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LIMITS AND LIMITATIONS OF THE TITLE TO LAND: ANALYSIS OF APPROACHES

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Introduction: *the article reviews and analyzes the existing legal theory and civil law approaches and positions on the content and relationships of the concepts of "restriction", "limit", "encumbrance". These legal categories have different functional importance, which is evident from both analysis of their content and implementation of the subjective property right. Therefore, understanding the categories under consideration is of particular importance.* ***Purpose:*** *to form the idea of the existing different views on the content of the categories of "restriction", "limit", "encumbrance" and to present our own position on the issue.* ***Methods:*** *methodological framework of the research is based on a set of methods of scientific cognition, among which the dialectical method is the leading one; also, empirical methods of descriptions, comparison, as well as methods of analogy, abstraction, and the structural-functional method have been used.* ***Results:*** *limits and restrictions are inherent to the right of ownership. According to the author, limits of the right of ownership appear to be general frameworks determined by law, and the authorized person cannot go beyond them in order not to harm interests of other persons. Restrictions are understood as exemptions from the content of the property right associated with the imposition of restrictions on the owner, those being as a rule formulated through mandatory rules.* ***Conclusions:*** *limits (regardless of whether they belong to public or private ones) appear to be an objectified and relatively more static category, while the nature and content of encumbrances and restrictions can vary in the course of changes and development of both public relations themselves and conditions, as well as prerequisites for the implementation of the property right. It is proposed that the legislator should establish the principles of limits and restrictions for both subjective property rights and the title to land.*

Keywords: property right; legal powers, limits; restrictions;
encumbrances; subjective right; interests; legal incentives; owner; bans

Information in Russian

ПРЕДЕЛЫ И ОГРАНИЧЕНИЯ ПРАВА СОБСТВЕННОСТИ НА ЗЕМЛЮ: АНАЛИЗ ПОДХОДОВ

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Введение: *статья посвящена обзору и анализу существующих в теории права и гражданском праве подходов и позиций по вопросу о содержании и соотношении понятий «ограничения», «пределы», «обременения». Указанные правовые категории имеют различное функциональное значение, что очевидно как при анализе их содержания, так и реализации субъективного права собственности. В связи с этим понимание анализируемых категорий приобретает особое значение.* ***Цель:*** *сформировать представление о существующих различных воззрениях на содержание категорий «ограничения», «пределы», «обременения» и обозначить собственную авторскую позицию.* ***Методы:*** *совокупность методов научного познания, среди которых ведущее место занимают диалектический метод; эмпирические методы описания, сравнения; методы аналогии, абстракции, структурно-функциональный метод.* ***Результаты:*** *пределы и ограничения имманентно присущи праву собственности. Пределы права собственности представляются автору общими, законодательно очерченными рамками, за которые управомоченное лицо не вправе выходить, чтобы не причинить вред интересам других лиц. Под ограничениями понимаются изъятия из содержания права собственности, связанные с наложением на собственника запретов, формулируемых, как правило, через императивные нормы.* ***Выводы:*** *пределы (вне зависимости от отнесения их к категории общих или частных) представляют собой объективированную, сравнительно более статичную категорию, а природа, характер и содержание обременений и ограничений вполне способны варьировать с изменением и развитием как самих общественных отношений, так и условий, а также предпосылок для осуществления субъективного права собственности. Предлагается установление законодателем принципов пределов и ограничений как субъективного права собственности, так и права собственности на землю.*

Ключевые слова: право собственности; правомочия; пределы, ограничения; обременения; субъективное право; интересы; правовые стимулы; собственник; запреты

Introduction

One of the key topical and controversial in civil law of modern Kyrgyzstan is the topic of possible limits, restrictions and encumbrances of property rights in general and land ownership in particular. This is due to the fact that the institution is subject to a large extent of penetration of the so-called external world, including public law.

In turn, the scientific analysis of the potential constraints, established with various restrictions and encumbrances, is necessary to start from the research of the very "matter" subject to this kind of legal manipulation.

Recall of the existing presumption. Implementation by an owner of his/her existing powers inherent in the right of ownership is vested in his sole discretion, and may not be subjected to some additional legal regulation as an unwarranted interference in the sphere of economic domination of a person over the property belonging to him (a thing).

Completeness of property domination thus is verified both in the behavior of a carrier of subjective rights and the existing norms of objective law. It should be noted that the subjective right is established by law a measure and the type of possible behavior or created and guaranteed by the state (through the rules of objective law) special legal opportunity to make any necessary steps to enable the subject (as the bearer of such a possibility) to behave

in a certain way, to use existing social benefits, to require appropriate behavior from other persons, society, treat, if necessary, to the competent state authorities for appropriate protection in order to meet fully his/her personal needs and interests, not contrary to the public ones [15, p. 22].

