

On the Doctrinal Principles of Property Restitution

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This article aims to establish the reasons and demonstrate the necessity for restitution and its basic beginnings in Ukraine. The article emphasizes that process of restitution, which is undoubtedly needed in Ukraine, should be conducted in accordance to the principle of fairness in order to prevent a violation of private property rights.

Keywords: return of property; restitution; unlawful deprivation of property; justice.

Doktrininiai nuosavybės teisės atkūrimo principai

Šio straipsnio tikslas – nustatyti nuosavybės teisės atkūrimo proceso inicijavimo Ukrainoje priežastis ir pagrįsti jo būtinybę bei pagrindus. Straipsnyje pabrėžiama, kad nuosavybės teisės atkūrimo procesas, kuris Ukrainoje yra neabejotinai reikalingas, turėtų būti vykdomas laikantis sąžiningumo principo, kad būtų išvengta privačios nuosavybės teisių pažeidimo.

Pagrindiniai žodžiai: nuosavybės teisės atkūrimas; restitucija; neteisėtas nuosavybės nusavinimas; teisingumas.

Introduction

Restitution in the Ukrainian reality is connected with the consequences of recognizing the transaction invalid. Meanwhile, due to its more general understanding as a legal mechanism designed to return property to its owner, it must be perceived in this way. This property emphasizes the property vector of its movement in the legal field: *restitutio* (Latin) has the root word “*rest*” (“thing”), and the ending (“*tutio*”) indicates the dynamics of the process, which means the return and restoration of the right to a thing.

At the same time, such a perspective on the study of restitution in the civil law of Ukraine is practically absent, although it should have been updated a long time ago. In the post-monarchical post-revolutionary Soviet space, owners have been totally deprived of property since 1917. Some owners were forced to leave it, fleeing the Soviet republic. Legal arbitrariness with the adoption of dubious and unacceptable from the point of view of law laws was widespread. In modern conditions,

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although this process has been assessed, so far the process of returning property to persons unjustly deprived of the right to it has not been launched in Ukraine. Therefore, there was no adequate legal mechanism in our state.

However, as Ukraine is trying to enter the European legal space, where restitution processes have already been completed, it is time to consider the principles of this process in our country as well. This is the relevance of the study. There are critically few scientific publications on this topic – some investigations were made by I. Spasybo-Fateeva (Spasybo-Fateeva, 2015, 89–98; Spasybo-Fateeva, 2014, p. 34–37), O. Avramova (Avramova, 2019), N. Blazhivska (Blazhivska, 2017, p. 267–271), N. Moskalyuk (Moskalyuk, 2020, p. 106–111). However, this topic is so important that, of course, such publications are clearly not enough.

The purpose of this article is to establish the reasons and necessity for restitution and its basic beginnings.

The root cause of restitution is the forcible deprivation of an individual's property and the right to private property. For their part, the reasons for the seizure of property could be different – they could be political, economic or religious. However, the seizure of property on the territory of present-day Ukraine during the twentieth century was carried out: a) always purposefully; b) by the state; c) with the use of violence (as a result of wars, seizure) or in the absence thereof, but when the owner left his property due to some circumstances against his will and consequently lost his rights to it (was forced to emigrate).

The most revealing forced termination of private property ownership was nationalization. Ukrainian history demonstrates the model of nationalization as extremely unjust with its forceful nature; political background, the ideology of the proletariat dictatorship on which it was based; extreme violence, including against property owners; and categorical gratuitousness. According to the modern standards, the nationalization of 1917 can be regarded as an unlawful act on the part of the state in the form of a forcible seizure of private property.

The nationalization was followed by the dispossession, collectivization and other forms of property seizure from particular individuals and by civil circulation in general. We can therefore speak of the deliberate (programmatic!) deprivation of private property rights by changing the legal regime of property into the state ownership or by the physical destruction of this property. The slogans „Land to the peasants, factories to the workers“ were not followed at all by the transfer of these objects to the latter's private ownership. These slogans denoted the implementation of a state program for collectivization and nationalization based not on the private property but on the wage labor.

