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SPECIFIC PROBLEMS OF LEGAL REGULATION OF PROPERTY EXPROPRIATION AND SEIZURE (BASED ON THE MATERIALS OF EUROPEAN JUDICIAL PRACTICE)

ОКРЕМІ ПРОБЛЕМИ ПРАВОВОГО РЕГУЛЮВАННЯ ЕКСПРОПРІАЦІЇ ТА ВИЛУЧЕННЯ МАЙНА (НА МАТЕРІАЛАХ ЄВРОПЕЙСЬКОЇ СУДОВОЇ ПРАКТИКИ)

Kossak V.M., Doctor of Legal Sciences, Professor,
Head of the Department of Civil Law and Procedure
Ivan Franko National University of Lviv

The article has been devoted to the consideration of individual problems of legal regulation of expropriation and seizure of property (based on the materials of European judicial practice). Expropriation is defined as a procedure for the transfer of property exclusively to the state. In the national legislation, the institute of forced termination of the right of ownership by means of requisition received a special legal regulation. At the same time, the construction of the article on requisition is based on Article 41 of the Constitution of Ukraine, which establishes that: "No one can be illegally deprived of the right to property. The right to private property is inviolable. Forced expropriation of objects of private property rights can be applied only as an exception for reasons of public necessity, on the basis and in the manner established by law, and on the condition of prior and full reimbursement of their value. Compulsory expropriation of such objects followed by full compensation of their value is allowed only in the conditions of war or state of emergency." Until recently, the specified norms of the Constitution had a rather declarative nature for us, and in today's conditions, special attention should be paid to them and the norms of other legislative acts.

Despite the fact that the right to nationalization is determined by international acts, the legislation of most countries of the European Union does not provide for the possibility of applying such a ground for the termination of the right of ownership. Requisition, as a ground for terminating the right of ownership, can be used only in cases provided for by law. At the same time, the law establishes the cases of deprivation or limitation of the right of ownership by seizing land plots and real estate for public needs. The procedure for seizing property for public needs is different from confiscation, which is a sanction for an offense.

Requisition in Ukraine is also applicable in the event that the relevant property is in the use of third parties, encumbered by easement, etc. The requisition must be carried out in strict compliance with the legislation, if there are legal grounds for this.

European judicial practice shows that the provision of public interests should be carried out without unlawful deprivation of the property rights of individual subjects. It is necessary to consider the right of ownership as an absolute right, the termination of which is possible only on the grounds and in the manner determined by the law.

Key words: ownership, property, unjustly acquired property, termination of ownership, expropriation, nationalization, requisition.

Статтю присвячено розгляду окремих проблем правового регулювання експропріації та вилучення майна (на матеріалах європейської судової практики). Експропріація визначена як процедура переходу прав власності виключно до держави. У національному законодавстві спеціальне правове регулювання одержав інститут примусового припинення права власності шляхом реквізиції. При цьому, в основу побудови статті щодо реквізиції покладена стаття 41 Конституції України, яка встановлює, що: «Ніхто не може бути протиправно позбавлений права власності. Право приватної власності є непорушним. Примусове відчуження об'єктів права приватної власності може бути застосоване лише як виняток з мотивів суспільної необхідності, на підставі і в порядку, встановлених законом, та за умови попереднього і повного відшкодування їх вартості. Примусове відчуження таких об'єктів з наступним повним відшкодуванням їх вартості допускається лише в умовах воєнного чи надзвичайного стану». До недавнього часу вказані норми Конституції мали для нас доволі декларативний характер, а в умовах сьогодення на них і норми інших законодавчих актів потрібно звернути особливу увагу.

Незважаючи на те, що міжнародними актами визначається право на націоналізацію, законодавство більшості країн Європейського Союзу не передбачає можливість застосування такої підстави припинення права власності. Реквізиція, як підстава припинення права власності, може застосовуватися лише у випадках, передбачених законодавством. Водночас законом встановлені випадки позбавлення або обмеження права власності шляхом вилучення земельних ділянок, нерухомості для суспільних потреб. Процедура вилучення майна для суспільних потреб відрізняється від конфіскації, яка є санкцією за правопорушення.

Реквізиція в Україні є застосовною також у випадку перебування відповідного майна у користуванні третіх осіб, обтяження його сервітутом тощо. Реквізиція повинна відбуватися у суворому дотриманні норм законодавства за наявності для цього законних підстав.

