

BRINGING A STATE TO CIVIL LIABILITY WITHIN LEGAL RELATIONS OF PROPERTY RESTITUTION

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ABSTRACT

The article is focused on studying civil liability of the state within legal relations of property restitution. The features, principles and conditions of civil liability of the state within legal relations of property restitution have been determined. The limits of civil liability of the state within legal relations of property restitution have been defined. The natural form of civil liability of the state within legal relations of property restitution has been characterized. The content of the compensation form of civil liability of the state within legal relations of property restitution has been revealed. Based on the systematic analysis of the provisions of the theory of civil law, domestic and foreign legislation, the practice of its application, the authors have formulated scientifically sound conclusions, propositions and recommendations aimed at developing a general scientific approach to a state's civil liability within legal relations of property restitution. The authors have offered to single out the following types of a state's civil liability within legal relations of property restitution depending on the boundaries: full restitution; limited restitution, aggravated restitution. It has been established that each country independently chooses the types and boundaries of restitution depending on the socio-economic situation, society's attitude to this issue, the assistance of international organizations. It has been emphasized that Ukraine has no restitution legislation, so it is impossible to identify the boundaries of restitution.

Key words: Restitution, Civil Liability, Property, State, Property Rights, Compensation, Return of Property in Kind

INTRODUCTION

Restitution of nationalized property, abandoned property of internally displaced persons, cultural values, etc. are issues that are insufficiently studied in the scientific works of Ukrainian civil law scholars. Significant update of Ukrainian legislation, in particular the adoption of the Law of Ukraine "On Condemnation of Communist, National and Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols" (Law of Ukraine, 2015), Law of Ukraine "On Restoration of the Rights of Persons Deported on National Grounds" (Law of Ukraine, 2014), amendments to the Law of Ukraine "On Rehabilitation of Victims of Repression of the Communist Totalitarian Regime of 1917-1991" (Law of Ukraine, 1991), encourage scholars to conduct new research on the restitution of nationalized property. Besides, there are real risks of deprivation of private property in Ukraine on the examples of

nationalization and reprivatization, as evidenced by the facts of their application (for example, nationalization in 2019 PJSC “Commercial Bank Private bank”, reprivatization in 2005 OJSC “Kryvorizhstal”). The risk of deprivation of private property rights is associated with the likelihood of adverse consequences due to political, social, economic factors and/or the impact of negative internal and external factors. The owner’s acceptance of such a risk indicates the existence of a concept of agreement between him and the state, according to which the owner accepts the potential risk of being deprived of property, and the state guarantees the exclusivity of such deprivation (Teremetskyi, Avramova & Andriiv, 2020). It is indirectly stated in the Art. 321 of the Civil Code of Ukraine “Inviolability of Property Rights” (Law of Ukraine, 2003).

The number of internally displaced persons has been recently increased significantly in Ukraine. But still there is the problem of determining the status of property left in the occupied territory of Ukraine and the procedure for its return or compensation under restitution, in accordance with the UN Guiding Principles on Internal Displacement (UN Guiding Principles, 1998). It is known that all European countries upon accession to the EU and NATO have introduced legislative norms on property restitution. We believe that enshrining the strategic course of the state to become a full member of the European Union and the North Atlantic Treaty Organization in 2019 into the Constitution of Ukraine requires special attention of scholars in regard to the legal relations of property restitution. Besides, there is no single approach to the state’s civil liability within legal relations of property restitution in the legal science of Ukraine. The above indicates the relevance of the chosen topic for research.

RESULTS AND DISCUSSION

Civil liability of the state within legal relations of property restitution is one of the complex issues of civil law of Ukraine. This problematic issue has been studied in the works of M.I. Brahinskyi, O.V. Dzera, A.S. Dovhert, I.S. Kanzafarova, O.A. Krasavchikov, V.V. Luts, R.A. Maidanyk, O.A. Pushkin, Ya.M. Romaniuk, I.V. Rushchak, V.I. Teremetskyi and other scholars. The conclusions of the indicated and other scholars are mainly based on the consideration of restitution as a consequence of the invalidity of the transaction. It is not surprising, because the provisions of Part 2, c. 1 of the Art. 216 of the Civil Code of Ukraine (Law of Ukraine, 2003) provide only one case of applying restitution – in case of invalidation of the transaction. There is no other understanding of restitution in the civil legislation of Ukraine. Thus, the current national legislation supports a narrow approach to the legal nature of restitution and does not share the existing approach existing in European and Anglo-Saxon law on restitution as a restoration of justice in cases of illicit enrichment at the expense of another person (Teremetskyi, 2019).

