THE GENESIS OF LUSTRATION IN THE WORLD AND ITS SIGNIFICANCE FOR THE DEVELOPMENT OF LAW-BASED SOCIETY

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Summary

Considering that lustration is quite a controversial instrument for change of the form of government on the way towards democratic values, the article considers timely issue for contemporary Ukraine – that is the realization of lustration within the framework of building a democratic law-based state with the focus on certain issues of the legislation in force. In addition, the peculiarities of lustration in ex-USSR countries are clarified under the conditions of democratic transit.

Key words: cleansing of the ranks of power, lustration, corruption, human rights, civil servant, decommunization, ex-USSR countries, democracy.

Аннотация

Поскольку люстрация является неоднозначным средством изменения режима правления на пути к демократическим ценностям, в статье рассматривается актуальный для современной Украины вопрос проведения люстрации в условиях построения демократического правового государства с акцентом на отдельные проблемы действующего законодательства. Кроме того, освещены особенности проведения люстрации постсоветскими странами в условиях демократического транзита.

Ключевые слова: очистка власти, люстрация, коррупция, права человека, государственный служащий, декоммунизация, постсоветские страны, демократия.

Formulation of the problem. In order to analyze the institute of "lustration" in Ukraine, to evaluate its purpose and efficiency it is necessary to refer to the experience of the procedure for cleansing of the ranks of power that was realized in foreign countries. When the concept of cleansing of the ranks of power was implemented in Ukraine, there were calls for adopting the best practices of certain countries in implementing lustration. However, the question, which has to be additionally analyzed, is to which extent the preconditions, the goal and activities pertaining to lustration in Ukraine and in other states coincide.

Recent publications analysis on the issues under consideration and determination of the elements of broader issue, that were not addressed to earlier. A great number of national scientists engaged in the issues with regard to lustration, in particular, the following ones: R.V.Kostyshyn [4], O.V.Kutovyi[5], A.O.Neuhodnikov [6], I.H.Orlovska [7], A.M.Poraiko [8], O.V.Srtohova [9] and others. But at the time being there is no comprehensive analysis of the phenomenon of lustration and there are no practical guidelines for the implementation of lustration in Ukrainian politicum.

Setting paper objectives (aim). The general objective of the article is analysis of foreign experience of lustration and clarification of certain issues with regard to cleansing of the ranks of power in Ukraine on the basis of the legislation in force.

Presentation of the main results and their substantiation. In the twentieth century the administration of lustration started from the denazification of Germany after World War II by the decision of the Potsdam Conference. Lustration was carried out in the 90s in the states belonging to Central and Eastern Europe after the fall of the Soviet regime. So basically lustration is carried out in order to make a switch from anti-democratic regimes to political system with democratic political order and principles of rule-of-law state.

POLAND. In Poland, when power changed from the Communists to the opposition – "Solidarity" – government guaranteed inviolability to former communists. But in 1997 the first Law "On lustration" was adopted in order to check the connection of top executives with the security agencies in the communist period. The Law was applied to ministers, members of parliament, senators, judges and bureaucrats, former employees or agents of the state security apparatus of People's Republic of Poland, and so on. It is worth paying attention to the fact that the Law "On Lustration" was adopted only upon eighth years of transformational changes.

The second stage of implementation of lustration was characterized by adoption of new legislation with regard to carrying out lustration in 2006-2007. At the time lustration in Poland is aimed at checking all persons entering the civil service, in terms of their involvement in the former communist regime in this country. The functions pertaining to such examination are entrusted to Lustration Office of the Institute of National Memory. The corresponding procedure is applied to everyone starting from the president and up to the vice-principal of higher educational establishment.

Analysis of all Polish laws on lustration shows that their main purpose was to disclose information with regard to secret officers, ones who assisted in the communist regime, and the voters themselves had to decide whether such persons were worth electing. Thus, despite the standard inspection procedure, it is possible to establish the principle of individual responsibility (mainly political). So lustration in Poland possesses mostly social and information functions.

CZECH REPUBLIC. In the Czech Republic, despite some antagonism on the part of elite, it was possible to adopt the law on lustration fast enough – October 4, 1991 (which remains in effect up to now). The Law provided for the removal from holding public posts of employees pertaining to former criminal regime. The next step in order to regulate the lustration process was the adoption of

the Law "On the unlawfulness of the communist regime" (1993), where the Communist Party of Czechoslovakia was a criminal organization and was worthy of conviction, as well as other organizations, based on its ideology. The activities of these institutions were aimed at depriving people of their rights and suppression of democracy. 140,000 people who collaborated with the communist regime in 1948-1989 fell within the scope of the law. The Law on decommunization has no expiration date from 1996.

