



Journal of Geography, Politics and Society

2019, 9(1), 23–27

DOI 10.26881/jpgs.2019.1.03



ABOUT RESTRICTIONS OF LAND RIGHTS IN UKRAINE

Dmytro Fedchyshyn (1), Iryna Ignatenko (2)

(1) Department of Civil Law, Zaporizhzhia National University, Zhukovskoho 6b, 69600 Zaporizhzhia, Ukraine, ORCID: 0000-0002-1565-8150
e-mail: marlynykh@gmail.com (corresponding autor)

(2) Department of Land and Agrarian Law, Yaroslav Mudryi National Law University, Pushkinska 77, 61024 Kharkiv, Ukraine, ORCID: 0000-0003-0398-9891
e-mail: irena.nekosargot@gmail.com

Citation

Fedchyshyn D., Ignatenko I., 2019, About restrictions of land rights in Ukraine, *Journal of Geography, Politics and Society*, 9(1), 23–27.

Abstract

The article deals with restrictions on the exercise of land rights. Attention is paid to the consideration of the content of the concept of “restriction of subjective right to land” and the views of domestic scientists regarding its definition are analyzed. The classification of restrictions on rights to land by different criteria is proposed. The peculiarities of reconciliation of public and private interests in the establishment of restrictions on the rights to land are explored.

Key words

restriction of land rights, land use, land ownership, public interests, private interests, Ukraine.

Received: 14 January 2018

Accepted: 26 January 2019

Published: 31 March 2019

1. Introduction

Today, the issue of exercising the rights to land is becoming increasingly important in front of Ukraine as an independent state, which is heading towards the European Community. One of the key vectors of the transformation of the land system in Ukraine is a fundamental modernization of the system of public administration in the field of land use and protection (Bondar, 2018). According to the Constitution of Ukraine (Konstytuciâ..., 1996), the land is proclaimed the main national wealth of our country. In addition, the Land Code of Ukraine (Zemel'nij..., 2001) establishes the pluralism of land ownership forms, defines the types of land rights, as well as the circle of subjects of ownership and use of land.

The above-mentioned legal acts and other laws adopted for their development determine precisely the objective land rights, the characteristic feature of which is their static nature. However, issues related to the content and mechanism of exercising of subjective land rights are actualized today. The exercising of such rights is inherent in the dynamics, which manifests itself in the behavior of certain actors in order to meet the needs and legitimate interests associated with the use of land in general or individual plots of land. Through the exercise 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. At the same time, the volume of such implementation is not always the same due

to factors of a legal nature. In this context, attention should be paid to restriction of land rights.

Issues related to restrictions of rights, including land rights, were the subject of scientific research of such famous domestic scientists as: V. Andreytsev (2006), T. Kharytonova (2016), O. Kot (2016), P. Kulynych (2011), V. Nosik (2006), M. Shulga (1998) and others.

The land plot is the object of the interests of an unlimited number of natural and legal persons, who are obliged to refrain from committing actions that may violate the rights of owners or users of the land or prevent them from carrying out transactions within the ownership, use or disposal of a land plot (part thereof).

As V. Nosik (2006) proclaims, in accordance with the Constitution of Ukraine, the right to own, use and dispose of land by citizens, legal entities must be carried out within the limits specified by law. At the same time, the legal framework in which a person exercises his powers of the owner or user of the land as an obstacle that prevents anyone, without the consent of the owner or user without proper legal grounds, to interfere in the realization of their land rights. These frameworks provide landowners and land users with the opportunity to choose the legal forms, means of protecting ownership rights or the right to use land from unlawful actions of state authorities and local self-government, as well as third parties.

