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SUBJECTIVE RIGHT OF OWNERSHIP IN THE CIVIL LAW OF DIFFERENT COUNTRIES OF THE WORLD

Ownership can be without exaggeration considered as one of the fundamental concepts of civil law. Legislators of different countries formulate the notion of subjective right of ownership in different ways. In the article on the basis of comparative legal analysis the generalized vision of the civil category is offered.

Key words: *civil law, property law, ownership, civil legislation, subjective civil right.*

An amazing quality is demonstrated by the title of «ownership». Old as the hills, after being studied and described, it is still fresh, unpredictable and open to the new researches. The substance of the ownership right is studied by the lawmakers throughout the world, who keep promoting their understanding of this civil law construction in the codified civil laws. One can hardly find two absol-?tely identical definitions of the subjective ownership right, each of them possesses certain specificity, slightest distinctions or its own original character. The study of the articles of the Civil Codes, suggesting their own approach to the property right, represents an enormous interest for the research.

The insight into the features of the different constructions of this right permits to formulate a unified definition, reflecting the collective knowledge of the lawmakers of the world. The article aims to have a closer look and to analyze the approaches to the understanding of the ownership right in the twenty countries of the world.

Among them there will be territorially big and small countries, developed ones and those that have not reached the high levels of the economic development, heavily populated and those with the small number of the citizens. Due to the fact that civil codes have not been adopted in these countries for many years.

We will start our analysis with the Civil Code of the Netherlands adopted in 1994[1]. Article 1, Book 5 «Property law» is dedicated to the notion of the ownership right. The article contains three clauses: firstly, the Dutch lawmaker underlined that the property right is a full right. Secondly, the lawmaker put a focus on the freedom of property owner in the disposal of the thing. Thirdly, the lawmaker pointed out the exceptional authority of the holder of the right. Fourthly, the attention was drawn to the restricted character of the title of property, based both on the power of the law and of the unwritten law. Fifthly, the property right, according to the Civil Code of the Netherlands, is extended to the separated fruits of the thing. Thus, the property right in this heavily populated Western country is composed of the following basic characteristics: full authority, the freedom of realization, exceptional and restricted character, and extension to the separated fruits of the thing.

The Civil Code of Quebec, the province of Canada, situated in the north-eastern part of the North America has dedicated the second section of the code adopted in 1991 to the property right. This codified law contains an article dedicated to the subjective property right (art. 947[2]). Here the lawmaker applies the triad approach, directly stating that the property right is the right of possession, usage and disposal of property. The Quebec lawmaker underlined the full character of the right, the freedom of the property owner, although with the account of the restrictions and conditions, defined by the law. The Civil Code of this North American country points out that property «may possess different regimes», thus, the lawmaker links the notion of «property» with the notion of the «property regimes». It may be resumed that the property right in Quebec is understood as a right a) composed of the three powers; b) full one; c) free in its exercise; d) restricted by law; e) exercised in the different property regimes.

Another field of the research interest may be found in the notion of the property right in the Civil

[1] Civil Code of the Netherlands // URL: http://wetten. overheid.nl/BWBR0005291/Boek3/Titel2/ Artikel40/ geldigheidsdatum_29-05-2013 (date of access: 01.07.2014).

[2] Civil Code of Quebec // URL: http://www2. publica-tionsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991.html (date of access: 01.07.2014).

Code of Austria, one the most wealthy countries in the world. In Austria the second book of the Civil Code is dedicated to the real rights. Two paragraphs (353, 354)[1] deal with the understanding of the ownership and its objective and subjective character. The notions are extremely concise. In its objective meaning the property is "everything that could belong to someone, the plenitude of material and non-material things". In its subjective meaning the property right is «any usage of the thing according to the owner's will» to the exclusion of all the others. Thus, there is no triad in Austrian approach, as there are no numerous characteristics such as absol-?teness, freedom and restrictions. The lawmakers consider the usage according to the will to be the essence of the right.

