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For Publisher
Zorica STABLOVIĆ BULAJIĆ

Editor-in-Chief
Nikola SAMARDŽIĆ

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Predrag Knežević

Proofreading
Ana Acić

Sale and Subscription
h.edu@eunet.rs; +381 11 72 46 023

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AUTHORS:

Dragan ALEKSIĆ, Institute for Recent History of Serbia, Belgrade

Vesna ALEKSIĆ, Institute of Economic Sciences, Belgrade, Serbia

Ljiljana DOBROVŠAK, Institute of Social Sciences "Ivo Pilar", Zagreb, Croatia

Wesley A. FISHER, Research Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization (WJRO), USA

Goran ILIĆ, Association of Prosecutors of Serbia, Belgrade

Jovan KRSTIĆ, Association of Public Prosecutors of Serbia, Belgrade

Radovan LAZIĆ, Association of Public Prosecutors of Serbia, Belgrade

Kristen NELSON, Th e European Shoah Legacy Institute, Czech Republic

Adam J. SACKS, Brown University, USA

Nikola SAMARDŽIĆ, Faculty of Philosophy, University of Belgrade, Serbia

Rajika L. SHAH, The European Shoah Legacy Institute, Czech Republic and Brownstein Hyatt Farber Schreck, LLP, Czech Republic

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HOLOCAUST AND RESTITUTION

Part III

THE LEGAL ASPECTS: Rehabilitation and Restitution

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Review Scientific Article

AN OVERVIEW OF THE LAW ON REHABILITATION FROM THE POINT OF VIEW OF HOLOCAUST VICTIMS AND OTHER VICTIMS OF NAZI TERROR

Radovan LAZIĆ,
Association of Public Prosecutors of Serbia, Belgrade

Law on Property Restitution and Compensation stipulates that its provisions apply to confiscated property provided that the owner of that property is rehabilitated. In this case, the request for the return of property must be accompanied by a court decision on the rehabilitation or proof that the application for rehabilitation was submitted. The first Serbian Rehabilitation Act was passed in 2006. According to the Law on Rehabilitation, from December 2011, persons who have been deprived of a right (to life, to freedom of movement, to property...) because of political activism, ideological or religious beliefs and national origin before the entry into force of this Act can be rehabilitated. However, the question is how the provisions of this law are applied to the victims of the Holocaust and other victims of Nazi terror. Does this law take into account the victims, does it provide any satisfaction to the victims of the Holocaust and other victims of the occupiers and various quisling formations? What consequences the implementation of the Rehabilitation Act may have on the property rights of persons who, in the course of World War II, acquired property that was previously forcibly taken away (factual and legal violence) from their rightful owners? What consequences the implementation of this law may have on the rights of the victims of the Holocaust and their heirs and what consequences the implementation of this law may have on the rights of the victims of the Holocaust who have no heirs?

ojtbtopola@gmail.com

Key words: rehabilitation, restitution, victims, the Holocaust, rights, property, compensation, consequences

Introduction

After the period with socialist state structure with single party political system that favoured social property, the Republic of Serbia chose to introduce and build parliamentary democracy in West European fashion. In such a political system, private property has maximal legal protection. The mentioned decision of the state implied state obligation to return seized property, i.e. compensate the damage for the property seized from individuals and legal entities and converted into state, social or communal property through property confiscation or through application of regulations on agrarian reform, nationalization, sequestration, and other regulations on nationalization in the Republic of Serbia. That decision also meant annulment of, both legal and *de facto*, acts and actions that deprived many individuals, soon after the end of WWII, for political, religious, national or ideological reasons, of their lives, freedom or other rights. That brought about the Law on restitution and compensation of 2011 and the Law on rehabilitation of 2006, i.e. 2011. In such a situation, there certainly existed a need to legally regulate consequences of property seizing of victims of holocaust and other victims of Nazi terror on the territory of the Republic of Serbia with no surviving successors, therefore legislator, through the article 5 paragraph 4 of the Law on restitution and compensation established this issue will be regulated by a separate law. Anyway, such a special law was not dispensed yet.

According to the article 6 paragraph 1 of the Law on restitution and compensation, provisions of this law apply also to confiscated[1] property on condition

1 Confiscation of property took place during the WW II (1941–1945), and especially after the war. Through confiscation, all property or exactly specified portion of the property was enforcedly taken from an individual that was, as a perpetrator of certain criminal act was convicted to property confiscation. The peculiarity of property confiscation in the post-war Yugoslavia was that it was not imposed just as a collateral sanction (along with primary one), but was also imposed to certain categories of individuals via regulations that were general in character, without a criminal procedure, for instance in the case of certain members of German minority that did not play active role in the Partisan movemement on the basis of AVNOJ decision of November 21, 1944.

the owner was rehabilitated, and under article 42 paragraph 5 it is stipulated that in such a case it is obligatory to accompany request for property return with court ruling on rehabilitation, i.e. a proof that request for rehabilitation was submitted. This paragraph implies that a right for confiscated property return or compensation does not require owner of confiscated property to be rehabilitated, but was sufficient a request for his/her rehabilitation was submitted, although it contradicted article 6 paragraph 1 that requires former owner to be rehabilitated. This way it showed the condition for confiscated property return was owner rehabilitation, provable by rehabilitation request only. Of course, rehabilitation request can be declined, but the text of the Law implies such a request is proof enough that certain person was rehabilitated.