In 2007 there was adopted a law on the establishment of the Institute for the Study of Totalitarian Regimes and the Security Service archives in the Czech Republic. All registers were spread out and were publicly available. During lustration a list of people (140,000 names) who collaborated with the communist regime during the years 1948–1989 was exposed to public. This list was subject to verification. And there were established restrictions with regard to holding positions within government authorities for such persons for the term of 5 years.

Therefore lustration in the Czech Republic had both the repressive and information nature. In the process of its implementation the repressive nature was completely replaced by purely information one. Much attention should be paid to the fact that lustration activities were caused by the fall of the communist regime, including the replacement of legal framework.

BALTIC STATES. The countries within Baltic region were the first ones of former Soviet Union who regulated the implementation of lustration in terms of legislation. Here the issue of lustration was first raised in 1990 by the Congress of illegally repressed in Estonia, Latvia and Lithuania. In Estonia, the Law on the extrajudicial mass repression in Soviet Estonia in 1940–1950 was adopted, according to which the Prosecutor's office of Estonian SSR was given a task to consider the issues with regard to initiation of criminal cases and criminal prosecution of persons guilty of mass killings and other crimes against humanity. Latvian electoral law dated 1992 required from all Parliamentary candidates to issue a written statement on the availability or lack of their ties with the Soviet or other secret services. The law on elections to the Latvian Seym starting from 1995 prohibits the election of persons who were active in the Communist Party and in a range of its partner organizations after January 13, 1991, as well as of employees and agents of the State Security Committee of the USSR (hereinafter – KGB of USSR).

In Lithuania, the Law on verification of the mandates of deputies that were suspected of conscious collaboration with the special services of USSR or other countries was adopted. According to this law in order to examine and investigate the facts of collaboration between the member of parliament and special services of USSR or other states there should be created a special parliamentary commission of the respective council, which where required, should attract officials from the prosecutor's office, internal affairs office and national security office.

Both in Latvia and in Lithuanian Republic, according to the laws that are currently in force, the Parliamentary candidates are subject to examination in terms of relations with foreign intelligence services. And former employees of foreign (Soviet or other) intelligence services may not stand for parliamentary elections.

However, much attention should be paid to the fact that despite the fairly rigid model of lustration procedure, which is being carried out in connection with decommunization, there exists a principle of individual punishment in legal responsibility. In addition, in the Baltic States this law was adopted under the conditions of threats to the independence of states, since at the time, when their independence was declared, the Soviet troops entered the territory of Baltic States and subsequently a real threat of armed intervention continued to exist on the part of the aggressor state – the Russian Federation.

HUNGARY. In Hungary the history of lustration begins in 1992 with the adoption of the "Zétényi–Takács law", which established criminal prosecution without period of limitation for persons, who committed "treason against the fatherland" in December 1944 – May 1990. In 1994, after fairly lengthy proceedings the Constitutional Court of Hungary arrived at the decision, the essence of which was as follows: a list of agents can be opened to society if there is a public interest in disclosing the past of agents. Public interest will be justified if the person wants to enter into public office.

"Zétényi–Takács law" dated 1992 established criminal responsibility without period of limitation up to life imprisonment for persons, who committed treason against the fatherland in December 1944 – May 1990. It was the first stage of lustration (years of 1992–1994). The second stage of lustration (years of 1994-2001) was aimed only at achieving a high level of public awareness with regard to the activities of public authorities. In this period the sanction was only the disclosure of information about the activities in the state security apparatus. May 30, 2005 the Parliament opened wide access to previously secret documents about the secret service agents.

It should be concluded that lustration in Hungary as also in other countries, in which such lustration was carried out, lost the repressive nature due to the fact that repressive measures were no longer relative to the desired goals. It happened, firstly, from the perspective of time factor, and secondly, given the establishment of the rule of law and the respective legal framework.

Thus, the experience of lustration in connection with the realization of decommunization in post-socialist states mostly comes down to the information area, and not the administrative restrictions or criminal prosecution. The latter existed only at the first stage of the establishment of a democratic form of government, where there was a real threat of armed intervention or revenge of the communist regime. In addition, the main thing in the respective process is observance of the principle of individualization of punishment, if actions of administrative limitations and/or criminal prosecution come around.