This approach to nationalization fundamentally undermined the notion of the state as a power structure in society, which was called upon and obliged to take care of the goods, including property, of all its citizens and not to dispossess them, even if for good purposes. Subsequently, during the construction of socialism and communism based on primary violations of the private individuals' rights, the Soviet Union could in no way get rid of these violations of the rights of a huge number of owners.

Understandably, such actions violate what is now called peaceful ownership of property, cannot elicit either approval or benevolence from those dispossessed, and are regarded as unjust. Modern states under the rule of law are therefore compelled to recognize that it is their duty to restore the property status of private individuals that existed prior to the seizure of their property by or without the fault of the state itself due to its return to former owners. Developed democracies have programs in place to eradicate the negative consequences that were produced by the totalitarian regimes of communism and fascism. One such program at the international level is the restitution of property rights.

A number of democratic states have already solved or are solving these problems, and the process of property restitution is in an active stage, although it should be noted that the very idea of restitution as a way of returning property is utopian. Never in the history of mankind has such a task been set before the countries and their associations, nor in individual states, to restore justice through the return of seized or nationalized property. Wars and revolutions were not originally fought as instruments of social political degradation but rather were intended or seen as tools to change society for the better.

In reality, however, this was not always the case. Napoleon was hardly less humane than modern politicians of the first rank were. The formation of democracy in general was not at first a humane process, but the opposite, with the aid of war and passion, which is also the case in the modern world. Thus, we find it paradoxical that modern democratic principles of social organization require the implementation of restitution, i.e. the reverse process. Moreover, both are within the limits of democratic change.

Naturally, in the case of nationalization or during revolutions and military action leading to the seizure of property, there is no agreement with the person who has lost it, as there can be no agreement between it and the authorities on this matter. Therefore, the subsequent procedure for the return of what has been taken away must also be reasonably accessible, if not simple, which should be ensured by an appropriate law.

Restitution must be discussed in the context of restitution of property rights not only to individuals, but also to the state. These issues arise most often from the annexation of territories, even if it has been fixed by an international act, as was the case after the end of the Second World War.

At the same time, various political movements, actions, events, etc. aimed at restitution of state property are also directly linked to the restitution of private property. Quite revealing is the phenomenon referred to in publicity as the historic collapse of the Berlin Wall, which in essence was not only the reunification of the two states – the People’s Democratic Republic and the Federal Republic of Germany and the consequent return of state property to the FRG in a certain sense – but also the basis for the return of property to private individuals. This example from international practice has prompted the development of all further restitution programs in other European states.

It is thus possible to distinguish with certainty between international and domestic restitution, and in the ratio of the general and the particular, since the return of property from one state to another has in its next stage the return of the transferred property to its citizens who has lost it in real possession or ownership. Therefore, the most important principles of international law, implemented in international acts on the transfer of property from country to country, are naturally reflected in domestic property restitution programs and laws. If restitution is only of a domestic nature, as it already is and probably will be in the post-Soviet space and Ukraine in particular, the return of property to private individuals is based solely on domestic national laws, carefully drafted by each country’s legislature.

Of course, property restitution is a global process and requires significant financial outlays from the state that has set the policy. As for the European Union, its scale, both political and economic, is incomparably higher than that of our country. But the most important thing is that European states were and are eager to help their citizens restore their lost property rights and, subject to a strict procedure established by a certain special law that requires substantial proof of lost owner status, the state’s will to return property to a private person yields real results (Property Restitution in Central and..., 2021).

In Ukraine, however, the implementation of such a program seems unthinkable at its present stage of existence. The compensatory nature of restitution requires huge amounts of capital, which even powerful entities, such as the state, find it very difficult to allocate on their own – and this is what prevents the issue from being brought up to date in the first place. However, the supreme legislative body has set itself the task of drafting a bill on property restitution in Ukraine (On Property Restitution and Compensation..., 2021).