General conditions for rehabilitation, types and consequences of rehabilitation

The Law on rehabilitation was passed for the first time in 2006. In December 2011 a new Law on constitution was passed, the one still in power. According to that law, it is possible to rehabilitate „persons that due to political, religious, nationalist or ideological reasons were deprived of life, freedom or other rights until the date this law came into effect:

Decisions on confiscation were not delivered solely by courts, but could be dispensed by administrative bodies on the basis of several laws and regulations:

1. The Decree of conversion into state ownership of enemy property, on state management of property of absent persons, and on sequestration of property occupation administration seized after November 21, 1944, through which was *ex lege* confiscated all the property of the German Reich and its citizens in Yugoslavia, all the property of Volksdeutschers and property of war criminals and their accessories;
2. The Law on property confiscation and confiscation execution of June 9, 1945, later confirmed by the same law of July 27, 1946, with several authentic interpretations; The Law on converting enemy property into state property and on sequestration of property of absent persons of July 31, 1946, that specified application of the Decree of November 21, 1944;
3. The Law on seizing profits obtained during enemy occupation of July 24, 1946, that stipulated seizing of property individual and corporate bodies obtained through economic activities during the war;
4. The Law on suppression of ilegal trade, ilegal speculations and economy sabotage of July 11, 1946, that stipulated criminal accountability and property confiscation for such acts (*Службени лист ДФЈ* 56/46);
5. The Law on criminal acts against nation and state of July 16, 1946 and other regulations.

1. In the territory of Republic of Serbia without court or administrative ruling;
2. Outside the territory of the Republic of Serbia without court or administrative ruling of military and other Yugoslav authorities, if they had or have place of residence in the territory of Republic of Serbia or citizenship of Republic of Serbia;
3. by court or administrative ruling of the Republic of Serbia;
4. by court or administrative ruling of military and other Yugoslav authorities, if they had place of residence in the territory of Republic of Serbia or citizenship of Republic of Serbia."[2]

If there exists court or administrative ruling from options 3 and 4, the condition for rehabilitation is also that ruling was made against the principles of the rule of law and generally accepted standards of human rights and freedoms. The law there does not specify if those principles and standards are measured against the times when decision was made (in the middle of last century) or against the times when process for rehabilitation is conducted. It is obvious these standards are today, compared to those of the post-war period, far from being the same, for they were established by international documents that were passed after the period the Law on rehabilitation refer to. For instance, *Universal declaration of human rights* was adopted by the United Nations General Assembly on December 10, 1948[3]. *The Convention (of the United Nations) on punishment and prevention of the crime of genocide* was also adopted in 1948. *International covenant on civil and political rights* was adopted by UN General Assembly in 1966, and optional protocols to that document in 1976 and 1989. Anyway, both optional protocols are with us (Federal Republic of Yugoslavia, at the time) were ratified only on June 22, 2001. *The European Convention on human rights and elementary freedoms* is one of the most important documents of European Council. It was signed in Rome in 1950, and came into effect in 1953. Still, there is an impression our legal practice accepts principles of the rule of law and generally accepted standards of human rights and freedoms in the sense given by listed international documents that came into existence after regulations were adopted or concerning suggested

2 The Law on rehabilitation, (*Службени гласник РС* 92/11) in Official Gazette of the Republic of Serbia) No. 92 of December 7, 2011, article 1, paragraph 1

3 This date, as a date of acceptance of the Declaration, was internationally proclaimed Human Rights Day (UNGA 1948b).

actions towards annulment or invalidity requested by rehabilitation requests. With such a judgment of the rule of low principles and generally accepted standards of human rights in relation with court and administrative rulings just after the war, it is hard to expect those old rulings are supported, therefore rehabilitation requests are usually accepted.

Legal consequences of rehabilitation are measures of full elimination, or extenuation where elimination is not possible, of consequences of void and null or invalid documents and actions. That, among other things, means a right for restitution of seized property, and a right for restitution seized in accordance to regulations specifically listed in the article 2 of the Law on property restitution and compensation[4]. The law states the Republic of Serbia is not responsible for act of occupiers during WW II, so this law cannot be in any case foundation for property return to the victims of holocaust, or victims of occupiers, quisling formations and their collaborators.