The EU adopted Directive 2014/60/EU on 15 May 2014 about the return of cultural objects unlawfully removed from the territory of a Member State and on amending Regulation (EU) No. 1024/2012 (new version) (EU Directive, 2014). The Art. 12 of that Directive provides that the payment of fair compensation and other payments does not restrict the right of the requesting Member State to take actions aimed at recovering such sums from persons responsible for the unlawful removal of a cultural object from its territory. It indicates the existence of civil liability of the state within legal relations of property restitution. It is applied when it is established that one person has unjustifiably received property from another, then it is obliged to return it to its rightful owner so that he does not receive unfair enrichment or retain an unjustified advantage.

The process of property restitution in European countries is considered as a post-communist restoration of church property, ownership for movable property, agricultural land plots, housing and industrial property. There is also a tendency for spreading lawsuits on restoring property rights or on paying compensation as a strategy for rehabilitation and peace in case of the property’s violation as a result of a conflict or authoritarian regime. The lawsuits are based on violations of human rights and international humanitarian law. To ensure the personal rights of individuals the Parliamentary Assembly of the Council of Europe adopted Resolution

1708 (2010) “Resolving the Property Issues of Refugees and Internally Displaced Persons” on 28 January 2010. It is necessary to pay attention to the Art. 3 of this Resolution, which states:

“The destruction, occupation and confiscation of abandoned property violate the rights of victims, prolong their replacement and complicate the process of reconciliation and peacemaking. Therefore, the restitution of property – that is, the restoration of the rights and physical possession in favor of displaced former residents – or compensation – are forms of reimbursement necessary to restore the rights of such persons and the rule of law”

(Council of Europe Parliamentary Assembly Resolution, 2010). At the same time, the Parliamentary Assembly emphasizes that

“Restitution is the optimal response to the loss of access and the rights to housing, land and property, as it among all forms of compensation helps to choose between three “long-term decisions” in terms of relocation: safe and dignified return to own housing; local integration at the place of relocation; relocation to another place within the country of origin or abroad”.

(The Art. 4 of the Resolution) (Council of Europe Parliamentary Assembly Resolution, 2010). This approach is based on the norms of the ECHR (ETS No. 5), in particular on the Art. 6 “The right to a fair trial”, the Art. 8 “The right to respect for private and family life”, the Art. 13 “The right to an effective legal remedy”, the Art. 14 “Prohibition of discrimination” (European Convention, 1950). Having analyzed the above norms, it can be argued that the property restitution is the restoration of the rights and physical possession in favor of the former owners in the form of return of property or its compensation. The principles of compensation are the rule of law, a fair trial, and respect for private and family life, an effective legal remedy, and the prohibition of discrimination.

The Report on the Human Rights Situation in Ukraine prepared by the Office of the UN High Commissioner for Human Rights (February 16 – May 15, 2018) addresses the issue of the lack of restitution mechanisms in Ukraine. Thus, paragraph 34 states: “The Government during the reporting period did not establish an effective mechanism for restitution and compensation for private property destroyed or damaged as a result of armed conflict on both sides of the line of contact. This issue remains one of the most urgent among unresolved socio-economic issues facing by those directly affected by the conflict. As of the end of 2017, as a result of hostilities since their beginning in 2014, more than 40,000 civilian homes have been damaged or destroyed. This figure does not include abandoned houses by internally displaced persons” (Office of the UN High Commissioner for Human Rights Report, 2018). At the same time, the Report states that as of April 19, 2018 more than 230 lawsuits were filed to courts for compensation for damaged or destroyed property. The courts have ruled in favor of the plaintiff for the most part recognizing the right to compensation, but none of those decisions has been enforced yet (paragraph 35 of the Report) (Office of the UN High Commissioner for Human Rights Report, 2018). The state will be the subject of liability within legal relations of property restitution with internally displaced persons. The possibility of bringing Ukraine to justice was confirmed by the decision of the European Court of Human Rights to accept the application “Anton Vasylovych Lisnyi and two other applicants v. Ukraine and Russia” (No. 5355/15) (Application, 2017). Despite the fact that the application was rejected due to the lack of evidence, a precedent has been set for the possibility of bringing Ukraine to justice. Therefore, it is quite permissible and justified to consider the civil liability of Ukraine within legal relations of property restitution.

The state can act as a defendant within legal relations of property restitution regarding illegally obtained property through forced nationalization/confiscation and property left in the occupied territories. Restitution in this case will be a mean of protecting unjustly violated individual rights. It should be also noted that restitution can be not only a mean of protecting civil rights and interests, but also a sanction. At the same time, the participation of the state in the legal relations of civil liability not only makes it possible to obtain fair compensation or return the property, but also to recognize the existing state of ownership at the time of its

violation.