The second equally important issue could be the demand for the return of land plots, and possibly parts of land owned by the state of Ukraine and the Ukrainian people. This could also be related to political issues that are painful for any state. Meanwhile, there is reason to believe that the stalling of restitution in Ukraine is also connected to land reform, which is also controversial in society and sometimes openly opposed. Therefore, the parallel processes of restitution and land reform may well become a threat to public tranquility and sufficiently self-defeating.

The third problem, no longer of a legal and political nature but of a social and psychological nature, is the enforced termination of property ownership from private individuals from whom it is taken in order to transfer it to former owners. One way or another, restitution involves, once again, the forcible taking of property from the owner in order to return it to the previous owner. There is also a certain injustice in this.

The fourth, purely legal problem is the determination of the legal regime for restitution in general and issues of succession in particular. Since restitution is compensatory in nature and consists in the actual provision (transfer) of a thing, it is necessary to determine whether the deprived person's ownership arises anew.

All of the above suggests that restitution is a rather controversial and ambiguous legal phenomenon. In the absence of a system of checks and balances, it can take on threatening consequences of unheard economic, legal and even political proportions. For this reason, well-balanced restraints are sufficiently important: just as the limits and restrictions on property rights are intended to secure and preserve the rights of other owners and third parties, so the restitution process must not only be subject to state control, but also, to a certain extent, limited. In other words, restitution requires a careful balancing of private and public interests and the decision at the state level to undertake it must be preceded by an equally careful economic analysis of the law.

The specific nature of restitution varies in each country that has enacted the relevant law, and there is no single international procedure for restitution and recovery of lost property. However, restitution processes for the return of property to individuals and their formations can be tentatively classified according to the territoriality criterion. One may distinguish Western, Eastern (Middle Eastern and Far Eastern), African restitution (Restitution of land right Act 22 of 1994...) and of course restitution in the post-Soviet area (Lithuania, Latvia, Estonia, Poland, Hungary, Romania, Czech Republic, Slovenia, Slovakia). This criterion is, however, rather tentative and only superficially allows for any gradation of restitution processes in different states. Analysis of specific features related to restitution in these States cannot be undertaken within the scope of this article – this would be a topic for a separate study.

However, the main and indicative basis of restitution is the restoration of the right of ownership for the property forcibly seized from the owner or lost by him against his will – is the only one; the ways of its implementation, legal and economic mechanisms differ.

The subject of restitution, i.e. the thing to be returned, can be any property, although primarily immovable and especially valuable, but of completely different characteristics, properties and qualities. Yes, they may be cultural values, historical and architectural monuments, estates, land, and even objects of worship. The Verkhovna Rada of Ukraine set before the Committee on Humanitarian and Information Policy the task to develop the draft law «On the return of cultural property» and establish a legal mechanism for the return and restitution of cultural property in Ukraine (On the Plan of legislative work of the Verkhovna Rada of Ukraine for 2020: Resolution of the Verkhovna Rada..., 2020). To date, however, the implementation of this task is unknown. The same problem is being investigated not only by lawyers (Dudenko, 2017, p. 220) but also by historians (Kot, 2020, p. 1020).

The mechanism for the emergence and/or restitution of ownership in restitution involves various combinations of ways and grounds to acquire/restore rights to property forcibly taken or otherwise

disposed of outside of the owner's will. These include the law (and the program), court decision (in necessary cases provided for by law), transfer (*traditio*) of the thing itself with reciprocal actions to register ownership of the property.

The restitutionary capacity of property to be returned to the person to whom it rightfully belonged or to his/her successors in title is determined by the very nature of restitution – to restore the right to that property. Moreover, these are by no means mutually exclusive processes, although restitution and return are interrelated, as restitution of property leads to the restoration of the owner's status and vice versa – such restoration is carried out on the return of the property to him.