In our opinion, all the existing in the legal literature definitions of subjective rights can be explained primarily by the fact that the subjective right is seen both as a means and as an object of legal action.

In exercising its subjective right of property, the subject is usually intended to achieve any of his own socio-economic or legal purposes. The process of meeting the subject's own needs (as real, concrete actions) inevitably has a strong-willed character. The subject of property rights, possessing a certain autonomy of the will, as well as personal initiative, is free to choose from a variety of existing well-defined, concrete ways and means of achieving the designated goals.

At the same time, it seems a logical question of how compatible the will of the owner and his freedom of action with similar conditions and prerequisites for the implementation of the rights of all other entities operating in the public space. Some researchers often regard individual freedom and property as social phenomena of the same order. This freedom is interpreted as a perceived need and at the same time, in the concept of property and the contents there are no elements of "necessity", "should" or "restrictions" due to existing social needs and interests, as well as the specific features of the objects of property rights.

Main content

The power and freedom of the owner, of course, have effect till certain limits set out primarily in the public interests, i.e. third parties. At this the owner is also an integral part of the society and, therefore, agrees to some for himself «restrictions" and "restraints". Therefore, the subjective right of ownership characteristic for the individual is built according to the needs of all the civilian society and all its needs in which the subject-owner implements the law, and not only from the standpoint of the interests of the subjects of property rights. In fact, the restrictions appear as immanent part of the structure of ownership itself.

A number of regulations with respect to possible limitations of existing rights and freedoms of a certain citizen set forth in the Basic Law – the Constitution of the Kyrgyz Republic. Thus, according to the constitutional norm, the certain rights and freedoms of a citizen in order to protect national security, public order, health or morals of population, protection of the rights and freedoms of other persons may be restricted by the Constitution and laws. At the same the imposed restrictions must be fully commensurate with these objectives.

It has been established that according to the norm of Art. 12 of the Constitution the limits and procedure of exercising by the owner his existing rights and guarantees of their protection are determined only by the law.

With regard to land ownership the review and study of legislative approaches in various existing legal systems to establish certain limits and restrictions clearly indicates that, in general, a pronounced upward trend in the proportion of various ownership restrictions, only reflects the dialectic movement from the principle of "unlimited freedom" to the principle of "restricted freedom". This provision is relevant and continues to be maintained and operates in the present. And with regard to land ownership it has been established especially many of such restrictions [10, p. 227].

The idea of the admissibility and necessity of different restrictions for ownership is known and is valid for a long time, but today it has become a generally accepted fact. This phenomenon can be explained only with the awareness by the society that the land, being at the same time the object of civil rights and goods has a specific cost value, but also is a natural resource, that also acts as an important, substantial productive capital for all the nations and their habitats (home of the nation).

From this base, the existing resource of the earth cannot be considered the property of any individual, group of people, the state in general, and even living on the planet at the same time of all the generations of mankind. In the first approximation, we can talk about the belonging of the totality of natural re-

sources (and including land) to the whole of humanity, not just living in the moment, but also to future generations [14, p. 8].

The validity of this idea is supported by global development agenda, in particular the concept and goals of sustainable development, the effectiveness of which will provide benefits for future generations as the resources of development.

We agree with the view that the XIX century, drawn by the idea of "mobilization of landed properties", as far as it was possible, facilitated the transition of land from the owner to the owner. Currently, the pendulum is moving in the opposite direction: new demands "immobilization", "consolidation" of land ownership and restrictions on the freedom and the transfer and pledge of agricultural land are advanced. It is assumed that the market and economic elements do not lead automatically to the optimal agrarian structure and that is certainly necessary to fight against some deviations with the help of state intervention [2, p. 59].

Attempts to put the interests of a single individual over the interests of the whole society has led to the fact that primarily the society suffered losses and then the individual suffered himself, devoid of the necessary protection of his existing rights by the state weakened by such processes [19, p. 79]. Proclamation of super liberal principle "allowed everything that is not prohibited by law directly" allowed the practice and science to justify the necessity and reasonableness of an imminent intervention into the private affairs of the state [1, p. 68]. Scholars and practitioners have become aware that with the development of modern productive forces and increasing maturity of public relations the state more and more began to take over the functions of certain control over the use and disposal of land [7, p. 423].

Range scientific statements shows that the vast majority of jurists (regardless of the legal system that they represent) are united in the opinion that the right of ownership, especially on such a specific object as land, needs to establish the relevant real constraints and limits in order to ensure the efficient use of the limited land resources by authorized persons.