The law envisages two types of rehabilitation: under compulsion of law (law rehabilitation) and by court order (court rehabilitation). So, under compulsion of law are rehabilitated persons whose rights and freedoms are infringed:

1. Without court or administrative order, i.e. by the action not based on any specific document;
2. Persons that were punished by court or administrative order:
3. for an act that at the time it was committed was not declared punishable by law, or if they were given punishment that at the time of commitment was not formal,
4. for a criminal act of enemy propaganda by malicious and untrue interpretation of social and political conditions in the country,
5. for a criminal act according to article 1, paragraph 3 and article 5, paragraph 1, in connection with paragraph 1 items 1–6 and 11–12 of the Law on suppression of illegal trade, illegal speculations and economy sabotage,
6. for an act according to the Law on suppression of illegal trade, illegal speculations and economy sabotage when presumption of innocence of enterprise (shop) owner, responsible management of a corporate body,

4 The Law on property restitution and compensation, article 2, Official Gazette of the Republic of Serbia 72/11 of September 28, 2011 (*Службени гласник РС* 72/11).

mandataries of a corporate body that managed an enterprise or an estate was infringed by application of the article 11[5].

7. for a criminal act as per article 2 of the Law on prohibition of inciting national, racial and religious hatred and discord, if done only by writing,
8. due to escape from a penal institution while serving punishment or other enforced measures by a person whose rights and freedoms were infringed without court or administrative ruling;
9. Persons that were arrested in accordance with court or administrative ruling and charged for their support of Cominform Resolution of June 28 1948 and kept in camps or prisons in the territory of Federative People's Republic of Yugoslavia from 1949 to 1955;
10. Persons declared on the principle of collective responsibility guilty for war crimes, or for taking part in war crimes, if they did not lose Yugoslav citizenship and did not commit or took part in war crimes[6] and
11. Persons that had their citizenship annulled and all the property confiscated by the Decree of the Presidency of Presidium of the National Assembly of Federative People's Republic of Yugoslavia.

Persons not complying with these, but complying previously mentioned general conditions for rehabilitation, can be rehabilitated by a court ruling.

5 „The owner of an enterprise (shop) who is an individual is responsible for the act as per this law, unless it is proven act was commited without his knowledge, or his subsequent approval or his negligence. With corporate bodies, besides executors responsible are body or mandataries that managed enterprize or estate in point, unless it is proven act was commited without their knowledge, or their subsequent approval or their negligence." The Law on suppression of ilegal trade, ilegal speculations and economy sabotage. (*Службени лисӣ ДФЈ* 56/46).

6 By the ruling of Commission for establishing crimes of occupiers and their collaborators in Vojvodina No. Стр. пов. 2/45 of January 22, 1945 all citizens of Hungarian and German nationality in the community of Čurug, county of Žabalj in Vojvodina were proclaimed war criminals. By the ruling of the same Commision of March 26, 1945, also collectively proclaimed war criminals were, according to their nationality, citizens of the community Mošorin, county of Titel in Vojvodina. Following request by the Association of Vojvodina Hungarians to annul these rulings of the Commission for establishing crimes of occupiers and their collaborators in Vojvodina, the government of the Republic of Serbia during session on October 30, 2014 annuled both rulings. This ruling was announced in: (*Службени īласник РС* 121/2014) on November 5, 2014.

Persons excluded from rehabilitation

Apart from discussed rehabilitation conditions, the law specified also certain limitations. Rehabilitation is not applicable to persons that lost their lives during WW II in armed conflicts as members of occupational armed forces and quisling formations[7]. Such limitation is really logical and hard to reproach. Anyway, other limitation stated in article 2 paragraph 1 is doubtable – namely, no rehabilitation is possible for members of occupational forces and quisling formations who committed a war crime or took part in war crime commitment. This limitation poses a problem, for there are two conditions for its application:

1. Person to be rehabilitated was a member of occupational or quisling forces;
2 Person to be rehabilitated committed a war crime or took part in war crime commitment.

The law itself does not specify if these conditions are cumulative or alternative. The item in article 2 paragraph 1 sounds as if both conditions should be met, so there are no obstacles for rehabilitation if a person was a member of occupational forces or quisling formations, if that person did not commit a war crime or took part in war crime commitment. Other possible situation would be there are no legal obstacles to rehabilitate a person that committed a war crime if that person was not a member of occupational forces or quisling formations, which is inexcusable. Therefore, item of paragraph 3 of the same article, the one specifying what persons are considered corresponding to article 1, should be interpreted that it applies to all persons from item 1, regardless if they were members of occupational forces or quisling formations, if they committed a war crime or took part in one.

