that involve issuing an order and/or committing a violation of human rights (law enforcement agencies, service security and intelligence, judicial authorities and prosecutor's office); 8) the term of deprivation of office on the basis of lustration – no longer than five years; 9) persons who gave orders, committed or significantly contributed to the commission of serious violations of human rights may be prohibited from holding positions; if a body has committed serious violations of human rights, then it is considered that its member, employee or representative was a participant in these violations, if he held a high position in this body, until he can prove that he did not participate in planning, directing or carrying out such policies, practices or actions; 10) prohibition to subject an official to lustration solely because of membership or activity in favor of any organization that was legal at the time of such membership or activity (except for the cases specified in the previous subparagraph), or because of personal views or beliefs; 11) the possibility of lustration of "conscious employees" who, together with state authorities, really participated knowingly, understanding the consequences, in serious violations of human rights and actually caused harm to other persons; 12) provision of full due process protection to persons subject to lustration.

Attention is drawn to the Bangalore principles of the conduct of judges and their correlation with the legislation of Ukraine.

Key words: democracy, human rights, constitutional responsibility, the state, purification

of power, lustration, rule of law, protection of human rights, quality of the rule of law, official, violation of human rights.

Слюсаренко Ю.А. Забезпечення відповідності законів про люстрацію вимогам держави, заснованої на принципі верховенства права: європейські стандарти.

Виявлено коло міжнародних актів регіонального характеру, які покликані відновити цивілізовану, ліберальну державу, засновану на принципі верховенства права, а також ті міжнародні акти, які регулюють суспільні відносини, що виникають в державах-членах Ради Європи при здійсненні очищення влади. Проаналізовано Резолюцію Парламентської Асамблеї Ради Європи № 1096 (1996) «Про заходи, спрямовані на ліквідацію спадщини колишніх комуністичних тоталітарних режимів». Акцентовано увагу на таких негативних явищах, які зазначені в ній і які попри те, що було створено нормативно-правовий та організаційно-правовий механізми очищення влади, викоринити не вдалось, що призвело до загроз новоствореній демократії. Звертається увага на застосування процесуальних засобів, притаманних такій державі, а також на баланс, який має бути дотриманий при їх застосуванні, щоб держава з молодого демократією не стала не кращою за тоталітарний режим, який має бути ліквідований. Підкреслюється, що самі по собі права людини є цінністю і права мають бути забезпечені навіть тим людям, які, коли вони були при владі, самі їх не дотримувалися.

Проаналізовано Керівні принципи для забезпечення відповідності законів про люстрацію та аналогічних адміністративних заходів вимогам держави, заснованої на принципі верховенства права. Виокремлено такі вимоги до національного законодавства про очищення влади: 1) спрямованість люстрації на такі дві загрози: загроза основоположним правам людини та загроза процесу демократизації; 2) заборона помсти, в тому числі – політичної; 3) заборона зловживанням результатами люстраційного процесу (в тому числі – заборона полічному зловживанню; заборона соціальному зловживанню); 3) мета люстрації – захист новоствореної демократії; 4) створення спеціальної незалежної комісії з люстрації, до складу якої входять шановані суспільством громадяни; 5) люстрація застосовується до суб'єкта, який обіймає конкретну посаду і використовує цю посаду для вчинення дій/бездіяльності, що становлять загрозу створенню вільної демократії – використовує посаду для порушення прав людини, блокування демократичних процесів; 6) коло посад, до яких застосовується люстрація – має бути обмеженим; 7) підстави вибору посад для люстрації – посади державної служби, які передбачають значну