GEORGIA. Lustration in Georgia took place at a later time. In October 2010 the Georgian parliament adopted a law prohibiting to hold key positions in the state in respect to persons who were employed within the KGB of USSR or were at the senior management level in the Communist Party of the Soviet Union (hereinafter – CPSU). The commission on lustration, established in accordance with this law, dealt with the issues of eradication of communist symbols in Georgia, including the names of streets and squares, as well as the elimination of

monuments, symbolizing the totalitarian past. In 2011 the parliament of Georgia unanimously adopted a law on lustration and also on forbiddance of fascist and communist symbols. This law established work-related restrictions for the former employees of intelligence agencies of the Soviet Union, as well as former public officials of the Communist Party and Komsomol (All-Union Leninist Young Communist League (AULYCL), or Komsomol). These people can not work in executive bodies and in judicial authorities. In addition, the above-mentioned citizens will not be able to hold the positions of heads of higher education institutions.

In our opinion, the lustration process in Georgia, which in substance focused on the establishment of administrative restrictions of constitutional rights mainly through the affiliation with the Soviet authorities, can be judged with a critical mind. As of 2010 neither revanche of communist regime nor influence of anti-democratic ideas associated with it constituted a significant threat. Instead, Georgia encountered a problem of direct armed aggression on the part of the Russian Federation. Why there was no focus on the removal from office of individuals who were involved in the promotion of carrying out actions against the territorial integrity and independence of Georgia by intelligent services of aggressor state on the basis of individual punishment and why the interim measures with regard to the removal of persons suspected of such actions were not introduced – is a rhetorical question.

However, lustration is not always connected to the resistance to totalitarian regimes and eliminating the possibility of their revanche, but it is also related to combating and liquidation of total corruption.

SINGAPORE. Singapore is a country that fought down corruption over the period of slightly more than 40 years and has attained economic achievements. Government team of Lee Kuan Yew set the task of liquidating corruption and increasing trust and respect towards the state by the population. In this country there was an inquiry made with respect to revenue earned by the officials, what became the second part of the anti-corruption program, as in Singapore the presumption of guilt of officials, of any government establishment or public NGO was actually introduced. In 1960 a law was passed that allowed to consider the fact that the accused person lived beyond his/her means or owned property items that he/she could not buy on his/her income as an evidence of bribery. Here was also included any payment received by an official from the person who sought connections with him/her in order to deal with the specific subjects. A civil servant must convince the court that the payment was not received within the framework of the corruption scheme. In case if the guilt of official is proved his property is subject to confiscation, the official pays a huge fine and gets in jail for a significant period of time. At this his family is considered dishonoured, and none of the family members can find a good job in Singapore.

Therefore, from the international practices lustration as a legal process (in the narrow sense) may be classified into the following types with regard to legal nature:

– depending on means lustration can be divided into:

– punitive, which is in the application of means of legal responsibility, including with hindsight;

– information, which is in the revelation of information before the public with respect to the activities of certain individuals and their role in the repressive activities of totalitarian regimes;

– according to directions:

– political, which is in the limitation of opportunities to hold positions in public offices for individuals who are involved in the evolvement and establishment of totalitarian regimes and participation in their repressive mechanisms;

– anti-corruption, which is in the statement of constraints for persons who committed corruption offenses, or who can not explain the origin of their property and there is a chance without reasonable doubts that the latter is acquired through breach of legislation, including with regard to taxation.

UKRAINE. While in Ukraine, according to the author, lustration is carried out typically not according to the actions that are displayed while being in this or that position, but according to the actual positions.

The substantiated criticism with regard to the provisions of Ukrainian law on lustration does not come out from the fact that we deny the need for cleansing of the ranks of power, but from the fact that the corresponding legislation does not include the principle of individualization of punishment and may trigger a situation, in which persons, who are thrown out of office without the establishment of reasonable actions and facts that allow to apply general sanctions of criminal or administrative nature, will be restored through the courts of Ukraine or will work out the decision in the European court of human rights (hereinafter – ECHR) for their own benefit. In such a situation, the persons, who actually committed unlawful acts while being in their positions, will also be recompensed at the expense of taxpayers for the respective incompetent approach of the legislator.