At the same time, the lawful establishment of legal restrictions and restrictions of the right to exercise the powers of the owner of the land is consistent with the legal nature of the constitutional guarantee of inviolability of the right to ownership of land. This is due to the permissibility and the possibility of limiting the right of private property provided for in Articles 13, 41 of the Constitution of Ukraine, according to which the ownership of land obliges, and therefore the use of ownership of land cannot harm the rights, freedoms and dignity of citizens, the interests of society, worsen the ecological situation and natural qualities of land (Konstytucija..., 1996). In addition, for the users of land plots, Ukrainian civil law provides general requirements for the conclusion of lease agreements, and the land legislation provides special requirements for the parties of such agreements regarding the special nature of land and necessity of its protection (Fedchyshyn et al., 2018).

2. Restrictions of land rights

The concept of restriction of subjective land right has a special scientific and practical significance and

is the basis for the study of restrictions in the exercise of land rights. General theoretical studies of the restrictions of rights, the discovery and analysis of their essential features and types allows it to consider with greater depth, consistency and justification the problems of restrictions of ownership rights.

Modern scholars (Kot, 2016; Kuznetsova, 2014; Stefanchuk, 2008), in their writings pay a lot of attention to the restriction of subjective civil and other rights, defining the general theoretical foundations of such restrictions. At the same time, some authors (Kharytonova, 2016; Nosik, 2006; Rozgon, 2006) emphasize the connection between restrictions of freedoms of the subject in exercising rights to land with public interests. The Law, combining permissions and prohibitions, fulfills two objectives: on the one hand, it defines the limits of the freedom of the participants in the legal relationship, and, on the other, ensures the freedom of man by means of effective mechanisms that make it possible to make human freedom a reality. In turn, the task of legal regulation is the harmonization of relations between man and society, since, objectively, the interests of an individual subject may not coincide with the interests of the state, society or part of it. For example, in the Republic of Serbia, the right of ownership of agricultural land can be deprived or limited only in public interest determined by the law or by a governmental decision (Trgovčević-Prokić, Počuča, 2016).

Based on the contents of Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the deprivation of property rights may be exercised solely on terms laid down by law or the general principles of international law (Konvencija..., 1950).

Unlike the subjective right, as a measure of possible behavior of an authorized person, limitation of the right constitutes a certain difficulty, deterrence in the exercise of a particular subjective right. Restriction of land rights is a system of legal norms established by regulatory acts in order to protect the morals, rights and legitimate interests of the population and others, ensuring the defense of the country and the security of the state.

In the scientific literature D. Meyer (1864) opposed the restriction of ownership to the rights of others to the thing and noted that the restrictions do not constitute the right to another's thing, because such a right is allocated from the right of ownership, and the restrictions are its limit. The owner due to restrictions of ownership was deprived of the possibility to perform one or another act in relation to a thing, whereas without such restriction, according to his right, he could have acted. In addition, the owner, as a result of restricting ownership,

undertook to admit one or another action against the thing from another person, while he could and would not have been allowed without restriction. However, the scientist comes to the conclusion that the owner was not obliged to make a certain active action as a result of his ownership rights restrictions.

Today, on this issue, there are quite a lot of diverse opinions of scientists. For example, M. Stefan-chuk (2008) rightly observes in his study that the restrictions have a negative nature. They prohibit (narrow or exclude) certain possibilities for realization by subject of his right and thus they differ from the limits of realization of the right, which reflect the positive aspect in realization by the subject of his right. Thus, they establish possible (permitted or not prohibited) variants of the behavior of the subject.

O. Rozgon (2006), considering the limits and restrictions of ownership, gives some of their differences. In particular, in her opinion, the limits characterize the ownership in the objective sense and restrictions are established on the subjective right of ownership. Limits have a general nature and apply to all owners, but restrictions are established in relation to the rights of a particular subject. Also, the scholar points out that the limits are too broad, since they include such criteria for their establishment as "moral principles of society", "the impossibility of using the owner of his rights to the detriment of the rights of others" etc. Restrictions, however, determine the requirements for certain actions or refrain from certain actions.

