STATE'S CIVIL LIABILITY WITHIN LEGAL RELATIONS OF PROPERTY RESTITUTION: HISTORICAL AND LEGAL RESEARCH

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ABSTRACT

The article is focused on studying the genesis of civil liability of the state within legal relations of property restitution. The authors have characterized the genesis of civil liability of the state within legal relations of property restitution. On this basis the author has revealed the imperfect state of the Ukrainian legislation in the sphere of restoration of the rights of the repressed persons/peoples and persons who lost their property during the totalitarian communist regime, namely, the authors have proved that: 1) the status of property support/compensation to Crimean Tatars while their repatriation; 2) there is the set direct prohibition to compensate the value of nationalized/municipal real estate; 3) state-designated compensation is not applied to all repressed persons under the law on the rehabilitation of repressed persons/peoples; 4) the state has not formally assumed civil liability for deprivation of property, which is recognized as a form of repression. It has been stressed that full compensation among the repressed persons/peoples was received only by Crimean Tatars. Measures for providing land, housing, long-term loans, arrangement of socio-cultural infrastructure, compensation for travelling expenses and transportation of luggage, etc. have been developed towards them. The state's policy on the return of Crimean Tatars has been defined as the compensation policy for the return of repatriated people to their homeland. The fact of compensation in this case is obvious, which makes it possible to correlate the actions of the state with legal relations of property restitution. It has been concluded that the lack of legal assessment of the state's actions in the repatriation of the Crimean Tatar people is a certain gap in the legal science of Ukraine.

Key words: Genesis, Restitution, Property, Nationalization, Deportation, Repatriation, Civil Liability, Property, State, Property Rights, Compensation

INTRODUCTION

The problematic issue of a state's civil liability within legal relations of property restitution is relevant both for the doctrine of civil law and for legislative regulation. It is confirmed by the fact that insufficient attention is paid to the issue of property restitution in modern research, and the Ukrainian legislator understands the legal nature of restitution narrowly providing its application only in case if a transaction is invalid (Part 2, paragraph 1 of the Art. 216 of the Civil Code of Ukraine) (Law of Ukraine, 2003). At the same time, restitution in the legal system of Western and Central Europe is primarily applied in cases of illicit enrichment, return of nationalized/expropriated property and "… is understood as the restoration of justice in cases of illicit enrichment at the expense of another person" (Teremetskyi, 2019).

The legal nature of restitution in the EU countries and the USA is the subject matter of public and private law research, since it is related to illicit enrichment at the expense of another person. In addition, the mechanism for the restitution of nationalized property, which is a necessary element in building a democratic, legal state of post-communist countries, is being implemented in the world. This type of restitution is a separate subject matter of ssupervision by the US Congress, and its application allows getting membership in the EU and NATO. Therefore, the issue of restoring the right to private property after the condemnation of the communist totalitarian regime is a necessary step in the development of Ukrainian statehood.

The need to study this issue is due to other factors: the need of amending the regulation of civil liability of the state within legal relations of property restitution; the presence of gaps and inconsistencies in some legislative norms in regard to the return of property to repressed, deported persons, religious organizations, which in practice lead to disputes and violations of the rights and legally protected interests of citizens, legal entities and the state; the presence of different scientific positions in the theory of civil law on the legal nature of restitution (Ukrainian scholars mostly consider restitution only as a consequence of the invalidity of the transaction); the importance of distinguishing between restitution, which is a consequence of an invalid transaction and restitution as a ground for the return of nationalized property, property of internally displaced persons. Such a distinction is, first of all, necessary within the framework of adaptation of Ukrainian legislation in line with European standards.

Given the constant amendments and updates of civil law and legislation in the field of rehabilitation and restoration of the rights of repressed persons, there are many issues that have not been studied in the field of property restitution yet. The problem of restoring the rights of repressed persons is indicated by a large number of court cases considered during the years of Ukraine's independence. The problem of implementing European legislation on property restitution should be pointed out separately. This scientific paper is focused on solving these and other issues in their historical dimension.

RESULTS AND DISCUSSION

Issues of civil liability of the state within legal relations of property restitution arose after 1945, when Jewish communities declared the illegality of deprivation of property during the Nazi regime. Thus, thousands of cemeteries and synagogues were forcibly confiscated, many of which changed their usage purpose by the end of the war (Labendz, 2017).