It is obvious that cleansing of the ranks of power from these categories makes sense; on top of that, it is necessary in the contemporary conditions of the development of Ukrainian state. However, the way through which the legislation of Ukraine went, is fundamentally wrong both from a legal and political point of view.

Firstly, most of the acts mentioned in the Law of Ukraine "On cleansing of the ranks of power" are introduced both in the Criminal Code of Ukraine and in the Code of Ukraine on administrative violations with the respective harsh sanctions. In addition, individually, such persons may be thrown out of work on the grounds set out in the Code of Laws on Labour of Ukraine or in the Law of Ukraine "On civil service". At the same time the application of the provisions of legislation solely on the grounds set out in the Law of Ukraine "On cleansing of the ranks of power" can only indicate the reluctance and unwillingness of authorities to provide proper legal and criminal evaluation of the specific actions of persons who occupied public offices.

Secondly, the revanche of the communist totalitarian regime in Ukraine is unlikely, and therefore the application of enforcement efforts of retrospective responsibility to persons who do not constitute a significant menace to national security is illogical, and what is more – illegitime. If such persons do not meet their current positions – the legislation of Ukraine has proper legal mechanisms for their dismission. In this part, to say the least, the legislation was late for two decades.

Thirdly, anti-corruption direction of lustration, which was supposed to be the key one, is not regulated properly. And what is more, instead of proving the guilt of individuals in unlawful enrichment in accordance to the criminal procedure (what would be appropriate to do in the state governed by the rule of law), the latter will be thrown out of work on the grounds of the Law of Ukraine "On cleansing of the ranks of power". We believe that such persons will receive positive judicial decisions in state judicial authorities, or in the ECHR, and by that time the time frames for their criminal prosecution will pass away.

The Law of Ukraine "On cleansing of the ranks of power" was also substantiated and unequivocally criticized by international legal institutions, in particular by the Venice Commission in its conclusion № 788/2014 dated December, 16, 2014.

At the time being certain provisions of the Law of Ukraine "On cleansing of the ranks of power" are being reviewed by the Constitutional Court of Ukraine (hereinafter – CCU) with respects to its constitutionality. There is a strong possibility that CCU will rule its provisions as unconstitutional and such situation would be most preferable for the following reasons:

1) the Ukrainian authorities will find no other way out but to start the real process of investigating the acts of persons to whom the provisions of the above-mentioned legislation should be applied, to provide legal as well as criminal and judicial evaluation to such acts based on individual approach, instead of accomplishment of unreasonable anti-democratic and anti-constitutional measures with regard to prosecution on the basis of collective responsibility (it is public investigations and criminal prosecution that the society calls on in particular, and not throwing out of work of everyone according to the certain criteria);

2) the respective decision of CCU will ensure protection of citizens within national courts and will reduce the cost of compensation by means of the budget, which Ukraine would have to pay according to the corresponding decisions against Ukraine in the European Court of Human Rights.

Going back to anti-corruption direction of lustration, based on the final conclusion of the Venice Commission dated June 19, 2015 № 788/2014, it should be noted that the Commission was skeptical in its evaluation of the combination of anti-corruption and purely lustration measures in one Law, taking into account the fact that the latter should be assessed in the light of various international standards. It must be emphasized that automatic disqualification from the access to public office for a period of 10 years of all persons whose examination shows some violations, regardless of the nature and extent of these violations, is quite a radical measure and raises a questions on the part of the Commission whether it can correspond to the principle of proportionality, one of the principles of the process of cleansing of the ranks of power.

In particular, it has been noted that respective sanctions are higher than sanctions identified in the Criminal Code of Ukraine at the time of commitment of respective corruption-related offences, in what may be displayed disproportionality of anti-corruption measures in relation to general legislation. On top of that, the corresponding sanction can not be applied as measure of legal liability to acts which were committed before the entry into force of the Law of Ukraine "On cleansing of the ranks of power", in accordance with the constitutional regulations and international standards. Therefore, the direction of combatting corruption and its legal regulation should in future be "singled out" from the provisions of the Law of Ukraine "On cleansing of the ranks of power" and transferred to the general anti-corruption legislation, including criminal one.

