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THEORETICAL PROBLEMS OF EXERCISING OF LAND RIGHTS IN UKRAINE

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Abstract

The article is devoted to theoretical issues related to the exercising of land rights. The author analyzed the concept, content and limits of the exercising of land rights. Also the relation of concepts “exercising of the rights” and “realization of the rights” is carried out. The content of the concept of “the exercise of land rights” is examined. The category “limits of realization of the land rights” is investigated. The views of scientists in the sphere of land law, which contained term of “intended purpose of a land plot”, are analyzed. It is considered as one of the main characteristics of each land plot.

Key words

land rights, subjective right, exercising of land right, limits of rights, land plot, intended purpose of land, land ownership, permanent use of land.

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1. Introduction

In conditions of the implementation of modern land reform in Ukraine, subjective land rights occupy a prominent place in the system of subjective rights of both individuals and legal persons. These subjective land rights are constantly at the center of attention of representatives of domestic and foreign legal science. The problem of the exercising of land rights is one of the most important in both scientific and practical aspects. As we know, any subjective right has its own social value only when it can be exercised, that is, to realize the opportunities that it provides to the authorized person.

In its turn, the Land Code of Ukraine consolidates the pluralism of forms of land ownership, defines the

types of rights to land, as well as the circle of subjects of ownership and land use. That is, we are talking about objective rights to the land, the characteristic feature of which is their static nature. However, neither the Constitution, nor the Land Code of Ukraine and the laws adopted for the development of their provisions, disclose the content and mechanism of exercising of subjective rights to land. The exercising of subjective rights is characterized by the dynamics, which consists in committing by subjects of certain actions to meet the needs and legitimate interests. These actions relate to the use of land in general or individual plots of land. Through the exercising of the corresponding rights to land, the subjects realize the objective rights of land provided for by the

Constitution of Ukraine, the Land Code of Ukraine and other normative-legal acts.

2. "Exercising" or "realization" of land rights?

Legislative acts of Ukraine often use such terms, the content and the relationship of which are not precisely defined, as a result of which in lawmaking and law enforcement, there are problems with the definition of the object and subjective composition of land legal relations. For example, the Constitution of Ukraine (Article 13) operates with the term "exercise of the rights of the landowner", and in Article 14 The Basic Law uses the term "realization of the right of ownership" (Конституція..., 1996). It is advisable to consider the essence and content of these terms and determine their correlation.

First and foremost, one should touch upon the etymology of the terms «exercising» and «realization». So, in the Ukrainian language, the word «realize» is considered in the sense of carrying out, doing something real, embodying something in life. At the same time, the term «exercise» has two meanings, one of which: to introduce, implement, do something real (Словник..., 1980, p. 541). As a result of the comparison of the above interpretations of terms, we can come to the conclusion that they are completely identical, since they are determined one by one. However, in legal literature, the approach to the ratio of phrases «realization of right» and «exercising of right» is ambiguous.

Some scientists identify these concepts as the same ones. Thus, representatives of civil law emphasize that under the exercise of civil law it is necessary to understand the realization of those opportunities provided by the content of subjective civil law (Науково-практичний..., 2011). According to this, the realization of subjective law - is the transformation of the possibility of reality by means of a set of actions of an actual or legal nature in order to satisfy the interest.

There are also some other approaches regarding the relation between the terms «realization» and «exercising». Some researchers emphasize that the concepts are not identical, but rather includes one else. For example, O.V. Grygorenko (Григоренко, 2016) asserts that realization is a very broad concept, since it includes exercising and protection. She emphasizes that exercising is one of the stages in the realization of personal non-property rights, during which, for example, an individual, committing legally significant acts (acts or inactivity) directly or through other persons, transforms the objectively

existing right into his own subjective right, in the form of rights and obligations created for himself.

In his turn, R.O. Stefanchuk (Стефанчук, 2008), proposing the definition of «exercising of subjective civil right», notes that the latter can be understood as all possible types of behavior of the carrier of the corresponding subjective civil right, aimed at both the realization of individual powers that make up its content, and to exercise rights in general, which may take place in a form prescribed by the law. In this approach, exercising implies the realization of those opportunities provided by the contract or law to the owner of subjective law. So we can reach the conclusion that the concept of «realization» is narrower than «exercising» and concerns only individual powers, and not rights in general.