Law experts in their scientific research have argued that the systematic deprivation of property rights is an integral part of the gradual, deliberate process of exclusion and elimination of certain categories of people from the population of the state (Veraart, 2016). Over the decades, a clear position has been formed in European countries on legislation on property restitution and scientific discussions have taken place on this issue. The United States has officially stated that an indicator of the effectiveness of the rule of law in a democratic country is a successful property restitution program (U.S. Department of State Archive). Ukraine has chosen the European vector of development and declared the irreversibility of the European and Euro-Atlantic course in the preamble of the Constitution of Ukraine (Law of Ukraine, 1996). Despite the chosen course for the development of the state, the topic of restitution has not become the subject matter of a thorough scientific discussion. We believe that to prove the possibility of applying the state's liability to the former owners, it is advisable to identify the genesis of civil liability of the state within legal relations of property restitution in the world and the facts of deprivation of property in Ukraine. The importance of carrying out such studies is also confirmed by the current risk of deprivation of private property associated with the likelihood of negative consequences due to internal or external (political, social, economic, etc.) factors, as noted in the scientific literature (Teremetskyi, Avramova & Andriiv, 2020).

The first wave of nationalization in Ukraine arose after the adoption of the Decree of the Higher Central Executive Committee "On the abolition of private ownership of real estate in

cities" on August 20, 1918. Despite the fact that this decree was adopted by an all-Russian agency, it also extended to the territory of Ukraine, which in 1918 was trying to gain independence. The Decree was applied to the real estate of Ukrainian cities captured by the Soviet authorities in 1919. The Article 1 of the Decree provided: "The right of private ownership to all without exception plots, both built-up and undeveloped, belonging to private persons and industrial enterprises, as well as to departments and institutions located within all urban settlements shall be abolished" (The Decree, 1918). The right of private ownership of land, all residential and non-residential buildings, enterprises, as well as encumbrances imposed on these objects was abolished on the basis of that document. The document did not substantiate the nationalization of property in the public interest, did not state the expediency of such actions of public authorities for society, did not explain the purpose of liquidating private property by the state. On the contrary, the Soviet government of that period of time acted against the interests of the social community, since it deprived the entire population of the country of the right to private property. Such an approach indicates that the interests of the state were higher than the interests of society in the whole. The development of the Soviet state began due to private property. At the same time, the owners did not receive any compensation for the property that was used by the state to build and strengthen the economy.

Subsequently, the nationalization of housing began on the basis of the norms of the Housing Law of the Ukrainian SSR of November 1, 1921. The Article 1 of this Code referred to the nationalization of all residential and service outbuildings together with the land plots, where they were located (Council of Peoples Commissioners Resolution, 1921). According to the Art. 22 of the Civil Code of the Ukrainian SSR of 1922 the subjectss of nationalization were enterprises, their equipment, railways and their rolling stock, ships, buildings withdrawn from private circulation (Council of Peoples Commissioners Resolution, 1922). Analysis of the provisions of the first codified acts of the Ukrainian Soviet Republic indicates that nationalized property was withdrawn from circulation, but the grounds and denationalization of certain objects of property were established, in particular, some private houses and small enterprises were returned to private ownership. Buildings that were subject to denationalization according to the Housing Law of November 1, 1922, but remained for various reasons in the possession of public utilities, passed into the possession of those authorities and were inalienable. In general it is worth agreeing with researchers who claim that nationalization in Soviet times was carried out in violation of common law principles, was a manifestation of legal nihilism, low level of legal culture and legal awareness (Yatsenko, 2018).

Denationalization of certain houses and small businesses did not stop the first wave of nationalization. The Government of the U SSR (and later the Government of the Ukrainian SSR) On January 4, 1928, issued Resolution on the forced eviction of all persons who received an annual income of more than 3,000 hryvnas from "non-labor sources" from buildings (municipalized and cooperative) nationalized by the Soviet authorities, (Shcherbyna, 2014). The eviction of businessmen and their families first took place in Kharkiv, and later throughout Ukraine. This indicates that the state, through eviction, deprived property of those families who received housing during the denationalization. Persons deprived of housing did not have the legal opportunity to appeal against the decisions of the Soviet authorities. Therefore, given the relationship between housing and natural human rights, eviction from 1918 to 1929 should be considered as violation of natural human rights.