In addition, it should be emphasized that the restrictions are characterized by dynamism, since they can both be installed and removed, affecting the possibility of exercising the land right. For example, according to Article 111 of the Land Code of Ukraine and adopted in accordance to it other normative legal acts, contracts and court decisions there may be established such restrictions in the use of land plots: (a) condition to begin or complete construction on, or to bring into cultivation, the land plot during the established period of time; (b) forbidding the conduct of certain kinds of activities; (c) forbidding a change in the purpose of use/designation of the land plot, landscape; (d) condition to build, repair or maintain a road or a section of a road; (e) condition of observing nature conservation requirements or carrying out indicated work; (f) requirement to allow hunting, fishing, gathering wild plants on one's land plot during established periods and according to the established procedure (Zemel'nij..., 2001). In turn, limits have a static nature. They are an integral part of the relevant right, which defines it.

3. Types of restrictions

Considering the types of restrictions, it is possible to distinguish them according to various criteria. In particular, by types of activities carried out: (a) nature protection activity – due to the use of natural complexes, resources and landscapes that are located on or near the land and form a viable environment; (b) property activity – associated with the exploitation of various property located on the land; (c) other activity – established by features of the implementation of social, economic, commercial demand in accordance with the statutory power of entities.

Depending on the nature of the occurrence of restrictions, they can be divided into several groups: (a) due to the setting of easements; (b) due to the influence of norms of "neighbor" law; (c) constitute an institution designed to provide social needs and which have a legislative basis in the interests of not individuals, but of all society with the domination of public principles over private.

In addition, A. Tretyak (2001) proposes to divide all restrictions on the content of the legal relationship to those: (a) which provide the right to use someone else's land; (b) which prohibit the implementation of certain actions on their own land; (c) which is a combination of the first and second types of restrictions. The author also proposes to classify restrictions on the use of land according to the functional feature – the degree of suitability of land for various types of economic use through the establishment of criteria for restrictions on land use. For the purpose of practical consideration of restrictions, there is a classification of them on such subspecies as: legal, ecological, agrotechnical and special.

4. Restriction of rights as a factor of balance of public and private interests

As it is known, the system of legal regulation of social relations includes in its composition permissions, prohibitions and positive obligations. This triad of legal regulation arose in Roman law. In the XX century there were theories that justify the use of three varieties of regulatory norms – prohibiting, authorizing and binding. However, some scholars have identified a fourth set of legal instruments – legal restrictions. S. Alekseev (1989) noted that the restriction of subjective right is achieved through a well-known triad of methods, by limiting permissions, new prohibitions and additional obligations. Restriction of rights is expressed in the pinching of the subject in the exercise of subjective right. However, we cannot accept without objection the further argument

of this author that the “restriction” in the exercise of subjective rights due to the transfer of its possible implementation to a third party. It seems that the restriction of subjective law (for example, ownership of land) is connected, above all, with ensuring the interests of society as a whole. In this case, as an example, we can consider zones of sanitary protection created around objects with underground and open sources of water supply, water collection and water purification facilities, water pipelines, sanitary facilities and others for their sanitary and epidemiological protection (Article 113 of the Land Code of Ukraine) (Zemel’nij..., 2001). Activities within these zones are prohibited, which may result in damage to the above-mentioned objects.

Since such restrictions are diverse and rather rigid, the tasks of regulation should be weighty and important, as well as the result of legal regulation, which should be significant for society and the state (Fedchyshyn, Ignatenko, 2018).

At present, the coordination of conflicting private and public interests by eliminating legal, economic, socio-ecological problems by satisfying the public and individual claims of the population of the country is an important link in the reformation of land ownership relations and formation of principles of market economic. V. Nosik (2006) believes that the absence of land market and abstract (when ownership is not associated with physical occupation) land rights potentially lead to corruption in state bodies of power and local governments. In turn, restrictions and burdens do not encourage enterprises and citizens to finance measures to improve land and carry out their production intentions, inducing the need to alienate land property.