Thus, the position of scientists, according to which the term «exercising» is considered broader than the term «realization» and includes the latter, seems most acceptable and accurate. The content of the exercise of subjective rights to land consists of the rights enshrined in the legal norms, according to which an empowered person can commit certain actions aimed at transforming the his legal powers into reality. The exercising of land rights is combined with the active volitional behavior of a person, with his activities aimed at the use of land through the realization of legally secured facilities, that constitute the content of his right to meet the needs and interests protected by the parties to land legal relationships.

The exercising of right lies not only in the attachment to a particular person of a subjective right, but above all its materialization, the actual and complete achievement by this person the main and the original goals. These are, in particular, the reception of those goods and values, the satisfaction of interests, which are programmed by this subjective right and form the basis of its content. For example, a citizen, in accordance with the Land Code of Ukraine, has the right to free land privatization (Земельний..., 2001). However, an interested person cannot simply come and «privatize» any land, thereby committing a volitional action, which is enshrined by the law. In order to exercise such a right, a citizen must perform a number of procedural actions (to file an application to the relevant body, to form a certain package of documents, etc.). Only after this the person can acquire the land plot into ownership, and as a result, to exercise his right to privatize land.

3. Limits of exercising of land rights

While individuals exercise their subjective rights, the conflicts of their rights are often encountered. In such cases, one person cannot exercise his right to land due to a certain influence on him by another person. So the question of establishing certain limits of exercising of rights to land is actualized. Such limits, as a rule, take place where the exercising of the right of the subject encounters with the rights and interests of another person or society as a whole, which are also recognized and protected by law.

According to V.V. Nosik (Носик, 2006), while exercising the property rights, as well as any other right, there is a certain framework – external borders or a certain amount of freedom, the output of which is combined with legal liability. Therefore, for example, the land owner or an authorized person, on the one hand, must act within the limits of his powers, on the other – not to infringe upon the legal freedom of other owners, third parties and not to harm the state and people. In order to ensure such behavior of subjects there is a need for state regulation of property relations and control over the actions of the owner, while not allowing illegal interference in the permissible limits of exercising of the right of ownership. Failure to comply with the above requirements regarding the exercise of property rights leads to the emergence of such negative legal phenomena as abuse of law and offenses. Thus, the establishment of the limits of the exercising of rights to land is the prerogative of the state, which is aimed at ensuring the rights and legitimate interests of individual citizens and society as a whole.

First of all, it should be emphasized that the use of land as an important natural resource requires compliance with a number of environmental regulations and standards in view of the importance of land as a condition of existence of future generations (Костяшкін, 2016). In particular, in this context, as one of the examples, we should mention Article 167 of the Land Code of Ukraine, according to which economic and other activities that cause pollution of land and soils above the maximum permissible concentrations of hazardous substances are prohibited (Земельний..., 2001). The norms of the maximum permissible concentrations of dangerous substances in soils, as well as the list of these substances, are approved by the central executive body implementing the state policy in the sphere of environmental protection and by the central executive body, which implements the state policy in the sphere of sanitary and epidemiological well-being of the population. In this case, the limits of exercising of the use of the corresponding land plots, which are based on the

ecological criterion, are established. While exercising the rights to land, each person must not only do everything possible to prevent the deterioration of the ecological situation, but also to try to improve the conditions of land.

Subjects of land law relations must also act in good faith, when they exercise land rights. They must follow the standards of morality adopted in society. For example, the Constitutional Court of Ukraine in one of its decisions drew attention to the fact that one of the manifestations of the rule of law is that the law cannot be limited only by legislation as one of its forms, but also includes other social regulators, in particular, the norms of morality (Рішення Конституційного..., 2004). Of course, the violation of moral norms is not drawn to the participants of land relations adverse legal consequences, since another interpretation of the law would ignore the differences that exist between the norms of law and morality. The sense of the requirements to act reasonably, conscientiously, fairly, humanely is to orient the subjects, as well as law enforcement bodies, on the mandatory consideration of the rules of morality in their work. As a result, the formation of the limits of the exercise of rights to land is affected by the norms of morality, the requirements of reasonableness and integrity of behavior and the purposes of law.