A particularly interesting article dealing with the understanding of the property right may be found in the chapter 2 of the Civil Code of Chile[2]. The lawmaker of this state, situated in the south-western part of the South America, firstly, characterizes the property right as a real right for the corporeal thing. Secondly, article 582 of the Chilean Civil Code advances two powers of the property owner, namely, the rights to dispose and to use the thing. Thirdly, the code establishes restrictions in the exercise of the property right, related to the exercise of the rights of the others or prescribed by law. Finally, the Chilean lawmaker underlines the essential role of the usage as a property right. Thus, the Chilean approach to the property right relates this right to the real possibilities of a person to use the thing without contradiction to the laws or the rights of the others.

The definition of the property right in the Federal Civil Code of the United Mexican States, adopted in 1928[3], turned out to be extremely short. The fourth title of the Civil Code of this South American country is entitled «On property», and the definition of property is given in article 830. It states that the property owner may use or dispose of the thing within the boundaries prescribed by law. Thus, the property right is defined through the dyad of powers (usage and disposal) and by the boundaries prescribed by law.

Attention should be paid to the definition of the property right given in the Italian Civil Code. The Book 3 of the Civil Code of this south European country is entitled «Ownership», article 832 is particularly dedicated to the content of the property right. «The property owner has the right, - states the provision, - to use and dispose of the things to the full extent and exceptionally within the boundaries and according to the restrictions prescribed by law»[4]. It may be inferred from this proviso that Italian lawmaker used the dyad of the powers (usage and disposal) having paid attention to the absol-?teness of the property right and its restricted character.

In the Civil code of Spain the property right is defined in the article 348. It is situated in the section II of the codified civil law of this country – being entitled «Property»[5]. The article is composed of the two precise clauses. The definition of the property right is in the first one. «The property right is, - it states, - a right to use and dispose of the thing without any restrictions apart form those prescribed by law». Thus, the essence of the property right in Spain is defined by the two aspects. The first one is the dyad, the powers to use and dispose. The second aspect is the unrestricted character of the right with the exceptions established by law. In the second clause of the article 348 of the Civil Code of Spain the lawmaker referred to the role of the judicial defense of the property rights of the owner. As a result, the property right in the Spanish national approach is defined through the dyad of powers, the accent on its unrestricted character and the right to the judicial defense.

Due notice should be paid to the definition of the property right in the Civil Code of Catalonia[6], the province of Spain fighting for its sovereignty and independence, including independence in the matters of the civil law regulation. In their definition of the property right the Catalonians aim to link it exclusively to the lawfulness of the grounds of origin of the right. This kind of reservation distinguishes art. 541-1 of the Civil Code of Catal-?nia from the other legal approaches. Besides, the specificity of the Catalonian approach is in the assignment of a social function to the property right.

[1] Civil Code of Austria // URL: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage= Bundesnormen& Gesetzesnummer=10001622 (date of access: 01.07.2014).

[2] Civil Code of Chile // URL: http://www.diariooficial. interior.gob.cl/actualidad/relacion/alegisla/ccmodifi/indicecc.htm (date of access: 01.07.2014).

[3] Civil Code of the United Mexican States // URL: http://info4.juridicas.unam.mx/ijure/tcfed/ 1.htm?s (date of access: 01.07.2014).

[4] Civil Code of Italy // URL: http://www.jus.unitn.it/cardozo/Obiter_Dictum/codciv/codciv.htm (date of access: 01.07.2014).

[5] Civil Code of Spain // URL: http://civil.udg.es/ normacivil/estatal/CC/indexcc.htm (date of access: 01.07.2014).

[6] Civil Code of Catalonia // URL: http://civil.udg.es/ normacivil/cat/CCC/Index.htm (date of access: 01.07.2014).

A specific article with the same title deals with the importance of the social function in the property right. It seems that the concept of the property right in Catalonia presents a certain scientific interest. The ideas of the lawfulness of the grounds and of the social function may be successfully applied in the laws of the other countries of the world.

The Swiss Civil Code of 1907 as of July 1st, 2013 in the book 4 «Property rights» composes the property right of two elements, as article 641 bears that title[1]. The first element is the possibility of the free disposal of the thing within the boundaries prescribed by law. The second one is the defense «against anyone who withholds the thing against the law with the possibility to deny any kind of usurp-?tion». The lawmaker of the mountain country situated in the center of Europe, demonstrated that in the definition of the essence of the property right one can satisfy himself with only one legal power – to dispose. Besides, the property owner in Switzerland is provided with an opportunity of defense against any unlawful seizure of property.

