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State property rights protection outside the territory of the Russian Federation

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Abstract

The paper deals with the protection and immunity of the Russian property, including the diplomatic one, outside the territory of the Russian Federation via comparative qualitative research methods. As a result, the constitutions of individual states, in addition to the value guarantee of protection of the right to property, also fix a judicial guarantee. In conclusion, the legislator needs to develop effective measures to implement various options in the system of the protective mechanism for protecting state property, including diplomatic, outside the Russian Federation.

Keywords: Property Right, Public, Sovereign State.

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Protección de los derechos de propiedad estatal fuera del territorio de la Federación Rusa

Resumen

El documento trata sobre la protección y la inmunidad de las propiedades rusas, incluida la diplomática, fuera del territorio de la Federación de Rusia a través de métodos comparativos de investigación cualitativa. Como resultado, las constituciones de los estados individuales, además de la garantía de valor de la protección del derecho de propiedad, también fijan una garantía judicial. En conclusión, el legislador necesita desarrollar medidas efectivas para implementar varias opciones en el sistema del mecanismo de protección para proteger la propiedad estatal, incluida la diplomática, fuera de la Federación Rusa.

Palabras clave: Derecho de propiedad, Estado público, Estado soberano.

1. INTRODUCTION

Ownership is a civil and law and economic category and the rules for determining the ownership of individual objects, as well as its features are investigated primarily in the theory of civil law, and then in other legal sectors. As Genkin (1961) pointed out property is a historically definite form of social relations in the possession and appropriation of material goods; it is not a relationship of a person to a thing, but a relationship between people about things. We believe that this approach is applicable both to property relations within the country, and to the property right of the Russian Federation, with respect to objects located abroad. The problem of protection and inviolability of property of the Russian Federation is especially acute in today's international civil turnover, especially outside of our territory. Unfortunately, especially in the light of

recent events in connection with the seizure of Russia's diplomatic property in the United States, we have to state that Western countries do not always try to restrict or even deprive the Russian Federation of its property by legal means neglecting the principles of state sovereignty and immunity which is not permissible in a democratic civil and law domestic and international space.

The need for interaction between the state and business has been discussed for a long time (Levushkin, 2014). It is determined that state property is an object of civil, public and other legal relations, and, in spite of its special legal regime, an object of civil rights. As it is known, the right of ownership in an objective sense is, traditionally in civil doctrine, an independent civil institution, however, it seems that property relations have a complex intersectoral nature and are applied in entrepreneurial activities including at the international level. In this case, the right of ownership in the subjective meaning implies the possibility for the owner to own, use and dispose of the property. Recently, the civil concept of private international law has been recognized in the Russian legal doctrine. The essence of this concept is reduced in consideration as a subject of private international law of private and law (civil and law) relations arising in the conditions of international life, including civil-law relations, as well as family and labor relations regulated by the categories of civil law (Vlasov & Kovalenko, 2015).

There is a regulation of relations of civil law character, business activity, relations with the participation of public institutions, state bodies at the international legal level. Relations in the sphere of protection and protection of property rights of the Russian Federation have the widest

application also at the international level, especially in the light of the so-called sanctions of foreign states currently in use with the Russian Federation which are predominantly discriminatory in relation to Russia. International private law is a set of rules governing complex private law relations (civil, family, labor, etc.) arising in the sphere of international jurisdiction (Vlasov & Kovalenko, 2015). The greatest practical interest in this article is the protection and inviolability of Russian property including diplomatic property located abroad. The implementation of this principle will ensure compliance with international standards and principles of international civil turnover in the sphere of sacredness and inviolability of the institution of state property of Russia. Public property quite naturally determines the significant interest of corporate organizations and state structures, including at the international level. It is necessary to recognize that despite the large-scale privatization carried out in the 1990s; state and municipal property have a fairly large volume in the total number of all facilities located on the territory of the Russian Federation. In addition, some of these objects can only be in public ownership and can be provided only on the right of use to third parties. The Russian state also possesses significant material objects outside the Russian territory.