The next wave of nationalization was in Western Ukraine. Deprivation of housing and land plots was carried out in this part of Ukraine, by administrative eviction. In addition, banks, businesses, land, forests and other real estate were nationalized. For example, the Declaration of the Ukrainian National Assembly on the nationalization of banks and large industry in Western Ukraine was adopted on October 28, 1939. At the same time, there was a decision to nationalize the real estate of landlords and monasteries. A bright example is the CPC Resolution of October 7, 1940 No. 1318 "On the nationalization of industrial, communal enterprises, large hotels, pharmacies and pharmacy warehouses in the Akkerman and Chernivtsi regions", according to

which a significant number of enterprises were nationalized (Luneva, 2016; Nadolska, 2012). Enterprises, printing, trade enterprises and banks were nationalized on the basis of the Order of the Presidium of the Supreme Soviet of the USSR of August 15, 1940 "On the nationalization of banks, industrial and commercial enterprises, railway and water transport and communications of Bessarabia" (Luneva, 2015). The specific feature of nationalization in the Western Ukraine was that the Soviet authorities created a situation that that process allegedly took place in accordance with the demands of workers and peasants. The claims of the owners for compensation for the value of the nationalized property remained unsatisfied and even without consideration. Individuals did not have the legal opportunity to protect their property.

Eviction was also carried out on the basis of deportation decisions. In particular, the Politburo of the Central Committee of the CPSU and the CPC of the USSR adopted Resolutions (No. II13/114 and No. 289-127cc, respectively) on March 2, 1940 on the eviction of family members of all prisoners of war and former officers of Polish army, as well as prison guards, gendarmes, spies, former landowners, manufacturers and government officials, members of insurgent and counter-revolutionary organizations, refugees from the regions of Western Ukraine (Bugay, 1990). Based on the analysis of the existing normative and historical material on the deportation of the population from the Western Ukrainian lands, the authors of the article have identified the following features: the issue on nationalization of residential buildings did not arise, their ownership was ceased as a result of leaving the building, which was considered as an object of state ownership;deprivation of housing ownership occurred without any legal registration; the reason for termination of ownership was administrative eviction; compensation for lost housing was not provided.

The deportation of the population with the subsequent deprivation of property rights also affected the peoples of the Crimean Autonomous Soviet Socialist Republic. The deportation of Germans from the Crimea began in 1941. The Crimean Tatars were deported on May 20, 1944 and began to return to their homeland only in the late 80s of the XX century. Having analyzed the documents aimed at the return of Crimean Tatars and other peoples to Crimea, we can conclude that a lot of documents were adopted in the regulations of the USSR and later the legislation of Ukraine on the rehabilitation of the Crimean Tatars and other peoples of Crimea. It was also decided to provide Crimean Tatars with financing, welfare assistance for resettlement. Those actions did not officially receive the status of financiall compensation, but they were precisely as those in the content. At the same time, the peoples deported from the Western Ukrainian land did not receive such compensation upon their return (Leszczynska-Wiacek, 2019).

It should be noted that Ukraine's expenditures related to the return and resettlement of the Crimean Tatar people were annually approved. Expenditures on construction (purchase) of housing for resettlement and accommodation of deported Crimean Tatars and persons of other nationalities who were deported from the territory of Ukraine were protected until 2012 by expenditures of the State Budget of Ukraine. Having analyzed the regulations on the return of Crimean Tatars adopted in different periods of Ukrainian history, it should be noted that no document specified whether it was compensation for deportation. The relationship between deportation and compensation can be identified by analyzing rehabilitation legislation, which should be studied separately.

Thus, the Declaration of the Supreme Soviet of the USSR "On the recognition of repression acts against peoples subjected to forced resettlement as illegal and criminal and the protection of their rights" (Declaration of the Supreme Soviet of the USSR, 1989) was adopted in 1989, where the Crimean Tatars were considered repressed people. According to Articles 1 and 2 of the Law of Ukraine "On Rehabilitation of Victims of Repression of the Communist Totalitarian Regime of 1917-1991", forms of repression are deportation of persons permanently residing in Ukraine, as well as deprivation of property by nationalization, expropriation, confiscation by the decision or sentence of the repressive agency, dekulakization, seizure by a repressive or other agency during a search, deprivation of housing (Law of Ukraine, 1991).

Thus, deportation and nationalization are forms of repression, and those who have experienced it are repressed. Regarding compensation to those persons the Art. 5 of the indicated Law stipulates: "If possible, the seized buildings and other property (if the house is unoccupied and the property is preserved) are returned to the rehabilitated person or his/her lawful heirs in kind. If there is no such opportunity, the applicant is reimbursed for the value of the buildings and property. Buildings and other property that has been nationalized (municipalized) on the basis of relevant regulatory legal acts are not subject to return (compensation)" (Law of Ukraine, 1991). The procedure for payment of compensation is defined in the Resolution of the Cabinet of Ministers of Ukraine of May 19, 2021 No. 535 "Some issues of executing the Law of Ukraine "On Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917-1991"" (Resolution of the Cabinet of Ministers of Ukraine, 2021). According to this Resolution, repressed persons and their lawful heirs have the right to receive monetary compensation for the time of imprisonment or involuntary placement in medical institutions. At the same time, the document does not provide payment to deportees or compensation for nationalized houses.