відповідальність за визначення або виконання державної політики та заходів, що стосуються внутрішньої безпеки або посади державної служби, які передбачають надання наказу та/або вчинення порушення прав людини (правоохоронні органи, служба безпеки і розвідки, судові органи та прокуратура); 8) термін позбавлення посади на підставі люстрації – не довше п'яти років; 9) особам, які віддавали накази, вчиняли або значною мірою сприяли вчиненню серйозних порушень прав людини, може бути заборонено обіймати посади; якщо органом було вчинено серйозні порушення прав людини, то вважається, що його член, працівник або уповноважений був учасником цих порушень, якщо він обіймав високу посаду в цьому органі, доки він не зможе довести, що не брав участі в плануванні, керівництві чи здійсненні таких політики, практик або дій; 10) заборона піддавати посадовця люстрації виключно через членство або діяльність на користь будь-якої організації, які були законними на момент такого членства або діяльності (крім випадків, зазначених у попередньому підпункті), або через особисті погляди чи переконання; 11) можливість люстрації «свідомих співробітників», які разом з органами державної влади дійсно брали участь свідомо, розуміючи наслідки, у серйозних порушеннях прав людини та фактично заподіяли шкоду іншим особам; 12) забезпечення повного належного процесуального захисту особам, які підлягають люстрації.

Звертається увага на Бангалорські принципи поведінки суддів та кореляцію з ними законодавства України.

Ключові слова: демократія, права людини, конституційна відповідальність, держава, очищення влади, люстрація, верховенство права, захист прав людини, якість норми права, посадова особа, порушення прав людини.

Formulation of the problem.

For Ukraine and the democratic world, the restoration of a civilized, liberal state based on the principle of the rule of law is one of the urgent issues. Since regaining its independence in 1991, Ukraine has been purging the government of officials who served the former communist totalitarian regime. Later, Ukraine faced another problem – young democracy and human rights were threatened by the actions of officials for whom neither human rights nor the rule of law were valuable. The Ukrainian people rose up twice against such threats – the Orange Revolution and the Revolution of Dignity took place. The Law "On Purification of Power" entered into force on October 16, 2014 [1]. It provided for the dismissal of persons who held certain positions in the civil service between February 25, 2010 and February 22, 2014 or in

the Communist Party of the Ukrainian SSR before 1991, or who did not apply for the application of prohibitions to them, as required by the Law "On Purification authorities", and prohibited them from holding civil service positions and certain other positions for ten years. The European Court of Human Rights has already issued a number of decisions [2; 3], in which it was established that a number of norms of this law are such as to contradict the norms of the Convention on the Protection of Human Rights and Fundamental Freedoms [4]. Therefore, when improving the norms of this law, it is necessary to fully take into account the Resolution of the Parliamentary Assembly of the Council of Europe No. 1096 (1996) "On measures aimed at liquidating the legacy of former communist totalitarian regimes", Guiding principles for ensuring compliance of laws on lustration and similar administrative measures with the requirements of the state established on the rule of law, the Bangalore Principles of Judicial Conduct.

In the doctrine of constitutional and international law, issues of human rights and democracy, threats to human rights and democracy were studied in the writings of Y. Bysaga [5; 6], O. Vasylychenko [7; 8], L. Deshko [9–15], H. Nechiporuk [16; 17] and other scientists. But the issue of improving the legislation of Ukraine on the purification of power, taking into account its compliance with the Resolution of the Parliamentary Assembly of the Council of Europe No. 1096 (1996) "On measures aimed at liquidating the legacy of former communist totalitarian regimes", Guidelines for ensuring compliance of laws on lustration and similar administrative measures with the requirements of the state, based on the principle of the rule of law, the Bangalore principles of the conduct of judges have not been comprehensively studied by scholars.

The purpose of this article is to analyze international acts that regulate the issue of lustration and to highlight the requirements for national legislation on the purification of power so that it is in accordance with the principle of the rule of law.

Presenting main material.

Among the international acts that regulate the issue of lustration, we will first of all single out the act of the Council of Europe. Thus, on June 27, 1996, the Parliamentary Assembly of the Council of Europe adopted Resolution No. 1096 (1996) "On measures aimed at eliminating the legacy of former communist totalitarian regimes" (hereinafter – PACE Resolution). This Resolution states that "...it is not easy to deal with the legacy of former communist totalitarian systems" [18]. This document singles out the following negative phenomena inherent in the institutional level,

which are the result of the former communist totalitarian regimes: 1) excessive centralization; 2) militarization of civil society institutions; 3) bureaucratization; 4) monopolization and excessive regulation. At the societal level, the legacy of former communist totalitarian regimes leads to collectivism and conformity, blind obedience, and other totalitarian thinking patterns. The Resolution rightly states that in order to restore a civilized, liberal state based on the principle of the rule of law, it is necessary to eliminate and overcome old structures and patterns of thinking.