Європейська судова практика свідчить, що забезпечення суспільних інтересів повинно здійснюватися без протиправного позбавлення права власності окремих суб'єктів. Необхідно розглядати право власності як абсолютне право, припинення якого можливе лише на підставах і в порядку, визначених законодавством.

Ключові слова: право власності, майно, безпідставно набуте майно, припинення права власності, експропріація, націоналізація, реквізиція.

Expropriation is defined as a procedure for the transfer of ownership exclusively to the state. In the national legislation, the institute of forced termination of the right of ownership by means of requisition received a special legal regulation. At the same time, the construction of the article on requisition is based on the Article 41 of the Constitution of Ukraine, which establishes that: "No one can be illegally deprived of the ownership. The right to private property is inviolable. Forced expropriation of objects of private ownership can be applied only as an exception for reasons of public necessity, on the basis and in the manner established by the law, and on the condition of prior and full reimbursement of their value. Compulsory expropriation of such objects followed by full compensation of their value is allowed only in the conditions of war or state of emergency". Until recently, the specified norms of the Constitution had a rather declarative nature for us, and in today's conditions, special attention should be paid to them and the norms of the other legislative acts.

In the ruling of the Civil Court of Cassation as part of the Supreme Court dated August 8, 2018 in case No. 284/276/16-ts, it was stated that requisition should be understood as the compulsory payment alienation of ownership by the state from the owner in the presence of extraordinary circumstances on the basis and in the manner established by law , subject to prior and full reimbursement of its cost or without such reimbursement [1].

Expropriation of ownership in the practice of the European Union (hereinafter referred to as the EU) is considered as an exclusive means of depriving the right of ownership and is an exception to the principle of inviolability of the right to private property. The main forms of expropriation are nationalization, requisition and confiscation. Nationalization is understood as the forced alienation of objects of private ownership in favour

of the state for reasons of public necessity and to protect national interests. The state's right to nationalization is considered as part of its state sovereignty and is enshrined in a number of international documents. Thus, the 1974 Charter of Economic Rights and Responsibilities of States [2] establishes that each state has the right to nationalize, confiscate or transfer foreign ownership, while appropriate compensation must be paid. In the event that a dispute arises over compensation, it shall be settled in accordance with the law of the nationalizing State and its courts, unless all parties concerned voluntarily and by mutual consent agree to other peaceful means of settlement. The Declaration on the Establishment of a New International Economic Order of 1974 [3] also provided for the right of nationalization, which is an expression of the inherent sovereignty of the state. A similar right was recorded in the Resolution of the General Assembly of the United Nations (hereinafter – UN) No. 1805 "On national sovereignty over natural resources" [4].

Requisition means the forced expropriation of property from the owner for the purpose of public necessity in the event of a natural disaster, accident, epidemic, epizootic and the other extraordinary circumstances, subject to prior and full reimbursement of its value. Unlike nationalization, the law provides for the right of the person who owned such property to demand its return after the end of the emergency, if possible, and to restore ownership of it.

Despite the fact that the right to nationalization has been determined by the international acts, the legislation of most EU countries does not provide for the possibility of applying such a ground for the termination of the right of ownership. Requisition, as a ground for terminating the right of ownership, can be used only in cases provided for by law. At the same time, the law established the cases of deprivation or limitation of the right of ownership by seizing land plots and real estate for public needs. The procedure for seizing property for public needs is different from confiscation, which is a sanction for an offense.

The practice of the European Court of Human Rights (hereinafter referred to as the EC of HR) and the courts of the EU member states shows that the main problem of law enforcement is the balance between public and private interests. The main thing is to clarify the need to withdraw the object of private property rights for public needs. The right of ownership is an absolute right that can be taken away only in exceptional cases provided by law. Forced confiscation of property can be carried out in accordance with the procedure established by the law, subject to prior reimbursement of its value. Therefore, one of the defining tasks of the normative regulation of the mechanism of property acquisition for public needs is the optimal assessment of property rights based on market prices.