The stated above allows to conclude that the existing now postulate an organic connection of property rights and their limitations is beyond doubt. Relationship of the rule (freedom) and the exceptions from it (limit) is the key, an important aspect of property relations as a legal institution, the only one able to provide effective development of a market economy [11, p. 179].

The necessity to establish an adequate and natural relationship between what is permitted and obliging the authorized person seems actual at this stage of development of the legal regulation of property relations on the land.

The position, which reflects the category of limits and restrictions through the concept of incentives in the law, seems interesting. The talk, contrary to popular belief is about the only positive vector of their impact, legal norms that encourage the development of callable and necessary at the moment for the society and the state social relations. At this these rules stimulate both processes – the activity of the people, and the results [5, p. 51].

Stimulation is thus carried out through restrictions in the broad sense of the word. Holding legal incentives are seen as:

– legal restrictions on illegal activities, creating conditions for the subjects and the public interests in the protection and defense;

– set in law boundaries, within which the subjects have to act;

– exclusion of certain opportunities in individual activity [17, p. 26].

Analysis of legal literature on the possible and necessary limits and restrictions of ownership rights demonstrates a situation with serious frequently mixing of these categories. In particular, the researchers of Russian civil law, as a rule, identified the concept of restrictions and limits of property rights. For example, K. P. Pobedonostsev gives characteristic to limits (restrictions) as the negative part of the property rights, equating them to each other based on the legal value, form and consequences [16, p. 345].

The definition of the limitation of subjective property right given by S. V. Scriabin: the limit of the subjective property rights to individually defined thing, based on the various prohibitions that were established earlier by positive law, or were related to the rights of others to the same thing.

Based on this definition, this author identifies the following signs of possible restrictions [18, p. 268]:

– the legal nature of the restrictions;

– expansion of property rights in eliminating restrictions;

– restrictions are a limit to the implementation of property rights;

– limits for the most part relate to immovable property.

It should be noted that many opinions expressed by the author are common with the position of D. I. Meyer: ignoring distinctions between the concepts of encumbrances, restrictions and limits of property rights.

There is a strong opinion, according to which the concept "encumbrance" is within the concept of "limits of exercising the civil rights", because the limits represent a certain limitation of rights, or even some frames, which, in exercising its legitimate right one cannot go beyond. But these are general limitations that are inherent to all civil rights (including in rem) and defined by law. But encumbrance – it is some additional limitation of rights imposed on the owner or other owner of property rights in accordance with the signed agreement, or a specific article of legislation.

In view of the above the following main features of encumbrances (restrictions) are offered [13, pp. 228–229]:

– "negativeness", i. e, the existence of encumbrances (restrictions), suggesting the subject to be abstained from doing certain actions;

– encumbrances (restrictions) are not included in the content of the right;

– the right to property is recovered in full or completely terminated upon termination of encumbrances (limitation);

– encumbrances (restrictions) are temporary in nature (as opposed to the law limits);

– encumbrances (restrictions) are based on various legal facts arising from applicable law or agreement of the parties, and their boundaries defined by the legislation;

– encumbrances (restrictions), as opposed to the right limits usually have a civil and not public law character.

And the concept "restrictions", and the concept "limits", as claimed by some researchers in the field of law, must assume certain limits within which the owner owns, uses and disposes own property at his discretion. The nature of these boundaries is quite different. The legislator, considering such restrictions, refers to the owner's will based on the law, and to the subject entering with him into the agreement, or to the will of the judiciary.

The following conclusions are made based on:

– limits are always objective in the sense that they do not depend on the will of the owner or other persons, as predetermined by the applicable law;

– limitations are subjective because they depend on the law based on the will of the subjects or the judiciary.

Since the limits of the property rights have an objective character, so far only in this range limitation of the property rights is also possible. The stated allows us to consider the limits as the general basis for restraint of property rights and restrictions – private [8, p. 78].

In addition, limits can also be defined as a certain border, within which the owner has full domination in relation to his property. They define range of specific rights that, as a rule, has the owner. Restrictions on the contrary, in any way hold back the owner [3, p. 175].

Encumbrances and restrictions according to O. V. Shvedkova represent some constraint, set within the limits of the right of ownership. The difference is that the encumbrance may be established on the property of the object (eg, servitude), and the restrictions are only certain constraint of rights.

At this the restrictions and encumbrances, in the author's view, are characterized by almost the same signs [20, pp. 115–117]:

– they are established within the limits of the right of ownership;

– associated with any adverse conditions;

– entail a decrease in the volume of opportunities of the subject of ownership right in the exercise of his right to property;

– aimed at protection of the public relations (doing so, guard function).