In 1991, Ukraine became an independent sovereign democratic state. But due to the above-mentioned factors, the young democracy was under threat. The Ukrainian people, striving for a truly democratic development of Ukraine, started a struggle against the usurpation of power and corruption. There was an orange revolution, a revolution of dignity. Today, the Ukrainian people are fighting for their right to build Ukraine as a democratic state committed to the rule of law.

Resolution No. 1096 (1996) "On measures aimed at liquidating the legacy of former communist totalitarian regimes" states that "when liquidating the legacy of former communist totalitarian systems, a democratic state based on the principle of the rule of law must apply procedural means inherent in such a state. It cannot use any other means, because then it will be no better than the totalitarian regime that must be eliminated. A democratic state based on the principle of the rule of law has at its disposal sufficient means to ensure justice and punish the guilty, but it cannot and should not succumb to the desire for revenge instead of achieving justice. Instead, the state must respect human rights and fundamental freedoms, such as the right to a fair trial and the right to be heard, and these rights must be extended even to those people who, when in power, did not themselves observe them. A state based on the principle of the rule of law can also protect itself from the revival of the communist totalitarian threat because it has at its disposal a sufficient number of means that do not contradict human rights and the principle of the rule of law and are based on the application of both criminal and administrative norms" [18].

The Resolution has a very important aspect that allows the newly created democracy to avoid unconsciously turning into a totalitarian regime in an effort to bring to justice those who committed criminal acts during the totalitarian regime. We are talking about the prohibition of the adoption and application of criminal legislation, which has retroactive effect in time. Thus, the Parliamentary Assembly of the Council of Europe recommends that "...criminal acts committed by individuals during the communist totalitarian regime be

prosecuted and punished in accordance with the norms of criminal law. If the criminal law provides for a statute of limitations for criminal prosecution for some crimes, this period can be extended, as this is only a procedural and not a substantive matter. However, the adoption and application of retroactive criminal legislation is unacceptable. On the other hand, the trial and punishment of any person is permitted for any act or omission which, at the time of its commission, did not constitute a criminal offense under national law, but was considered a criminal offense according to the general principles of law recognized by civilized nations" [18].

Also in its Resolution, the Assembly states that "Regarding the treatment of persons who have not committed any crime for which they could be prosecuted under paragraph 7, but who nevertheless held high positions during the former totalitarian communist regimes and supported them, the Assembly notes that some States have found it necessary to take administrative measures such as lustration or decommunization laws. The purpose of these measures is to remove such persons from the exercise of state power, if they cannot be entrusted with it in accordance with democratic principles, because they have not demonstrated their commitment to them in the past, and have no desire and motivation to adhere to them today" [18].

In Resolution No. 1096 (1996) "On measures aimed at eliminating the legacy of former communist totalitarian regimes", the Assembly emphasizes that, "in general, these measures may be compatible with the principles of a democratic state based on the principle of the rule of law, provided that certain criteria are met. First, guilt, which is individual rather than collective, must be proven on a case-by-case basis, emphasizing the need for individual rather than collective application of lustration laws. Second, the right to defense, the presumption of innocence until proven guilty, and the right to judicial review of the decision should be guaranteed. The purpose of such measures cannot in any case be revenge, and political or social abuse of the results of the lustration process is not allowed. The purpose of lustration is not to punish those persons who are considered guilty - which is the task of prosecutors who use criminal legislation - but to protect the newly created democracy" [18]. The Assembly considers it necessary to ensure that laws on lustration and similar administrative measures meet the requirements of a state based on the principle of the rule of law and focus on the fight against threats to fundamental human rights and the process of democratization [18].

Another document that deals with issues of cleansing power – Guiding principles for ensuring

compliance of laws on lustration and similar administrative measures with the requirements of a state based on the principle of the rule of law (hereinafter – Guiding Principles). This document states that "In order to meet the requirements of a state based on the principle of the rule of law, lustration laws must meet certain requirements. First of all, lustration should be aimed at threats to fundamental human rights and the democratization process; revenge can never be the goal of such laws, nor is political or social abuse of the results of the lustration process allowed. The purpose of lustration is not to punish those persons who are considered guilty – which is the task of prosecutors who use criminal law – but to protect the newly created democracy" [19].