The experience of the Polish judicial system shows the need to establish objective legal grounds for the seizure of property on grounds of public necessity. In this case, the time limits of expropriation, the impossibility of otherwise satisfying public interests and the method of using the property after expropriation are important. The legal basis for the protection of the rights of the owner is the Constitution of Poland, the Civil Code, the Act of August 21, 1997 [5]. The issue of confiscation of property in the context of protection of the rights of the owner was the subject of the consideration by the Constitutional Court of Poland. In particular, the decision of December 13, 2012 (P 12/11 Dz U.2012/14 72) contains the position of this court regarding the interpretation of the Art. 21 of the Constitution of Poland in case of seizure of ownership and its further use. One of the problematic issues is the dispute between the owners and their heirs regarding the intended use of real estate confiscated from them. According to the official position of the Supreme Court of Poland, contained in the decision dated April 10, 2013 (IV CSK 541/12), a change in the way the property is used or a change in its purpose after the expiration of a period of several decades is not a reason to return the property to the owner or his heirs. At the same time, Polish judicial practice also has examples of voluntary return of property seized from the owner in the interests of the state. This was confirmed by the materials of the EC of HR case "Zwezynski v. Poland" (application No. 34049/96). In 1952, the house belonging to the applicant's father was expropriated in the interests of the state [6]. The applicant's father sought the restitution of the property, and after his death the heirs, including the applicant, continued to support this claim in court. Finally, on July 24, 1992, the Minister of Economy declared the expropriation procedure carried out in 1952 to be void. On November 23, 1993, the administrative court confirmed the minister's decision to revoke the alienation. Due to this, the ownership of the house was returned to the applicant. However, in view of the claim brought in 1992 by the State Treasury on behalf of the regional police department, which now occupies the building and defends its right of ownership by prescription, the applicant was still unable to get the property returned to him. The regional police department had informed the heirs of the person who owned the house before World War II that a lawsuit had been filed regarding the division of the ownership. Believing that they were entitled to the house, the heirs of the former owner took steps to reopen the court proceedings, but their application was rejected. They appealed on legal issues to the Supreme Court of Poland, which upheld their appeal and transferred the case to the Olsztyn Regional Court. The EC of HR noted that there had been a clear interference with the applicant's right to peaceful possession of his ownership. It consisted in the fact that the regional police department continued to occupy this house, despite the decision of the administrative body, which retrospectively recognized the applicant's father, whose property the applicant inherited, as the legal owner of this property. Interference also occurred with respect to claims made directly by the subject now occupying the house and by those he indirectly induced to do so. Therefore, the EC of HR had to find out whether the challenged intervention was justified in the context of the Art. 1 of the First Protocol to the European Convention on Human Rights (hereinafter referred to as the First Protocol, the Convention). The EC of HR noted that deprivation of property in the context of the second sentence of the Part 1 of the Art. 1 of the First Protocol could be justified only by proving that it was done in the state's interests and in compliance with the conditions stipulated by law. In addition, any intervention must also ensure a fair balance between the need to ensure the general interests of society and the need to protect basic human rights. It is impossible to ensure the necessary balance if the person whose rights are in question bears a personal and excessive burden. The EC of HR could not find any justification for the situation in which the state authorities placed the applicant. In the present case, he failed to identify any "state interest" that would justify depriving the applicant of his property. The EC of HR emphasized that, when the issue of ensuring general interests arises, it was the state authorities that were entrusted with the duty to act appropriately and with the highest consistency. In addition, the state as the guardian of public order had a moral duty to set an example and was obliged to ensure that its bodies responsible for the protection of public order ensured compliance with this duty. In this case, the EC of HR found that the fair balance referred to above had not been struck and that the applicant had borne and continued to bear a personal and excessive burden. Based on this, he came to the conclusion about the violation of Art. 1 of the First Protocol.

There are also cases of the state refusing expropriation in the practice of the other countries. Thus, in Sweden on July 31, 1956, acting in accordance with the Art. 44 of the 1947 Building Act, the Swedish government granted the Stockholm municipality a zoning permit for expropriation, which applied to 164 private estates, among them Mr. Sporrong's estate. Over one of the main shopping streets in the center of the capital, the municipality planned to lay an overpass connected to the main bypass road. One of the supporting platforms of the overpass was supposed to stand on the "Riddaren"