The exercising of subjective rights to land is limited by certain time limits. The current legislation establishes, where necessary, certain time limits for the exercising of land rights, including the time limits for exercising of a subjective right. So, for example, Part 5 of Article 93 of the Land Code of Ukraine stipulates that the right to lease a land plot may be alienated, including sold at land trades, as well as transferred to pledge or inheritance and may be entered into the authorized capital by the owner of the land plot – for a term up to 50 years. The law also allows a temporary occupation of a plot of land for conducting reconnaissance works (Article 97 of the Land Code of Ukraine). In turn, superficies and emphyteusis cannot exceed 50 years (Part 4 of Article 102-1 of the Land Code of Ukraine) (Земельний..., 2001).

In addition, in our country there is such a kind of land use as a permanent use, which is carried out indefinitely. The absence of a predetermined period of the right of permanent land use, on the one hand, gives this type of land use a sustainable character, and on the other hand, increases the degree of stability of the powers of a permanent land user. The right of permanent use of land is much less extensive than the right of ownership to these lands, since it does not include in its content the disposal of them. This creates a completely unacceptable

situation in which state and communal enterprises, being subjects of permanent land use, can not normally conduct business without having the opportunity to dispose of their land.

4. Intended purpose of a land plot

The main characteristic of each land plot is its intended purpose. The issue of the purpose of land is devoted to a significant number of various legal studies (Шульга, 2018, Федчишин, 2015, Ігнатенко, 2014). Emphasis is placed primarily on the lack of proper and unambiguous legislative regulation of this issue. In the science of land law, it is noted that the definition of the term «intended purpose of land» enshrined in the legislation does not reflect the peculiarities of the choice the use of a certain land plot and the procedure for its establishment, which leads to abuses in practice (Марахін, 2013). That is why scientists provide and substantiate their variants of definition of this concept.

In particular, P.F. Kulynych (Кулинич, 2002) notes that the intended purpose of the land plot is the permissible limits for the use of land by citizens and legal entities established by the legislation and specified by the relevant authorities. It is indicated in the state acts on the right of ownership of the land plot or for the right of a permanent use of the land plot, or in the lease agreement.

It should be emphasized that in most definitions both in scientific literature and in legislation, attention is always focused on the fact that the intended purpose is the establishment of an acceptable limit of exploitation of the land plot. According to M.M. Misnik (Місник, 2005), a land plot cannot exist outside of one or another category of land. It absorbs all the features of the category of land to which it belongs. That is why, while exercising the rights to the relevant land plots, landowners or land users should take into account which category the land plot belongs to. According to Article 19 of the Land Code of Ukraine, the division of land in Ukraine is carried out in accordance with the main intended purpose (Земельний..., 2001).

The «а» part of Article 96 of the Land Code of Ukraine proclaims that land owners and land users are obliged to ensure the use of land plots in accordance with their intended purpose (Земельний..., 2001). However, O.O. Kot (Кот, 2016) correctly notes that the imposition of such obligations on owners and land users cannot be considered as a limitation of their rights. In such cases requirements for any activity of any persons on the use of land are

established regardless of the type of the right which is exercised.

At the same time, the Land Code of Ukraine for landowners (Article 90) and land users (Article 95) defines the right to self-management on their land (Земельний..., 2001). The essence of this right is that a relevant land user or landowner, on his own will, independently determines the directions of his production and other activities, the way of using the land plot within its intended purpose and conditions for the protection of this land plot.

5. Conclusions

The exercising of land rights should be considered as a set of all possible types of behavior of a person for the purpose of acquiring, realizing and protecting the land rights, aimed at satisfying personal needs for land use, taking into account the intended purpose, rational use and protection of land, as well as the rights of others subjects of land legal relations. While persons exercise their subjective rights there can be a collision between the subjective rights of different persons. So a situation where the right of one person begins to contradict the right of another person is widespread. Then there is a problem regarding the limits of the exercising of land rights. Such limits are a legal guarantee of equality of rights of all subjects in the sphere of land law relations. Establishment of them can be considered as providing equal opportunities for all subjects to exercise their land rights, what, in turn, essentially enshrines the principle of equality of all people in their rights, provided by the Constitution of Ukraine.

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