The complication of social (including social-land) relations in Ukraine is caused by contradictory economic and social processes, which causes a clear imbalance of private and public interests, characterized by the fact that one set of interests does not objectively dominate the other. M. Kuntsevych (2014) points out that the achievement of the balance of public and private interests always constitutes the greatest problem of society, and therefore the ways of harmonization of these interests should be defined in the mechanism of the regulatory control of any social relations. Consequently, on the one hand, private interests should be carefully balanced with the aspirations and claims of the entire nation, on the other hand – the state as a representative of the interests of the people through power institutions should promote the reconciliation of public interests with the interests of individuals.

Taking into account the above, we can determine that the process of constructive combination

(balance) and the mutual reconciliation of public and private interests should be regarded as a philosophical and integrative model. In land relations, the achievement of a balance between private and public interests occurs through the development of acceptable mechanisms for the harmonization of requirements, both from the state to owners and users of land, and from landowners and land users in relation to state systems. At the same time, representatives of the private sector of land relations are trying to get around the burdensome issues of restoring productive qualities of land. Instead, institutions of state power are pursuing strategies for introducing systemic burdens on the rights of land owners and users, and applying restrictions to the use of land and land plots of all forms of ownership. Currently, the practice of applying encumbrances to the urban land is more in demand within the settlements, while requirements and norms of an ecological nature in the form of restrictions on the use of land and land shares are applied to agricultural land. N. Ilkiv (2008) notes that the realization of public interest by subjects of land law acts as an objective need of society in ensuring the priority of the requirements of environmental safety in the use of land over economic results, which is of particular importance for agricultural land plots.

Planning civilized land relations that would balance the interests of landowners, land users, society and the state, in agriculture has its own specifics. It provides an integrated approach that identifies the reconciliation (combination) of private interests associated with the use of productive properties of agricultural land and the public interest due to the preservation of natural properties of land as a natural resource. Such an interdependent balance of economic and socio-environmental interests in the regulation of economic activity should be based on the prerogative of the interests of the state and society (public interests) under their profitability for each carrier of private interest. Only in this situation, the strengthening of state control and supervision in the field of environmental land use will be inappropriate.

5. Conclusion

It should be emphasized that the legal mechanism of restrictions of rights, including rights to land plots, is one of the ways to ensure an optimal combination of public and private interests. For the legislation of Ukraine, as well as for the legislation of a number of the most developed countries of Europe and Latin America, there are certain restrictions on the land

rights. Moreover, in recent years there has been a tendency in the legislative consolidation of restrictions, as a result of which it can be argued that the restrictions on the powers of use and disposal of land plots are steadily increasing. All of this is the result of the desire of the human community to preserve the land as a limited and unforgiving natural object for future generations.