In the Brazilian Civil Code chapter 1 and title II are entitled «On Property in general». Thus, the definition of the property right in the biggest state of the South America is a general and a collective one, composed of the features enshrined in the six articles (524-529) of the codified civil law[2]. The lawmaker of the Federal Republic of Brazil applied to the property right such characteristics as «unrestricted» and «exceptional». Having noticed that the property right may be a full one, when all the powers are presented jointly, and a restricted one, when a property burden or any kind of separation of powers are at place. The leading position in the definition is occupied by such a feature as the «guaranteed by law» exercise of the powers of the property owner. thus, the Brazilian approach is that the subjective property right is a guaranteed, exceptional and unrestricted right, composed of a triad of powers (the full one), though sometimes a restricted one, if any burden is established with regard to the thing or any rights are partly passed to another person.

An interesting one is, from our point of view, the concept of the property right in the Civil Code of Bolivia. Art. 105 of the Civil Code of this multi-national state situated in the central part of the South America, is specifically dedicated to the «general concept» and the «scope» of this right. The essence of the right is expressed in the formula «legal power over the thing»[3]. The power permits to possess, use and dispose. The lawmaker of Bolivia notices the restrictions of the property right, related not only and not essentially to the law. In this country the property owner is not allowed to violate the interests of the society and to act against the economic purposes. Moreover, article 106 encloses the social function of the property right. Hence, in the Bolivian legal approach, in spite of the definition of the property right as a legal power over the thing with a triad of powers, the said power is restricted by the interests of the society and the general economic purpose for the sake of which the property right is exercised.

In the Civil Code of the Western Republic of Uruguay the property right is enshrined in article 486, chapter 2 book 4, entitled «Things, property and the property right»[4]. The essence of the property right in this state of the South America is related to the two possibilities: to use and to dispose of the thing. The arbitrary character of the property right does not exclude the necessity to obey the law and to preserve the rights of the others. The Uruguayan interpretation is by itself a very precise one and uniting such features as the dyad of the powers, the discretion in the exercise of the right with account to the restrictions in law and by the rights of the others.

The concept of the subjective property right, suggested by the Civil Code of Poland, cannot be left without attention. Art. 140 in the section II «The essence and the exercise of ownership» reads as follows: «Within the limits prescribed by statutes and by the principles of social co-operation the owner may, to the exclusion of other persons, use the thing owned in accordance with the socio-economic purpose of his right, and he may in particular collect the fruits and other proceeds of the thing. Within the same limits he may dispose of the thing»[5]. Apart from the three possibilities of the owner: to use the things, to benefit from them and to dispose, the definition suggested by the Polish lawmaker is original in its list of the restrictions of

[1] Civil Code of Switzerland // URL: http://www.admin.ch/opc/fr/classified-compilation/ 19070042/index.html (date of access: 01.07.2014).

[2] Civil Code of Brazil // URL: http://www.amperj.org.br/store/legislacao/codigos/cc_L10406. pdf (date of access: 01.07.2014).

[3] Civil Code of Bolivia // URL: http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/0843 (date of access: 01.07.2014).

[4] Civil Code of Uruguay // URL: http://www.wipo.int/wipolex/en/text.jsp?file_id=177350 (date of access: 01.07.2014).

[5] Civil Code of Poland // URL: http://www.kodeks-cywilny.pl (date of access: 01.07.2014).

the property right. The restrictions are justified not only by the law, but also by the principles of social co-operation and by the socio-economic role of ownership. This kind of restrictions is not very frequent in the codified civil laws. Although their significance seems to be quite high as far as they reflect the public interest in the civil law regulation – the interest aiming to ensure the economic devel-?pment of the country and the realization of the social goals.