In formulating our own position on the question of the relationship between the categories of "limits", "encumbrance" and "restrictions" in relation to ownership, we believe that it is necessary to distinguish these categories. Thus, the limits of

property rights appear to be certain limits, which are, in fact, the terms of the proper functioning of the mechanism of legal regulation or common legally outlined frames which the authorized person is not entitled to leave in order not to harm the interests of other persons (society).

In this case, the restrictions in their traditional sense are the exceptions from the content of property rights associated with the imposition of restrictions on the owner, formulated as a rule through mandatory rules. At the same time, in our opinion, the range of legal limits of the right of ownership includes both limits (relating to any property), and the limits of property rights (relating to a specific object, such as land plot). And the ground for them is law only.

At the same time, in our opinion, the range of legal limits of the right of ownership includes both limits (relating to any property), and the limits of property rights (relating to a specific object, such as land). The [reason of occurrence of such is the law only.

An example of the limits of the right of ownership can be given in 3 of Art. 222 of the Civil Code of the Kyrgyz Republic where states that the owner has the right at its discretion to make with respect to his property any actions not contrary to the legislation in force and does not violate the rights and lawful interests of other persons or society in general.

The requirement for land use without harming the environment is a particular limit of the property rights (para. 2, 3, Art. 222 of the Civil Code of the Kyrgyz Republic).

Under the restriction, in the broad sense of the term, it is necessary to understand some constraint of proprietary rights of owner's possession, use and disposal of property belonging to him, as well as requirements to him as to the subject of property rights. Restrictions of land ownership, by its legal nature, assume obligations of the owner to refrain from certain actions or make them under certain conditions. The owner due to the limitation of the right of property with respect to his ability to make things deprived of this or that action, whereas no such limitation on the right of ownership, he could perform this action [12, pp. 22–23].

Under the restriction of the rights of persons using land plots O. I. Krassov understands establishing in the administrative order bans on certain types of land use and economic activity, or demands to refrain from certain actions or provide limited opportunities for the use of another land for strictly defined purposes [9, p. 266]. In this sense, the restriction on the right, as opposed to the subjective right as a measure of possible behavior of the authorized person, is only a certain difficulty, hesitation or restraint in the implementation of a specific subjective right.

T. B. Stankevich believes that restrictions on the right do not completely exclude the possibility of the commission of an action, but rather is subject to the implementation of these actions under certain conditions, which must first comply with or provide the ability to operate within a certain framework, In her opinion, the restrictions on the right is a phenomenon that reflects the need for abstinence of subjects of limited subjective rights from certain activities [19, pp. 82–83].

In turn, the encumbrance of ownership to land should be set in relation to objects (for example, providing servitude for the owner of the adjacent land). In this case, the servitude serves as the encumbrance of the land plot, which causes certain difficulties in the implementation by the owner of the neighboring plot of his powers. Thus, the main type of encumbrance, as follows from its definition, is the availability of the property rights of certain third parties.

Thus, the fact that all real rights (other than property rights) are rights to someone else's thing leads to the reasonable conclusion that the encumbrances of property rights are all limited real rights. Moreover, these real rights can themselves grow into various encumbrances [4, p. 213].

Other authors generally share this position [1, p. 70], arguing that individual real rights (formally not referring to the encumbrances) in essence are a special kind of derivatives, dependent real rights encumbering the property right. From this point of view, we can fully agree with the only specification that they act as encumbrance only to the subject of property rights, while for the subject of limited right in rem – it is a subjective right. These rights exist and operate independently. For the real estate owner, in respect of which the servitude rights are established, the latter acts as some encumbrance. And according to the law

the servitude is concurrently serves as the real rights, and as the encumbrance (depending on what subject is covered by servitude) [6, p. 455].

Conclusions

It should be noted by determining the ratio of the concepts of "limits", "encumbrance" and "restrictions", that all limits (regardless of their classification in the category of public or private) are objectified, comparatively static category. In this case the nature, character and content of encumbrances and restrictions are fully capable to vary with the change and development of the public relations and conditions, as well as the prerequisites for the implementation of subjective ownership. In addition, the property of the object has a value and, accordingly, the interests and needs that it satisfies (whether private or public interest entity).

Consideration of the legal categories is key for ensuring the stability of legal relations due to warranty their members' immunity rights and freedoms. In turn, establishing of the legislative principles for the limits and restrictions as a subjective property rights and land ownership is of great importance. The proposal will, in its turn, allow to establish an adequate (proportionate, reasonable, proportional) balance of interests of a subject of law and the society as well.

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