Of course, these processes must have a legal basis. Each state develops its own program and enacts a law to implement it. The set of conditions, rights and obligations that persons wishing to recover their rights to property have, as specified in these laws, is the only basis for further acquisition/restoration of the right and its simultaneous termination from the bona fide acquirer or the state. Relevant programs and laws take into account the specificities of domestic civil law and should be consistent with its norms. Of course, they should take into account the following: when the right to the property arises; the possibility of preconditions for a person to obtain a right in rem; how the property is transferred or replaced; the possibility of establishing different legal regimes for property subject to restitution, not only for ownership.

As the practice of European states shows, property restitution is only possible after a decision on it has been taken at state level: it is usually a program approved by the state, containing a series of targeted tasks to restore the status of the private owner and return to the latter his property unjustly (in terms of principles and applicable rules of international law) taken from him under certain circumstances by the state. A restitution law, or set of laws, containing all the essential conditions for the implementation and execution of the program, shall be adopted by the highest legislative body based on the program.

At the same time, as a rule, the law does not specify a clear time limit within which the state is obliged to return the property to the owner or the person who has the right to claim it. In other words, the humanity of such laws has an extended long-term effect – a person at any time, having learnt his rights to the property, has a legal opportunity to recover, to fully realize his status as an owner, by reclaiming his property.

The focus of restitution should be on restoring the benefits that can accrue from the full realization by the owner of his or her own rights to the property. It is clear, however, that the costs associated with restitution should be borne by the state. These should include: a) the return of the property or payment of its value (in the absence of the property or if the former owner is unwilling to return it); b) ways to compensate the owner from whom the property is taken in order to return it to the former owner.

In this way restitution is fundamentally different from privatization, which also in a certain sense may cause the property to be returned and the rights to it to be converted from nationalized to private ownership, but only on a compensatory basis (clause 22(1) of Article 1 of the Law of Ukraine «On Privatization of State and Municipal Property») (On Privatisation of State and Municipal Property: Law of Ukraine..., 2018). At the same time, payment of the value of state/municipal property is expected from private individuals who acquire this property in accordance with the procedure and on the terms established by law.

Property restitution is different from the well-known right of restitution as a consequence of a void transaction. The latter requires certain actions on the part of the owner whose property has been removed from his possession outside his will or in breach of it, namely, to apply to a court to invalidate the transaction under which the property has passed to another person and to return the property to him. Therefore, the court, recognizing the transaction null and void, does not apply the consequences

of invalidity of the transaction – restitution, that is, return of the parties to the initial state that existed before the conclusion of the disputed transaction, declared by the court void (Part 1 Art. 216 of the Civil Code of Ukraine) (Spasybo-Fateeva, 2007, p. 95–106; Spasybo-Fateeva, 2008, p. 79–87; Krat, 2013, p. 19–22; Krat, 2017, p. 8–16; Spasybo-Fateeva, 2018, p. 232, 233; Miroshnichenko, Popov, Ripenko, 2012). In the absence of this property from the party to the transaction on the basis of which it was disposed of from the owner – vindication from the person who has this property (Uss, 2020, p. 310, 311; Romaniuk, 2014, p. 22–31).

If some persons have committed a worthless transaction, even though it does not produce any legal effect as envisaged by the transaction, a party to it must sue for the return of the property of which it remains the owner but which another person is holding in order to retrieve it.

Property restitution, on the other hand, does not provide for former owners to sue for its return, either restitution or vindication, but acquires rights to it according to the rules of procedure established by law. In addition, the property may not be repossessed, but actually remains with the person who continues to own and use it, but no longer as the owner. It is equally important to bear in mind that only owners who are plaintiffs in restitution and vindication actions claim the return of the property. In property restitution, the individual once retained his right (albeit unjustly or even unlawfully, although this claim is not undisputed), meaning that he is not the owner, but can only acquire ownership of the property that was taken from him or his relatives.

Conclusions

Thus, viewing restitution through the prism of acquisition, we can confidently state that it is a separate ground for acquisition of ownership rights by a person, which can be imposed by law. The adoption of such a law in Ukraine should be preceded by a thorough economic analysis of the law, which would allow conclusions to be drawn about the possibility of such a restitution campaign in our country. However, the development of legal mechanisms for property restitution should be based on the principle of fairness to prevent another violation of private property rights of some individuals in order to restore a fair return of property to other individuals.