We believe that Ukrainian legislation in the field of rehabilitation of repressed persons/peoples is imperfect, as: 1) the status of property assistance to Crimean Tatars during their resettlement to Crimea remains uncertain; 2) there is a direct ban on compensating the value of nationalized/municipalized real estate; 3) state-determined compensation is not applied to all repressed persons in accordance with the legislation on rehabilitation of repressed persons/peoples; 4) the Ukrainian state has not officially assumed civil liability for all repressions that took place on its territory. The indicated shortcomings violate human rights to property, inviolability, do not comply with European law and the practice that has emerged on this issue in European countries. Only the Crimean Tatars received full compensation among the repressed persons/peoples. In their respect the state took measures on providing land, housing, long-term loans, social and cultural infrastructure, compensation for travel and luggage transportation, etc. The state policy on returning the Crimean Tatars has been admitted as a compensatory policy on the return of the repressed people to their homeland. The fact of compensation in this case is obvious, which makes it possible to correlate the actions of the state with the legal relationship of property restitution. Considering measures on returning the Crimean Tatars, we can distinguish two areas: the restoration of the financial status of the Crimean Tatars and the restoration of their moral values (national traditions, the formation of ethnic self-government agencies, etc.). The lack of a legal assessment of the state's actions during the repatriation of the Crimean Tatar people is a gap in legal science (Leszczynska-Wiacek, 2019).

It is important to compare the experience of Ukraine with the experience of European states in the field of property restitution. Thus, European states have addressed the issue of property restitution in different ways. The common criterion for them is that the deprivation of property took place during the Nazi or totalitarian Soviet regimes. Jewish communities and real estate owners, whose property was nationalized during the Sovietization, suffered the most. European countries are divided into two groups within legal relations of property restitution: 1) countries where property restitution mainly extends to cultural values (France, Austria); 2) countries that applied restitution to nationalized/confiscated real estate and movable property during the communist regime, cultural values lost during the Second World War (Eastern European countries). Thus, France was one of the first countries to raise the issue of returning cultural property to its former owners, who were deprived of it during World War II. However, the state faced not only the problem of the lack of legal mechanisms to implement this intention, but also political circumstances, because the USSR was steadfast on the position of inadmissibility of compensation, considering the captured values as trophies of war (Cœuré, 2017).

The next stage in the application of restitution in the EU is due to the return of private property to the owners who were deprived of it during the communist regime. In the early 1990s, Eastern European countries faced the need for restitution. For example, the restitution

process in Bulgaria began in 1992. The deadline for filing a repossession application was the end of 1993. The restitution process was officially completed in 1995. The European Community identified Bulgarian restitution as the most successful. Restitution of property took place on the basis of two laws collectively referred to as the 1992 Restitution Laws: the Expropriated Real Estate Restoration Act and the Restitution of Expropriated Property Act under the Territorial Urban and Rural Development Act (Leszczynska-Wiacek, 2019). According to LRERP, if the former owner applied for restitution, the restitution procedure was initiated and was implemented by the mayor's office, who verified the ownership of the property to the former owner, the current status of the property and the possibility of its return. After that, the mayor restored the property. His decision was appealed to the Supreme Court of Bulgaria (Miller, 2010). The specific feature of the restitution of Bulgaria was that the forests were returned to the owners of the pre-communist period (Staddon, 2000). Although it indicates the national value of the object, it was decided to return the forests to their former owners by terminating their state ownership. At the same time, it was the restitution of Bulgarian forests that led to the question of how private and public interests correlate during restitution, which needs to be considered at the state level while deciding on restitution. Besides, the owner in case of returning forests was subject to restrictions on cutting down, forest maintenance, sales, etc. Despite Bulgaria's experience in restitution, its process was partially suspended. For example, the Bulgarian parliament in 2009 imposed a moratorium on the commercial use and sale of real estate that was returned to the royal family. That moratorium was in force until the National Assembly passed a law on the property of the royal family. Due to such restrictions, the royal family appealed to the European Court of Human Rights to return the royal palaces of the last Bulgarian king, Simeon Saxe-Coburg-Gotha (BalkanInsight, 2018). The experience of Bulgarian restitution shows that restitution laws should be based on the balance of private and public interests taking into account the principle of fairness.