The need for appropriation of material wealth by a separate individual, regardless of the nature of his personality (physical, legal person) and at the same time - the needs for social development, and today any legislation knows the institution of compulsory cessation of property rights in favor of the state. It seems that this situation is most relevant at the present time. According to civil legislation, it is possible to transfer property from private property to state property, namely in accordance with the norms of Art. 235 and 306 of the Civil Code of the Russian

Federation (hereinafter referred to as the Civil Code of the Russian Federation), which set out the questions concerning nationalization. In accordance with paragraph 1 of Art. 2 of the Civil Code of the Russian Federation the rules established by civil legislation apply to relations involving foreign citizens, stateless persons and foreign legal entities unless otherwise provided by law. Thus, proceeding from the content of the above-mentioned norms of the Civil Code of the Russian Federation it can be concluded that the issues of nationalization of the property of foreign persons regulated by international public law are also subject to the regulation of private international law.

2. METHODOLOGY

In the constitutions of foreign states, general legal guarantees for the realization, protection and protection of the constitutional right of private property are also fixed relating to the right of ownership equally with other rights and freedoms. The applicability of general legal guarantees for the protection of human and civil rights and freedoms, including state interests, stems from the consolidation of this right as the main, as well as from the natural and legal nature of the constitutional right of private property (Kachur, 2017). The first universal Russian International Affairs Council document which contains a separate provision devoted to the protection of property rights is the Universal Declaration of Human Rights and Fundamental Freedoms of 1948. Thus, Art. 17 of the Declaration provides:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property. It seems that this fully applies to the protection of property rights, including diplomatic one, of objects belonging to the Russian Federation and located abroad.

The participation of the state and its public institutions in any process that takes place in relation to property is a form of public institutions intervening in the economy, civil circulation, and therefore, such interference, its possibility and necessity, and its natural legal consequences, require constant research both to respect for the balance of public and private interest in a broad sense, as well as to determine the state's need for such actions and establishing legal certainty for sovereign states in relation to their property outside their national jurisdiction and in each case, in violation of the person's rights - the subject of international law. Management and involvement in public circulation of state ownership assume both strategic changes in the ownership structure in the country and abroad, aimed at optimizing it in the sense of goals and carried out within the framework of a balanced state policy on the property, especially abroad, and current property management. Public administration and protection of property rights outside of Russia involves an extremely wide range of issues and problems related to the disposal and use of state property, its inviolability.

3. RESULTS AND DISCUSSION

For a long time, the issues of protection of state property and its royalties are among the main ones for the formation of both international and domestic legal systems. Subjective ownership cannot be exercised outside the legal regulation that provides the owner with an array of rights and guarantees that protect against violations of their rights. Taking into account the fact that many phenomena in society, including those related to the regulation of property rights, are trans boundary in nature, the basis of such regulation is currently formed by standards developed at the international level, and today they are accepted by almost all national systems, including Russia, but, unfortunately, in the light of the negative attitude towards our country at the international level, is not fully respected by foreign states. This, unfortunately, negatively affects the stability of the international economic and civil law and order, interstate cooperation and interaction in the field of ensuring the rights of a sovereign state to its property.

The Russian Federation is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols since 1998. Expressing its agreement with the obligatory norms of international law, Russia must ensure the operation and compliance with these norms on its territory which has a direct impact on the regulation of public relations, including the formation of an appropriate national regulatory framework, the definition of the functions and powers of state bodies, the creation of domestic mechanisms to protect, including the public owner, from violation of their subjective civil rights. Protecting state property and investment in the economy of foreign countries is no

less important in the context of the current aggravation of intergovernmental relations for each state (sovereign) in the sphere of civil (private) turnover, than protecting against unjustified termination or restriction of property rights of its own citizens and organizations (Sukhomlinova, 2015).

This conclusion is based both on the norms of international treaties and agreements, as well as on the provisions of the national legislation of the Russian Federation and the practice of its application. Thus, Art. 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right of every natural and legal person to respect for its property and to prohibit the arbitrary deprivation of its property. Explaining these provisions and the practice of their application by the European Court of Human Rights (hereinafter - the ECHR), the Supreme Arbitration Court of the Russian Federation indicated that the restriction of private property rights is possible only in the name of maintaining public order, in exceptional cases and only on retribution. We note that the Supreme Arbitration Court of the Russian Federation following the ECtHR pointed out the need to pay compensation not only for the loss of ownership of the seized thing to its owner - an individual, but included in the list of persons entitled to compensation for the forcible seizure of property in favor of the state and all property rights.