Rehabilitation process

Rehabilitation process is conducted locally by a competent higher court applying procedure of nonlitiguos business, but there are significant differences legal rehabilitation process and court rehabilitation process. The court rehabilitation process is two-sided, with request opposing the Republic of Serbia, represented

7 The Rehabilitation law, article 1, paragraph 4. (*Службени ī ласник РС* 92/11, 33/06)

by senior public prosecutor. Senior public prosecutor participates also in a legal rehabilitation process that is one-sided, where court has obligation to secure his opinion, and in case that opinion contest the request, the process continue as two-sided (court rehabilitation). Participation of public prosecutor and its mandate are subject of high importance to public prosecution service because of sensitive matters involved, so it was given precedence to other processes that involve public prosecutor, so attorney general issued mandatory recommendations for rehabilitation process. These recommendations specifies obligation of competent higher public prosecutor to, after reviewing documents submitted, make a case study and submit it to appellate attorney general for confirmation. In that manner, appellate attorney general controls actions of higher public prosecutors in all procedures. If appellate attorney general does not support a case study, higher public prosecutor can accept his opinion, otherwise final saying has the attorney general.

Rehabilitation procedure, apart from person to be rehabilitated, can be initiated by its heirs (legal or by the testament) or a legal entity whose member of founder was that person, or, with their written consent, a legal entity aiming at protection of freedom and rights of people and citizens. The procedure can also be initiated by a public prosecutor in cases where rule of law and generally accepted standards on human freedom and rights were severely violated.

For this procedure legislator specified inquisitorial procedure, so the court ex officio secures proofs and data, and can independently research data not submitted by applicant.

Decision on rehabilitation request is made by higher court, by individual judge. The court can accept or reject request, and can reject it if not submitted by authorised persons. It is also possible court accept request partially, if valid only for some of punishable acts listed by ruling challenged by the request, or if valid only in respect of a type or extent of punishment.

Conclusion

Precedent text presents only some of solutions and characteristics of the Law on rehabilitation. Anyway, that implies this law not only offer any benefits or moral satisfaction to holocaust victims, except in cases where property belonged before WW II to victims of Nazi terror or their families, and was seized from surviving family members by post-war authorities, but these situations are extremely rare.

One possible conclusion is that strict application of the law could cause some kind of "secondary victimization", having in mind the law does not exclude from rehabilitation all participants of WW II on the losing side, or their collaborators, as previously explained. Under cited legal conditions, it allows even rehabilitation of persons whose property was seized even if before the war it belonged to holocaust victims, and they came into its possession after exile or killing of pre-war owners. Another conclusion could be the Law on rehabilitation does not protect at all rights of holocaust victims and other victims of Nazi terror in our country, even in those cases where there are no surviving legal heirs. Rectification of consequences for those holocaust victims and other victims of Nazi terror whose property was seized and who have no legal heirs should be regulated by separate law, and that proves to be not only justifiable, but necessary.

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Rezime:
Pregled Zakona o rehabilitaciji iz perspektive žrtava Holokausta i drugih žrtava nacističkog terora

Zakonom o vraćanju oduzete imovine i obeštećenju propisano je da se njegove odredbe primenjuju i na konfiskovanu imovinu pod uslovom da je vlasnik te imovine rehabilitovan. U tom slučaju se uz zahtev za vraćanje imovine obavezno prilaže i sudska odluka o rehabilitaciji ili dokaz da je podnet zahtev za rehabilitaciju. Prvi srpski Zakon o rehabilitaciji donet je 2006. godine. Prema važećem Zakonu o rehabilitaciji, iz decembra 2011. godine, mogu se rehabilitovati lica koja su lišena nekog prava (na život, na slobodu kretanja, na imovinu...) zbog političkog delovanja, ideološkog uverenja ili verske i nacionalne pripadnosti, do stupanja na snagu ovog zakona. Međutim, postavlja se pitanje kako se odredbe ovog zakona postavljaju prema pravima žrtava Holokausta i drugih žrtava nacističkog terora. Da li ovaj zakon ima u vidu žrtve, da li pruža bilo kakvu satisfakciju žrtvama Holokausta i drugim žrtvama okupatora i različitih kvislinških formacija? Kakve posledice primena Zakona o rehabilitaciji može imati na imovinska prava lica koja su u toku Drugog svetskog rata stekla imovinu koja je, prethodno, prinudno oduzeta (faktičkim i pravnim nasiljem) od svojih zakonitih vlasnika? Kakve posledice primena ovog zakona može imati na prava žrtava Holokausta i njihovih naslednika i kakve posledice primena ovog zakona može imati na prava žrtava Holokausta koja nemaju naslednike?

Ključne reči: rehabilitacija, restitucija, žrtva, Holokaust, prava, imovina, obeštećenje, posledice

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