Attention should be paid to the characterization of the subjective property right, suggested by the civil law of China. Chapter I of the section 5 of the General Principles of Civil Law 1986 is entitled «Property Ownership and Related Property Rights»[1]. Art. 71 of the above mentioned section formulates the definition of the property ownership. It says: «Property ownership means the owner's rights to lawfully possess, utilize, profit from and dispose of his property». The attention should be paid to the list of powers, representing the content of the property ownership. The lawmaker advances four of them: possession, usage, gain of profit and disposal. Thus, the gain of profit is presented as an owner's possibility of a specific character. In the light of this legal approach we should notice that along with the dyad and the triad the content of property right might be defined by the tetrad (uniting the possi-?ilities) of powers.

The concept of the property right in the Civil Code of France, undoubtedly, deserves attention. As far as article 544, title II «Of Ownership» is already more than 200 years old, we consider it proper to quote the full text: «Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations»[2]. The two powers are distinguished as the determinative ones – the usage and the disposal. The article also underlines the absolute character of the owner's rights. An additional feature of ownership is advanced in the article 545 of the French Civil Code. It essence is in the guaranteed character of ownership. Only public purposes might present a ground to yield ownership right, with the payment of the just compensation. Another feature of ownership in France is the «right of accession», which defines the right of the property owner as a right to everything produced by the thing or accessorily united to it, either naturally or artificially (art. 546 of the French Civil Code). In summary, the French approach to ownership is a dyad, uniting the usage and the disposal, with an absolute character, guarantee against yielding the right, combined with «the right of accession».

Without being overestimated the definition offered in the provisions of the German Civil Code (BGB) can be deemed to be a classic example of the understanding of the ownership right. The third book entitled «Property Law» contains a section dedicated to ownership. The definition of the subjective property right is offered in the paragraph 903 BGB, entitled «Powers of the owner»[3]. This definition is quite a short one: «The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influ-?nce»[4]. In fact the lawmaker has cut out all the other powers, having left the only and the most important one – the power of disposal. The principle of the autonomous will is expressed in the wording «at his discretion». In the same article of the BGB the German lawmaker «put in a word» for the animate things. It is underlined that the owner of animals is restricted by «the special provisions for the protection of animals». Such kind of restrictions is not very common in the world, but its presence, in our view, deserves approval.

A number of interesting ideas can be found in the understanding of ownership in the art. 210 of the Civil Code of the Republic of Belarus[5]. Apart from the traditional triad of powers (possession, usage, disposal), with regards to the freedom of discretion of the owner the lawmaker significantly develops the list of the restrictions of this right. Not only to the law the owner must obey, not only with his own actions not to violate the rights and the interests of the other persons. The owner must also abstain from causing any harm to the environment and to the historical and cultural valuables. The owner in Belarus should take into account the interests of public benefit and security. Thus, the necessity of the protection of the culture and of the environment is explicitly stated in the restrictions list. Not only private, but also public interests, in the form of the

[1] General Principles of Civil Law of China // Contemporary legislation of the People's Republic of China: a collection of the legislative acts / Compiled and edited by Gudoshnikov. Moscow (2004), p. 182

[2] Civil Code of France // URL: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (date of access: 01.07.2014).

[3] Civil Code of Germany // URL: http://www.gesetze-im-internet.de/bgb/index.html (date of access: 01.07.2014).

[4] *ibid*

[5] Civil Code of the Republic of Belarus // URL: http://pravo.by (date of access: 01.07.2014).

«public benefit» and «security», turn out to be important from the position of the legislative regul-?tion. It seems that these ideas deserve attention and implementation in the national legislation.

Art. 315 of the Civil Code of Moldova is worth attention[1]. The second book of this Civil Code is entitled «Real (proprietary) rights», its section III is dedicated precisely to ownership. There are five clauses in the article 315 «Substance of Right of Ownership», which present the legal understanding of the subjective right of ownership. Firstly, the unity of the three powers of the owner (possession, usage, disposal) is established. Secondly, the right of ownership is characterized as a permanent one. Thirdly, the right is a restricted one, as it may be restricted by law or by the third-parties rights. The special one is the fourth feature of ownership in this Civil Code. It deals with the notion of the freedom of the owner. Hence, this freedom, from the point of view of the lawmaker, also means a freedom not to use the thing. The restriction of the freedom not to use is permitted only in the case of the contradiction to the public inter-?st. Fifthly, taken into account the extension of the agricultural lands an emphasis is made on the use of this category of land. These features are taken into account only in the law. Finally, the formula of ownership in the Civil Code of Moldova includes the notion of property. Among these characteristics the following should be underlined: the permanent character of ownership and the freedom not to use if not in contradiction with the public interest. They complete the general characteristic of the subjective ownership right at issue.