The analysis of the Guiding Principles makes it possible to single out the following requirements for the national legislation on the purification of power: 1) lustration is aimed at the following two threats: a threat to fundamental human rights and a threat to the democratization process; 2) prohibition of revenge, including political revenge; 3) prohibited by abuse of the results of the lustration process (including – prohibition of police abuse; prohibition of social abuse); 3) the purpose of lustration is to protect the newly created democracy; 4) creation of a special independent commission on lustration, which includes citizens respected by society; 5) lustration is applied to a subject who holds a specific position and uses this position to commit actions/inactions that pose a threat to the creation of a free democracy - uses the position to violate human rights, block democratic processes; 6) the range of positions to which lustration is applied must be limited; 7) grounds for choosing positions for lustration – civil service positions that involve significant responsibility for defining or implementing state policy and measures related to internal security or civil service positions that involve issuing an order and/or committing a violation of human rights (law enforcement agencies, service security and intelligence, judicial authorities and prosecutor's office); 8) the term of deprivation of office on the basis of lustration – no longer than five years; 9) persons who gave orders, committed or significantly contributed to the commission of serious violations of human rights may be prohibited from holding positions; if a body has committed serious violations of human rights, then it is considered that its member, employee or representative was a participant in these violations, if he held a high position in this body, until he can prove that he did not participate in planning, directing or carrying out such policies, practices or actions; 10) prohibition to subject an official to lustration solely because of membership or activity in favor of any organization that was

legal at the time of such membership or activity (except for the cases specified in the previous subparagraph), or because of personal views or beliefs; 11) the possibility of lustration of "conscious employees" who, together with state authorities, really participated knowingly, understanding the consequences, in serious violations of human rights and actually caused harm to other persons; 12) provision of full due process protection to persons subject to lustration.

Another document that relates to the range of public relations that we consider in this article is the Bangalore Principles of Judicial Conduct.

The 2001 Bangalore Principles of Judicial Conduct project was endorsed by the Judicial Group on Strengthening the Integrity and Integrity of the Judiciary. It was reviewed at a meeting of the round table of chief judges held in The Hague in November 2002. It contains the following principle: "Constant attention from society imposes on the judge the duty to accept a number of restrictions, and despite the fact that these duties might seem burdensome to the average citizen, the judge accepts them voluntarily and willingly. The behavior of a judge should correspond to the high status of his position" [20].

Conclusions.

Therefore, in the above-mentioned international documents, it is stated that lustration is designed to protect two values from threats: human rights and the democratic process. Indeed, as L. Deshko rightly points out in his studies, human rights are a value for which humanity has fought for centuries, and therefore needs effective mechanisms for its protection. Since regaining its independence in 1991, Ukraine has nurtured the seeds of democracy, but the communist totalitarian regime has evolved. Nevertheless, the Ukrainian people saw the development of Ukraine only as a democratic state. Yanukovich's presidency ended as a result of the protests known as Euromaidan, which took place between November 2013 and February 22, 2014. On February 22, 2014, by Resolution No. 757-VII, the Verkhovna Rada of Ukraine established that Mr. Yanukovich unconstitutionally removed himself from the exercise of presidential powers. She called for extraordinary elections of the President of Ukraine, which took place on May 25, 2014.

The Law "On Purification of Power" entered into force on October 16, 2014. It provided for the dismissal of persons who held certain positions in the civil service between February 25, 2010 and February 22, 2014 or in the Communist Party of the Ukrainian SSR before 1991, or who did not apply for the application of prohibitions to them, as required by the Law "On Purification authorities", and prohibited them from holding civil service positions and certain other positions for ten years.

The European Court of Human Rights has already issued a number of decisions in which it was established that a number of provisions of this law are such as to contradict the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms. Therefore, when improving the norms of this law, it is necessary to fully take into account the Resolution of the Parliamentary Assembly of the Council of Europe No. 1096 (1996) "On measures aimed at liquidating the legacy of former communist totalitarian regimes", Guiding principles for ensuring compliance of laws on lustration and similar administrative measures with the requirements of the state established on the rule of law, the Bangalore Principles of Judicial Conduct.

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