References

- Alekseev S.S., 1989, *Obšie dozvoleniâ i obšie zaprety v sovetskoy pravoye* (Eng. General permissions and general prohibitions in Soviet law), *Ûriddičeskaâ literatura*, Moskva.
- Andreytsev V.I., 2005, *Zemelni pravovidnosyny za čynnym Zemelnym kodeksom Ukraïni: mify ta realnist* (Eng. Land legal relations under the current Land Code of Ukraine: myths and reality), *Visnyk Kyivskogo nacionalnogo universytetu imeni Tarasa Ševčenko*, 68, 47–51.
- Bondar O., 2018, Public administration in the field of land use and protection and state land policy in Ukraine: problems of correlation, *Baltic Journal of Economic Studies*, 4(3), 22–27, doi: 10.30525/2256-0742/2018-4-3-22-27
- Fedchyshyn D., Ignatenko I., 2018, Protection of land ownership of foreigners in Ukraine, *Juridical Tribune*, 8(Special Issue), 27–38.
- Fedchyshyn D., Ignatenko I., Shulga M., 2018, Legal principles of organic production in Ukraine: realities and prospects, *Economics of Agriculture*, 65(4), 1513–1528. doi: 10.5937/ekoPolj1804513F
- Ilkiv N., 2008, *Deržavne reguluvannâ zemelnyh orendnyh vidnosyn* (Eng. State regulation of land lease relations), *Socialno-ekonomični problem sučasnogo periody Ukraïny*, 6(74), 260–269.
- Kharytonova T.Ė., 2016, *Zdijsnennâ prav na čuži zemelni dilânku v Ukraïni: problemy teorii ta praktyky* (Eng. Exercising of rights on other people's land plots in Ukraine: problems of theory and practice), *Ûrydyčna literatura*, Odesa.
- Konstytucija Ukraïni vid 28.06.1996 roku № 254k/96-VR* (Eng. Constitution of Ukraine from 28.06.1996 No 254k/96-VR), 1996, <http://zakon5.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> (accessed 22 September 2018).
- Konvencija pro zahyst prav lûdyny ta osnovopoložnyh svobod vid 04.11.1950* (Eng. Convention for the Protection of Human Rights and Fundamental Freedoms from 04.11.1950) 1950, https://www.irs.in.ua/index.php?option=com_content&view=article&id=276%253A1&lang=uk (accessed 22 September 2018).
- Kot O.O., 2016, *Meži zdijsnennâ subjektyvnyh cyvilnyh prav* (Eng. Limits of exercising of subjective civil rights), *Visnyk Nacionalnoi akademii pravovyh nauk Ukraïnu*, 4, 127–137.
- Kulynyč P.F., 2011, *Pravovi problem ohorony i vykorustannâ zemel silskogospodarskogo pryznačennâ* (Eng. Legal issues of protection and use of agricultural land in Ukraine), Logos, Kyiv.
- Kuncevyč M., 2014, *Publični i pryvatni interesy* (Eng. Public and private interests), *Pravovyj visnyk Ukraïnskoï akademii bankivskoi spravy*, 2(11), 11–14.
- Kuznecova N.S., 2014, *Razvitie graždanskogo obšestva i sovremennoe častnoe pravo Ukraïny* (Eng. Development of civil society and modern private law of Ukraine), *Vybrani praci* (Eng. Selected Works), *Ûrydyčna praktyka*, Kyiv, 233–256.
- Meyer D.I., 1864, *Russkoe graždanskoe pravo* (Eng. Russian civil law), *Tipografiâ Tiplena i Ko*, Sankt-Peterburg.
- Nosik V.V., 2006, *Pravo vlasnosti na zemlû Ukraïnskogo narodu* (Eng. Ownership on land of the Ukrainian people), *Ûrinkom-Inter*, Kyiv.
- Rozgon O.V., 2006, *Meži ta obmežennâ prava vlasnosti* (Eng. Limits and restrictions of ownership right), *FOP Lysâk*, Kharkiv.
- Shulga M.V., 1998, *Aktuanye pravovye problem zemelnyh otnošenj v sovremennyh usloviâh* (Eng. Actual legal problems of land relations in modern conditions), *Konsum*, Kharkov.
- Stefančuk M.O., 2008, *Meži zdijsnennâ subjektyvnyh cyvilnyh prav* (Eng. Limits of exercising of subjective civil rights), *KNT*, Kyiv.
- Tretâk A. M., 2001, *Klasyfikator obmežen prav pry vykorystanni zemelnyh dilânok* (Eng. Classification of restrictions while using land plots), *CZRU*, Kyiv.
- Trgovčević-Prokić M., Počuča M., 2016, Acquisition of agricultural land, *Economics of Agriculture*, 63(4), 1281–1295, doi: 10.5937/ekoPolj1604281T.
- Zemel'nij kodeks Ukraïni vid 25.10.2001 roku № 2768-14* (Eng. Land Code of Ukraine from 25.10.2001, No 2768-14), 2001, <http://zakon2.rada.gov.ua/laws/show/2768-14> (accessed 22 September 2018).