site. The rest of the plot was to be turned into a parking lot. Under the Expropriation Act of 1917, the Swedish government set a five-year time limit for expropriation; before the end of this term, the municipality had to summon the owners of these plots to the real estate court to determine the amount of compensation. In the event of non-compliance with this condition, the said permit lost its validity. In July 1961, at the request of the municipality, the Swedish government extended the period of validity of this permit until July 31, 1964. This decision concerned 138 private plots, including the plot "Riddaren No. 8". At that time, these areas were not included in any urban development plan. On April 2, 1964, the Swedish government granted the municipality's request for a further extension of the permit period; this extension, now to 31 July 1969, applied to 120 of the previous 164 plots, including the Riddaren No. 8 plot. The municipality prepared a general development plan for the Lower Norrmalm area, known as "City 62", according to which the priority was given to the widening of roads for the benefit of private transport and pedestrians. Subsequently, City 67, a revised plan for the overall development of Lower Norrmalm and Estermalm (another district in the city center), included the priority of improving the public transport system by improving the road network. Some of those mentioned in the site plan were to be used for road widening, but a final decision could only be made after the consequences of these orders had been decided. According to preliminary calculations, this revised plan, which had the same character as the "City 62" plan, was supposed to be completed by 1985.

In July 1969, the municipality applied for a third extension of the expropriation permit, which applied to a number of sites, including Riddaren No. 8, noting that the grounds for expropriation set out in the City 62 and City 67 plans remained valid. On May 14, 1971, the Swedish government set the date July 31, 1979 as the deadline for initiating legal proceedings to determine the amount of compensation, that is, the permit was to be valid for 10 years from the date of the said request. In May 1975, the municipality prepared revised plans that did not foresee any changes in the operation of the site "Riddaren No. 8" and in the building located on it. Since May 1979, the Swedish government revoked the permission for expropriation at the request of the municipality. The work in the area was delayed and new plans were prepared for the review. Citing the urgent need to repair her property, Ms. Lionnrot appealed to the Swedish government to cancel the expropriation permit. The municipality replied that the existing plans did not permit any deviation from the plan, and on February 20, 1975, the Swedish government refused to grant this request, citing that the permit could not be revoked without the express consent of the municipality. However, since May 1979, the Swedish government canceled the mentioned permit at the request of the municipality [7].

At the same time, there are cases of different approaches in law enforcement practice regarding the issue of expropriation through nationalization. In the decision of the EC of HR of September 13, 2005 in the case "Ivanova v. Ukraine" (application No. 74104/01, paragraph 35), it is indicated that deprivation of ownership can be justified only if it is found, inter alia, that it was carried out "in in the interests of society" and "in accordance with the requirements stipulated by law." Moreover, a "fair balance" should be achieved between the requirements of the general interest of society and the requirements for the protection of fundamental rights of individuals [8].

Requisition is both a ground for termination (Clause 9, Part 1, Article 346 of the Civil Code of Ukraine [9]) and acquisition of the ownership. Moreover, as a basis for acquiring the right of ownership, it can be applied only by the state, which excludes the possibility of requisitioning by the local self-government bodies. Since only the will of the acquirer of property (the state) is taken into account during requisition, it belongs to the original ways of acquiring rights. The legal consequence of the requisition is the transfer of the requisitioned property to the ownership of the state or its destruction. The latter, as a rule, is associated with quarantine measures for sick animals and infected plants.

Interpretation of the provisions of the Art. 353 of the Civil Code of Ukraine allows us to state that such grounds must be present for the legality of requisitioning: the procedure and grounds for requisitioning must be established by the law; occurrence of extraordinary circumstances; the purpose of forced alienation is to eliminate those consequences that have arisen or may arise as a result of extraordinary circumstances, or to prevent such consequences; requisition must be preceded by full compensation of the value of the property that is forcibly expropriated, with the exception of its implementation in conditions of war and state of emergency. At the same time, it is advisable to take into account that the requisition is also applicable in the event that the relevant property is in the use of third parties, encumbered by an easement, etc. The requisition must be carried out in strict compliance with the legislation, if there are legal grounds for this. After all, in accordance with the Part 1 of the Art. 1212 of the Civil Code of Ukraine, a person who acquired property or kept it at the expense of another person (the victim) without a sufficient legal basis (unreasonably acquired property) is obliged to return this property to the victim. A person is obliged to return the property even when the basis on which it was acquired subsequently disappeared.

Therefore, the European judicial practice shows that the provision of public interests should be carried out without unlawful deprivation of the property rights of individual subjects. It is necessary to consider the right of ownership as an absolute right, the termination of which is possible only on the grounds and in the manner determined by the law.

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