Restitution in Hungary was carried out simultaneously with privatization processes in order to build a domestic market economy and to attract foreign investors. Privatization could also be used as a form of restitution. In addition, compensation for deprivation of property was preferred in this state. The Hungarian Government decided to compensate for all the losses associated with the communist regime, in particular the loss of property and unlawful detention by adopting compensatory acts between 1991 and 1992. Compensation was in the form of coupons, which could be used to purchase the entire object or share in the object of privatization, including enterprises, land, buildings. The person had to prove that he or she had been deprived of ownership of the land or building during the communist regime. Unlike Hungary, the governments of the Czech Republic, Romania, and the former Yugoslavia decided to restore private ownership of real estate in kind by the condition of retaining the property object.

About 100,000 people have returned their homes, shops and restaurants in the Czech Republic, which were valued at $ 4 billion. USA (Fleming, 1995). The different experience of European countries within legal relations of restitution indicates that each country independently determined the principles, procedure of restitution, taking into account the public interest and expediency in the development of the national economy.

CONCLUSION

Ukrainian history testifies to the existence of factual grounds for the application of restitution. In particular, Ukrainian society has long been under the burden of the communist regime. Therefore, almost every Ukrainian family has been deprived of property during nationalization/expropriation, deportation and forced eviction. The development of the state's economy began due private property, but the owners did not receive any compensation. Citizens did not have the opportunity to legally protect their right to property. The Ukrainian state did not take responsibility for the deprivation of the right to private property.

It has been clarified that there was an administrative eviction of businessmen and their families in addition to nationalization in 1928–1929, which led to the deprivation of property rights and housing. It is also evidence of the existence of systemic violations of economic human rights in the period from 1918 to 1929. The next period of nationalization was due to the accession of Western Ukrainian territories to the USSR. Claims for compensation for nationalized property were not considered, and the nationalization procedure allegedly proceeded from the demands of enterprises workers and peasants. Another reason for deprivation of private property rights was administrative eviction due to deportation of persons/peoples. It has been emphasized that neither the Ukrainian SSR nor Ukraine had officially recognized the obligation to compensate the former owners for the deprived property during the Ukrainian SSR.

It has been stressed that full compensation among the repressed persons/peoples was received only by Crimean Tatars. Measures for providing land, housing, long-term loans, arrangement of socio-cultural infrastructure, compensation for travelling expenses and transportation of luggage, etc. have been developed towards them. Ukraine's expenditures related to the return and resettlement of the Crimean Tatar people were approved each year (from 1991 up to 2012). At the same time, there was no legal assessment to such actions of the state. The state's policy on the return of Crimean Tatars has been defined as the compensation policy for the return of repatriated people to their homeland. The fact of compensation in this case is obvious, which makes it possible to correlate the actions of the state with legal relations of property restitution. The lack of legal assessment of the state's actions in the repatriation of the Crimean Tatar people is a certain gap in the legal science of Ukraine. At the same time, such compensation had no methodological justification in terms of deprived/abandoned property during deportation. Studying the measures to return the Crimean Tatars, we can observe that they were divided into two areas: the restoration of the financial status of the Crimean Tatars and the restoration of their moral values (national, the formation of ethnic self-government agencies, etc.).

The authors of the study have made the following conclusions. The state of Ukrainian legislation in the field of rehabilitation of repressed persons/peoples is imperfect, due to the following factors: 1) the status of property support/compensation to Crimean Tatars while their repatriation; 2) there is the set direct prohibition to compensate the value of nationalized/municipal real estate; 3) state-designated compensation is not applied to all repressed persons under the law on the rehabilitation of repressed persons/peoples; 4) the state has not formally assumed civil liability for deprivation of property, which is recognized as a form of repression. The indicated shortcomings violate human rights to property, inviolability and do not comply with European law and the practice that has emerged in European countries in regard to this issue.

It has been offered to divide the European countries into two groups according to legal relations of property restitution: 1) countries where property restitution is mainly extended to cultural values (France, Austria); 2) countries that promoted restitution to nationalized/confiscated real estate and movable property confiscated during the communist regime, cultural values lost during the Second World War (Eastern European states). The study of the genesis of a state's civil liability within legal relations of property restitution made it possible to identify the shortcomings of national legislation in the field of restoring the rights of repressed persons/peoples and persons who lost property during the totalitarian communist regime. Thus, the authors have proved the inconsistency of Ukrainian legislation with the norms of European law and the practice that has arisen on this issue in European countries. The need for a modern study of legal relations of restitution for Ukraine is due to the fact that the country seeks to join the EU and NATO. At the same time, membership in these organizations is possible only if there is a fair restitution of property.

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