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S u m m a r y

Restitution in the Ukrainian reality is connected with the consequences of recognizing the transaction invalid. Meanwhile, due to its more general understanding as a legal mechanism designed to return property to its owner, it must be perceived in this way. This property emphasizes the property vector of its movement in the legal field: *restitutio* (Latin) has the root word “*res*” (“thing”), and the ending (“*tutio*”) indicates the dynamics of the process, which means the return and restoration of the right to a thing.

At the same time, such a perspective on the study of restitution in the civil law of Ukraine is practically absent, although it should have been updated a long time ago. In the post-monarchical post-revolutionary Soviet space, owners have been totally deprived of property since 1917. Some owners were forced to leave it, fleeing the Soviet republic. Legal arbitrariness with the adoption of dubious and unacceptable from the point of view of law laws was widespread. In modern conditions, although this process has been assessed, so far the process of returning property to persons unjustly deprived of the right to it has not been launched in Ukraine. Therefore, there was no adequate legal mechanism in our state.

However, as Ukraine is trying to enter the European legal space, where restitution processes have already been completed, it is time to consider the principles of this process in our country as well. This is the relevance of the study. There are critically few scientific publications on this topic – some investigations were made by I. Spasybo-Fateeva, O. Avramova, N. Blazhivska, N. Moskalyuk. However, this topic is so important that, of course, such publications are clearly not enough.

The purpose of this article is to establish the reasons and necessity for restitution and its basic beginnings.

Doktrininiai nuosavybės teisės atkūrimo principai

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S a n t r a u k a

Restitucija Ukrainos teisinėje realybėje yra susijusi su sandorio pripažinimo negaliojančių padariniais. O dėl bendresnio jos supratimo kaip teisinio mechanizmo, skirto grąžinti turtą savininkui, ji turi būti suvokiama kaip nuosavybės teisių atkūrimas. Ši savybė pabrėžia jos judėjimo teisinėje srityje turinį vektorių: *restitutio* (lot.) turi šaknies žodį „*res*“ („daiktas“), o galūnė („*tutio*“) nurodo proceso dinamiką, kuri reiškia teisės į daiktą grąžinimą ir atkūrimą.

Tuo pat metu šios srities tyrimo perspektyvos Ukrainos civilinėje teisėje beveik nėra, nors šie tyrimai jau seniai turėjo būti atnaujinti. Postmonarchinėje porevoliucinėje sovietinėje erdvėje nuo 1917 m. savininkai buvo visiškai neteškai privačios nuosavybės. Kai kurie savininkai buvo priversti ją palikti ir bėgti iš sovietinės erdvės. Buvo paplitusi teisinė savivalė priimant abejotinus ir teisės požiūriu nepriimtinius įstatymus. Šiuolaikinėmis sąlygomis, nors šis procesas buvo retrospektyviai įvertintas neigiamai, iki šiol Ukrainoje nepradėtas nuosavybės grąžinimo procesas asmenims, iš kurių neteisėtai ji buvo atimta. Todėl Ukrainoje iki šiol nėra įtvirtintas tinkamas šiai sričiai teisinis mechanizmas.

Tačiau Ukrainai bandant įsilieti į Europos teisinę erdvę, kurioje nuosavybės atkūrimo procesai jau baigti, atėjo laikas apsvarstyti šio proceso principus ir mūsų šalyje. Tai ir sudaro šio tyrimo aktualumą. Šia tema yra kritiškai mažai mokslinių publikacijų – keletą tyrimų atliko I. Spasybo-Fateeva, O. Avramova, N. Blazhivska, N. Moskalyuk. Tačiau ši tema yra tokia svarbi, kad, žinoma, tokių publikacijų aiškiai nepakanka.

Šio straipsnio tikslas – nustatyti nuosavybės atkūrimo priežastis, būtinybę ir pagrindus.

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