After the established fact that the property belongs to the state against which the investment arbitration decision was made, the judicial institution of the state in which the property is located must determine whether the property is protected by state immunity. The rules on state immunity, as rightly noted by Schreuer, are a combination of customary

international law, state law and, to a lesser extent, the law of international treaties. It is necessary to agree with the opinion expressed in science that the national legislation on immunities, as well as international conventions, are a reflection of the theory of restrictive immunity and, in essence, contains the conditions under which a foreign state cannot take advantage of immunity. The first state to codify norms on state immunity was the United States. Further, laws on immunities appeared in Great Britain, Australia and other common law countries, while in countries with a continental legal system, approaches to resolving the issue of state immunity developed at the level of judicial practice (Bessonova, 2015). Most states that adhere to the doctrine of restrictive immunity with respect to the property of other states use the criterion of commercial activity. For example, § 1610 of the US Foreign States Immunity Act contains a provision that a claim may be levied only on the property of a foreign country that is associated with commercial activities conducted in the United States and on the basis of which the party applied with the application for consideration of the dispute. Moreover, in § 1603 (d) it is specifically emphasized that the commercial nature of the activity is determined by the nature of the actions, transaction or act, and not their purpose.

It is important to realize that, combined into one document, the contracts themselves should not contradict the law, and also should not contradict each other in their legal nature. Consequently, a correct understanding of these contractual models and an understanding of their essence contributes to their correct application in practice (Levushkin, 2014: 18).

For example, commercial activities include an agreement with the government of a foreign state on the supply of military equipment, despite the fact that the final facility serves to perform public functions. The State Immunity Act of Great Britain also fulfills this criterion, however, Article 13 points specifically to the commercial purpose of the property used, and also permits collection of state property, which is not only used for commercial purposes at the time of collection, but and if such a purpose of using the property is expected in the future. The purpose of using the property, in accordance with Article 13, may be confirmed by an official document (certificate) provided by the official representative of a foreign country. However, a private party (for example, a private investor) after submitting such a document also bears the burden of proving that the property that was levied is used for commercial purposes or is intended for that purpose in the future.

The definition of nationalization as a forced termination of property rights (and not only the ownership of a thing), as well as the dissemination of this concept and restrictions (along with termination) of rights to property will create an opportunity to realize the goal that the law on nationalization should pursue - restoration of the rights of individuals, property which it took society. On July 18, 2014, an arbitration court in The Hague made an unprecedented decision in the case of Yukos Universal Limited against the Russian Federation awarding the payment of $ 50 billion to former shareholders of a notorious oil company. The decision entered into force on July 28, 2014, and as of January 15, 2015, the Russian Federation is obliged to pay interest for late payment. Despite the fact that the Russian Federation did not agree with the decision made against it on a number of grounds, at the moment the case is at the stage of

challenging the decision, and the applicants, meanwhile, are trying to find and arrest Russian property in various jurisdictions.

According to the information portal Vedomosti, in the period from May to September 2015, there were claims to arrest the Russian property in the courts of Belgium, France, Austria, the United States, the United Kingdom, and also Germany. If the Russian Federation fails to challenge the decision of the arbitral tribunal in The Hague, as well as in the event of failure to pay compensation voluntarily, investors will have the right to foreclose on state property outside the country (Bessonova, 2015). The wording of international treaties containing guarantees to foreign investors against the forcible seizure of private property in favor of the recipient state contains a wide list of investors' property rights, the restriction of which creates the right for compensation to victims (Dorofeeva, 2016). The rules on non-use of nationalization without payment of compensation for foreign investments are provided for in Article 6 of the Agreement On the Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community, concluded by the Government of the Russian Federation, the Government of the Republic of Belarus, the Government of the Republic Kazakhstan, the Government of the Kyrgyz Republic, the Government of the Republic of Tajikistan. Clause 1 of Article 6 of the Agreement establishes that the investments of investors of the state of one Party made in the territory of the state of the other Party, as well as the income of such investors cannot be directly or indirectly expropriated, nationalized, as well as other measures equivalent to the consequences of expropriation. The same broad approach to the determination of measures of a coercive nature, possible and legal, in the case of the fulfillment of the conditions established by the countries

participating in international treaties, is also contained in intergovernmental agreements on mutual protection of investments, including the participation of the Russian Federation.