We offer to highlight the following features of civil liability of the state within legal relations of property restitution:

- 1) During its application there is the recognition of the violated right, the interest of the person (owner)
- 2) Leads to the restoration of property status, non-property rights, interests of the person
- 3) Is an additional civil obligation of a property nature manifested in the payment of compensation or return of illegally obtained property, property rights
- 4) May be performed voluntarily or by coercion
- 5) Have negative consequences for the violator of the subjective rights and interests of another person.

The purpose of this liability is to recognize the previous state of property relations, to restore the property status of the victim party, to bring the guilty party to civil liability, to pay compensation or return the property, property rights in kind.

It is possible to define the following principles of civil liability of the state within legal relations of property restitution:

1. Legality. It is impossible to maintain the lawful development of social relations without the lawful application of liability;
2. A fair trial. This principle is fundamental in restitution legal relations, since the problem of property restitution arises when the owner at the time of deprivation of property is not able to seek legal protection of his right. Therefore, the principle of a fair trial makes it possible to restore the right to go to court with arguments for property's restitution or compensation;
3. Individualization. The subject of liability must be established and individually compensate damage at the expense of his own property.
4. Full compensation for damage. It must be fully realized in the property restitution legal relations, because the owner, who is unlawfully deprived of property, rightly demands the return of the thing in kind or compensation for its value. There can be no restrictions on the value of the property.
5. The inevitability of liability for the offense. There is a need to bring the offender to justice for unlawful deprivation of property. This will restore justice within civil legal relations. Besides, justice within this liability should be a separate principle based on the Art. 3 of the Civil Code of Ukraine (Law of Ukraine, 2003).
6. Combination of public and personal interests. This combination indicates that the state can be held liable. In addition, personal interests are combined with public ones due to the fact that restitution restores the state of violated subjective property rights, which is unacceptable in a democratic legal society.
7. Equality of the parties. This principle must be applied to the specified liability, since the state will act as an equal subject, which is provided by the dispositiveness of civil law.
8. Prohibition of discrimination. This principle defines the idea of equality of all owners in the state: no one can get property illegally taken from the owner.

In addition to those listed in European law; the following principles are also distinguished: the rule of law, respect for private and family life, and an effective legal remedy.

We believe that the conditions of civil liability of the state within legal relations of property restitution are:

1) Illegality of the offender's conduct. The state's liability in the form of restitution for illegal conduct is defined in Part II "Content of international liability of the state" the Art. 35 "Restitution" of the UN Resolution of December 12, 2001 No. 56/83 "State's Liability for International Illegal Acts". This document stipulates that a state responsible for an internationally wrongful act is obliged to carry out restitution, *i.e.*, to restore the situation that existed before the commission of the wrongful act, if and to the extent that the restitution: (a) is not materially impossible; (b) does not entail a burden that is completely disproportionate to the benefit of obtaining restitution instead of compensation (International Law Commission Report, 2007). The illegal conduct of the state within legal relations of property restitution is the actions or omission of the state violating its obligations under national and international law. Violation of obligations is non-compliance with the constitutional guarantees of the rights and freedoms, the principles of state activity proclaimed in national and international regulatory legal acts. International law provides a classification of international violations of the state, whereas such a

classification in national law is absent due to the fact that the nature of the offense has a mixed sectoral nature. The illegal conduct of the state within legal relations of property restitution may consist in violation of the rights proclaimed by the Constitution of Ukraine (property rights, inviolability of housing, etc.) and obligations defined by international treaties;

2) The presence of negative consequences of a person, whose subjective right has been violated. Negative consequences resulting from illegal conduct are correlated in civil law with harm. The negative consequences of the offense are also the damage suffered by the person. Therefore, when determining the conditions of civil liability, it is necessary to find out which subjective right has been violated. The presence of the violated right makes it possible to identify the negative consequences that a person has got from the offender's actions. Civil liability of the state within legal relations of property restitution may occur if the owner has suffered negative consequences in the form of deprivation of property and social status. However, only a detailed description of the property makes it possible to assess the negative consequences received by its owner.