Conclusions and perspectives for further research. Parliamentary Assembly of Council of Europe in its Resolution 1096 (1996), "On Measures to dismantle the heritage of former communist totalitarian systems" dated June, 27, 1996 (hereinafter – PACE Resolution 1096 (1996) dated 27.06.1996) stresses that, "in general, these (lustration) measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasizes the need for an individual, and not collective, application of lustration laws. Secondly, the right of defense, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty (this is the task of prosecutors using criminal law), but to protect the newly emerged democracy" (paragraphs 12, 13 of the mentioned resolution).

In addition, according to PACE the aim of lustration should be elimination of threats with regard to violation of fundamental human rights and democratic process, and not the persecution of political opponents or punishment of persons who are seen as guilty of commitment of unlawful acts, as it is a matter of criminal prosecution, and not lustration process. Therefore, since the issues of power grab and authoritativeness of regime were not diligently identified in accordance with criminal procedure, Ukrainian lustration can be regarded as establishment of presumption of collective guilt of people who worked in civil service and law-enforcement authorities and performed their functional responsibilities during the presidency of V.F.Yanukovych.

At the time being it is necessary to go to great lengths to optimize the Law of Ukraine "On cleansing of the ranks of power" in order to prevent lustration in Ukraine from becoming a tool for settling political scores and political persecution. Therefore, experts in the field of law and scholars should emphasize the need for its substitution for the new Law of Ukraine "On cleansing of the ranks of power".

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ЗНАЧЕНИЕ И ПРИРОДА ИНСТИТУТА ПОГАШЕНИЯ ТРЕБОВАНИЙ КРЕДИТОРОВ В КОНКУРСНОМ ПРОЦЕССЕ

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Summary

The article analyzes the meaning and the order of creditors' claims paying off under the Law of Ukraine «On Restoring Debtor's Solvency or Recognizing it Bankrupt». The necessity of consolidation as the main purpose of proceedings on bankruptcy the maximum satisfaction of creditors' claims at the expense of the debtor's property is stated. The features which let to separate the creditors' claims repayment in the bankruptcy process to a separate Institution: special subjectival composition, conditions, order and methods of liquidation of obligations between creditor and debtor. The composite public-private nature of the institution of creditors' claims repayment in the bankruptcy proceedings is confirmed.

Key words: bankruptcy, bankruptcy process, debtor, creditor, creditors' claims, repayment of creditors' claims.

Аннотация

В статье проанализированы значение и порядок погашения требований кредиторов по Закону Украины «О восстановлении платежеспособности должника или признании его банкротом». Отмечена необходимость закрепления в качестве основной цели производства по делам о банкротстве максимального удовлетворения требований кредиторов за счет имущества должника. Указаны особенности, позволяющие выделить погашение требований кредиторов в конкурсном процессе в отдельный институт: специальный субъектный состав, условия, порядок и способы погашения обязательств между кредитором и должником. Подтверждена комплексная публично-частная природа института погашения требований кредиторов в процедуре банкротства.

Ключевые слова: банкротство, конкурсный процесс, должник, кредитор, требования кредиторов, погашение требований кредиторов.

Постановка проблемы. Несмотря на наличие в правовой системе разнообразных средств опосредования добровольного урегулирования спора и государственного принуждения к возврату долгов в форме деятельности судебных органов и исполнительной службы по принудительному исполнению судебных решений, все же решающим и последним средством соответствующего государственного реагирования остается деятельность хозяйственного суда по признанию должника банкротом и проведению соответствующих распорядительных, санационных и ликвидационных процедур в конкурсном процессе. В связи с этим, по мнению М.В. Телюкиной, институт несостоятельности и банкротства позволяет решить две задачи: во-первых, обеспечить должнику защиту от кредиторов, требования которых он не в состоянии удовлетворить; во-вторых, защитить интересы каждого кредитора от неправомерных действий должника и других кредиторов, обеспечив сохранность имущества и его справедливое распределение между кредиторами [1].

В свою очередь, реализация второй задачи сопряжена со множеством проблем. И не только в силу отсутствия четкого законодательного и организационного обеспечения порядка удовлетворения требований кредиторов, условий применения конкретных способов погашения задолженности во время отдельных судебных процедур банкротства, но и в связи с отсутствием комплексных научных исследований, позволяющих определить место, значение, правовую природу института погашения требований кредиторов в конкурсном процессе и на их основе установить первоочередную целевую направленность норм законодательства о банкротстве.

Актуальность исследования. Различным вопросам банкротства посвящены многочисленные труды ученых и