Andreeva rightly believes that in this case the norms of constitutions in a systemic relationship with the norms of other laws constitute the constitutional legal institution of expropriation, which, on the one hand, is a means of ensuring the highest public interests, the ability to solve state tasks and replenish state property, and the other ensures the protection of the rights of individuals in relation to ..., because ... is not carried out arbitrarily at the request of the latter, but must comply with a number of constitutionally established Word (Andreeva, 2009). She rightly believes that the constitutional securing of property seizure in the public interest, accompanied by the state's duty to pay compensation to the owner for the property seized, was a guarantee against arbitrary and gratuitous withdrawal to replenish the property of the Crown or major feudal lords. It seems that it is necessary to apply a broad approach to the observance of the procedure and conditions for the seizure of property outside of Russian territory, when taking measures to seize such property forcibly. At the same time, the implementation of nationalization plans by the Russian Federation should contribute largely to the fulfillment by the state of the functions of the sovereign and the fulfillment of its obligations undertaken by the norms of international treaties and agreements.

Among property rights, the limitation or other damage of which can be regarded as a measure of nationalization, there are also implicit, indirectly related to the right to property, the expectations of the owner of

certain state behavior, for example, in the field of taxation (Dorofeeva, 2016; Prihastiwi, 2019).

The decision of the Arbitration Institute of the Stockholm Chamber of Commerce based on Quasor de Valores, Orgor de Valores, GBI 9000, and ALOS 34 companies to the Government of the Russian Federation, concluded that domestic enforcement proceedings were not an attempt to collect taxes, but actual expropriation. The conclusion of the court about the fiscal nature of the actions of the Russian state was based on the lawful behavior of the applicants (the schemes of tax evasion did not contradict the law), the role of the state in weaning property in the enforcement proceedings (actions to establish the obligation to pay taxes, their collection and collection) all branches of government - legislative, executive, judicial), as well as the recipient of the value of the applicants' realized property - the state. Meanwhile, even an understanding of nationalization in the broad sense of this concept, like expropriation, the prohibition on the gratuitous implementation of which is established by the norms of international treaties with the participation of the Russian Federation, does not make it possible to extend to sanctions of non-payment of taxes a compensatory character for the violator.

It seems necessary to pay attention to the fact that in most modern democratic states, including the Russian Federation, there is currently no uniform regulatory act governing the jurisdictional immunity of a foreign state and its property. The existing normative legal acts, fragmentary touching upon the issues of jurisdictional immunity of a foreign state and its property, do not correspond to the realities of today. The exception is the Civil Code of the Russian Federation, which contains some provisions

reflecting the actual picture of the present day. In addition to the guarantees established by the norms of international treaties and agreements, national legislation, against the gratuitous weaning of state property and private individuals, the international community found another way to protect the property rights of citizens and organizations - property insurance in case of nationalization, expropriation, and other measures for the forcible removal property.

It should also be noted that the constitutions of individual states, in addition to the value guarantee of protection of the right to property, also fix a judicial guarantee. Thus, the possibility of judicial appeal against the decisions of state authorities on the compulsory paid seizure of property is enshrined in Part 4 of Art. 28 of the Constitution of Azerbaijan, Part 2 of Art. 31 of the Constitution of Armenia, Part 5, Art. 44 of the Constitution of Belarus, Part 3, Art. 14 of the Basic Law of Germany, parts 2 and 4 of Art. 17 of the Constitution of Greece, Part 3, Art. 73 of the Danish Constitution (the article provides for the creation of a special court that is considering disputes over expropriation), Part 11 of Art. 23 of the Constitution of the Republic of Cyprus, Part 1 of Art. 12 of the Constitution of Kyrgyzstan, Part 5 of Art. 41 of the Constitution of Romania, Part 1 of Art. 32 of the Constitution of Estonia.

4. CONCLUSION

The absence of the possibility of judicial appeal against acts of state power may nullify the effect of the constitutional provision on the compensated nature of the seizure of property, including fair or

proportionate compensation, because then it is likely that the amount of compensation will be determined not on the basis of the real market value of the seized property. Only a combination of judicial and value guarantees of the right (Vlasov & Kovalenko, 2015) of state and private property in case of seizure of property creates, in our opinion, the most effective legal mechanism for protecting and protecting the right of property and prevents its violation by foreign state bodies. The prohibition of confiscation (gratuitous seizure of property based on a court decision) can be considered as the highest legal guarantee of protection of the right of ownership. We believe that the implementation of the principle of state immunity is the main way to protect the property of the Russian Federation outside its territory. At the same time, the legislator needs to develop effective measures to implement various options in the system of the protective mechanism for protecting state property, including diplomatic, outside the Russian Federation, in order to prevent illegal actions by state bodies of foreign jurisdictions.

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