In order to compensate for damages within the framework of restitution, it is necessary to identify the value of the disputable property. In addition to compensation for property damage, the owner during restitution has the right to claim compensation for moral damage, if he can prove that unlawful deprivation of property resulted in mental suffering of an individual in connection with the destruction or damage of his property, humiliation of honor and dignity of a person, as well as the business reputation of an individual or a legal entity (paragraphs 3, 4, Part 2 of the Art. 23 of the Civil Code of Ukraine) (Law of Ukraine, 2003);

3) The causal relationship between the wrongful conduct of the offender and the negative consequences. A causal relationship exists when there is a sequence of phenomena (Smirnov & Sobchak, 1983). The cause is always the primary factor that causes the negative consequences. Relationship must be established between the offender's actions/omission and the consequences in each case of a civil offense. This relationship proves that it was the offender who committed a certain conduct resulting in negative consequences. It is another matter whether the offender assessed or did not evaluate those consequences, but such an attitude is an element of guilt. Causal relationship must be established during the restitution proceedings. It is necessary to identify how the deprivation of property affected the property status of the victim party. Besides, it is advisable to identify the relationship both between the wrongful act and the negative consequence in the form of deprived property and between the actions of deprivation of property and unjust enrichment of the offender, between the offender's actions and the impossibility of timely legal protection of property rights while establishing causal relationship in restitution cases;

4) The guilt of the offender. The possibility of bringing the state to civil liability is enshrined in the Civil Code of Ukraine. Thus, "damage caused to an individual or a legal entity by illegal decisions, actions or omission of a state authority, authority of the Autonomous Republic of Crimea or local self-government agency while exercising their powers, shall be reimbursed by the state, Autonomous Republic of Crimea or local self-government agency" in accordance with the Art. 1173 of the Civil Code of Ukraine (Law of Ukraine, 2003). Having analyzed this Article, we can conclude that the state is a specific entity within legal relations of civil liability without guilt, where it is impossible to establish guilt, because it is naturally uncharacteristic to have a mental attitude to their actions. Therefore, while studying the conditions of civil liability of the state within legal relations of property restitution, it should be noted that guilt is not a mandatory condition of this liability. In addition, the state, as an equal subject of civil relations, acts as a guarantor of the rights and interests of the subjects, which is an additional element for the emergence of liability without guilt. It indicates the existence of inchoate offense in the civil liability of the state within legal relations of property restitution.

Insufficient attention has been paid in jurisprudence to the issue of the boundaries of a state's civil liability within legal relations of property restitution. The general approach to the boundaries of civil liability is their correlation with the scope of liability. The scope (boundaries) of civil liability of the state within legal relations of property restitution may be

established: (a) in a fixed amount; (b) in the amount of the market value of the object at the time of deprivation of property rights in violation of human rights; (c) according to the indirect cost of housing construction in the regions of the state (Leszczynska-Wiacek, 2019).

The boundaries of a state's civil liability within legal relations of property restitution are determined exclusively by law or court decisions (in case of a dispute over the amount of restitution). Limitation of this liability may be established in the restitution legislation to reduce the amount of actual damage to property, the parties (only citizens of the state may enter into restitution legal relations), object (objects that represent the national heritage may remain within the state's property).

Each European state independently sets the boundaries of liability within legal relations of restitution, because there is no single approach. The definition of these boundaries is based on economic and social factors. These are: the presence of preserved nationalized property (in Ukraine part of the nationalized property was destroyed during the Second World War, and the nationalization in other countries was carried out after the war); conducting privatization processes (European states decided on restitution during the adoption of legislation on privatization, in other cases it is necessary to raise the issue about re-privatization); possibilities of compensation payments from the state budget; the balance of interests of the former owner and the owner-acquirer. These factors have a direct impact on the boundaries of liability.

Depending on the boundaries, the following types of a state's civil liability within legal relations of property restitution are distinguished:

1) Full restitution is liability in full within the value of the property, which may be in kind or in compensation form taking into account all damages. The full nature of the property restitution is manifested in the return of the thing in kind or fair compensation for the value of such property without any restrictions. Compensation in the Republic of Lithuania is provided in various forms: monetary compensation, in-kind compensation, equivalent compensation. This approach takes into account the interests of the owner of the former property and allows for full restitution. The Republic of Bulgaria is considered to be the country with the most complete restitution among the EU countries. Under restitution any property object (housing, land, forest) can be returned in kind. There are restrictions on the parties. Thus, only Bulgarian citizens have the right to receive forests and homesteads. Full restitution is applied within legal relations related to the return of property of internally displaced persons. There are countries that have experience in the restitution of property of internally displaced persons (Czech Republic, South Africa, Guatemala). The most successful state in this regard is Bosnia and Herzegovina (Bosnia). The return of property in Bosnia took place in kind, in particular houses and apartments, which belonged both on the right of ownership and on the basis of a social lease agreement were returned. At the same time, the return of the right to use housing made it possible to immediately privatize this object. Compensation for destroyed housing was provided separately. Thus, full restitution of the property of internally displaced persons is the most appropriate and aimed at restoring human rights and justice. Despite this expediency, there are no rules of restitution for internally displaced persons in Ukraine, they are only provided with compensation with certain restrictions;