An interesting one is the concept of ownership suggested by civil law of the Republic of Latvia. It likewise (as in the previous example) includes in its codified law a special chapter, entitled «Real rights». Article 927 is dedicated to the notion of ownership. This provision advances five powers of the owner: to possess, to use, to obtain all possible benefit, to dispose and the claim of its return from any third person. Possession and usage were united by the lawmaker into the full right of control over property. Besides, art. 928 underlines the unrestricted character of ownership. Any restrictions, says the article, of private or public character (pursuant to law) shall be construed in «the narrowest meaning». Thus, the Latvian approach to ownership represents a pentad with almost unrestricted possibilities of their exercise.

Resuming, what would the picture be, what would be the portrait of the subjective right of ownership, created by the knowledge of the lawmakers of these countries. Thus, ownership is one of the fullest of the real rights, offering to its owner the possibility to possess, to use, to dispose, to obtain benefit, to claim the return and the accession of the fruits. In observance of the requi-?ements of the law-making techniques the lawmaker chooses one power (to dispose), or two (to use and to dispose), or three (to possess, to use and to dispose), or four (to possess, to use, to obtain benefit, to dispose), or five (to possess, to use, to obtain benefit, to dispose, to claim return). Accor-?ingly, the substance of the right is presented by one, a dyad, a triad, a tetrad or a pentad of the powers. The choice of the powers by the lawmaker is justi-?ied by the various reasons, including the law-making tradition.

While being the most unrestricted among the real rights, ownership is nevertheless restricted. The system of the restrictions varies significantly. Firstly, the ownership right is restricted by law. Secondly, by the unwritten law. Thirdly, by the rules of social co-operation. Fourthly, by the restrictions related to the rights and interests of the third parties. Fifthly, the right is restricted by the public interest, requiring public benefit. Sixthly, the restrictions are justified by the goals of the economic development of the state. Seventhly, an essential part in the exercise of the ownership right should be given to the social function. Eighthly, the ownership right is restricted by the interests of security including the environmental security. Ninthly, the restrictions are related to the necessity to preserve historical and cultural valuables. Finally, ownership is restricted by the rules of the protection of animals, aiming to ensure humane attitude towards them.

Another important characteristics of ownership are the lawfulness of the grounds, guarantee against yielding and the permanent character.

In the light of the scientific analysis above, if we attempt to formulate an understanding of the ownership right, it might be defined as a based on law and a guaranteed from yielding, full real right, offering to its owner the possibility to exercise any actions with respect to the thing, having account of the requirements of the law, of private and public interests, aiming at the economic development of the country, the assurance of its security and prese-?vation of the historical and cultural heritage and of the environment.

[1] Civil Code of Moldova // URL: http://lex.justice.md/ru/325085 (date of access: 01.07.2014).

Л. Щенникова

Субъективное право собственности в гражданском законодательстве различных стран мира

Право собственности без преувеличения можно считать одним из фундаментальных понятий гражданского права. Законодатели различных стран мира по-разному формулируют понятие субъективного права собственности. В статье на основе сравнительно-правового анализа предлагается обобщенное видение этой гражданско-правовой категории.

Ключевые слова: гражданское право, вещное право, право собственности, гражданское законодательство, субъективное гражданское право.

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Суб'єктивне право власності в цивільному законодавстві різних держав світу

Право власності без перебільшення можна вважати одним із фундаментальних понять цивільного права. Законодавці різних держав світу по-різному формулюють поняття суб'єктивного права власності. В статті на основі порівняльно-правового аналізу пропонується узагальнене бачення цієї правової категорії.

Ключові слова: цивільне право, речове право, право власності, цивільне законодавство, суб'єктивне цивільне право.