2) Limited restitution is liability within the amount of actual damage caused to the owner as a result of deprivation of property in violation of human rights, which is the most common in the EU countries, where each country determines the boundaries of restitution depending on the object, subject and amount of compensation. Establishing the boundaries of restitution is necessary to preserve the balance of interests of former and new (bona fide acquirer) owners, as well as society. This type of restitution has certain limits, which allows to maintain the balance of private and public interests. Its most common form is compensatory restitution. Payment of compensation instead of return of property in kind is always a restriction of property rights. Besides, compensation always has limits. For example, Serbia has enshrined in restitution legislation that, if restitution is not possible, former owners are entitled to compensation payable partially in cash (up to € 10,000) and partially in government bonds denominated in euros. The total amount of compensation is limited to € 2 billion (plus interest) and the individual right is

limited to € 500,000 (Law of Serbia, 2011). Analyzing these provisions, it should be noted that Serbia has clearly defined the boundaries of restitution, *i.e.*, restitution is not carried out over certain (maximum) amount. It is an example of establishing the limits of restitution defined in a fixed amount;

3) Aggravated restitution is liability with double compensation for damage caused to the owner as a result of deprivation of property in violation of human rights (Leszczynska-Wiacek, 2019). The indicated type of restitution is not used in the practice of EU countries, since it does not correspond to the balance of private and public interests. At the same time, states have the right to provide this type of restitution, but in fact its use is impractical.

Analyzing different types of boundaries of a state's civil liability, it is advisable to recommend full restitution of property of internally displaced persons and limited restitution in regard to the nationalized property. Full restitution should also be applied in case of prosecuting the Russian Federation as a violating state against Ukraine, which has the status of a victim state, as a result of deprivation of state ownership of cultural values, strategic objects, land and other real estate.

CONCLUSION

The study of a state's civil liability within legal relations of property restitution has its own features, because:

- 1) This issue is not regulated by Ukrainian law.
- 2) And the current Ukrainian law supports a narrow approach to the legal nature of restitution by using it as a consequence of invalidation of a transaction.

At the same time, restitution in the legal system of Western and Central Europe countries is primarily used in cases of illicit enrichment and return of nationalized/expropriated property.

It has been substantiated that restitution of property in civil law can be considered as a sanction, since it is a negative consequence applied to the offender in case of violation of human rights to property, residence and a fair trial in the form of compensation or return of property.

It has been substantiated that the principles of civil liability of the state within legal relations of property restitution are: legality, individualization, full compensation, inevitability of liability for the offense, justice, combination of public and personal interests, equality of the parties, fair trial, prohibition of discrimination.

The authors have defined the features of civil liability of the state within legal relations of property restitution:

1. There is a recognition of the violated right, interest of the person (owner) while its application.
2. It leads to the restoration of property status, non-property rights, and interests of the person.
3. It is an additional civil obligation of a property nature, which is manifested in the form of payment of compensation or return of illegally obtained property, property rights.
4. May be performed voluntarily or by coercion.
5. Has negative consequences for the violator of the subjective rights and interests of another person.

It has been proved that the necessary conditions of civil liability of the state within legal relations of property restitution are:

1. Illegality of the offender's conduct.
2. Negative consequences of a person whose subjective right has been violated.
3. The causal link between the wrongful conduct of the offender and the negative consequences.

The lack of such a condition as guilt is due to the specifics of the state as an entity that can not have a mental attitude to their actions.

It has been clarified that the illegal conduct of the state within legal relationship of property restitution is the actions or omission of the state violating its obligations under national

and international law. Violation of obligations is non-compliance with the constitutional guarantees of the rights and freedoms, the principles of state activity proclaimed in regulatory legal acts.

The following types of a state's civil liability within legal relations of property restitution depending on the boundaries have been offered to distinguish:

1. Full restitution – full liability within the value of the property, which may be in kind or in the compensation form, taking into account all damages.
2. Limited restitution – liability within the amount of actual damage caused to the owner as a result of deprivation of property in violation of human rights.
3. Aggravated restitution – liability with double compensation for damage caused to the owner as a result of deprivation of property in violation of human rights.

Each country independently chooses the types and boundaries of restitution depending on the socio-economic situation, the attitude of society to this issue, the assistance of international organizations. There is no restitution legislation in Ukraine, so it is impossible to identify the boundaries of restitution.

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