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THE LEGAL REGULATION OF NEIGHBOURLY WATER USE IN UKRAINE: DEVELOPMENT PROSPECTS

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Abstract. The article is devoted to some questions of the legal adjusting of neighbourliness relations. Neighbourly water use should be defined as the use of water resources aimed at meeting the needs of owners or tenants of neighbouring land parcels. The regulation of neighbourly water use has historically been an inseparable part of neighbour law. Regulations of this kind were contained in many historically significant Ukrainian legal documents, including "The Statutes of the Grand Duchy of Lithuania". Currently, the regulation of the use of water resources mainly comes under the sphere of public law. Consequently, the current Land Code of Ukraine does not contain regulations of this kind. Nevertheless, a study of international legislation and regulation policies on neighbourly relations emphasizes the necessity to legislate on the private aspects of neighbourly water use. The findings of the study has made it possible to formulate the proposals aimed at improving the current legislation on this issue.

Keywords: neighbour relations, good neighbourliness, neighbour law, neighbourly water use, water use relations.

1. INTRODUCTION

The Regulation on good neighbourliness in land matters is contained in Chapter 17 of the current Land Code of Ukraine [10] and constitutes a separate body of land law. Examining the enshrinement of good neighbourly relations in the current international legislation is important for studying the theoretical basis of their legal regulation as well as their improvement.

The legislation on good neighbourliness (neighbour law) is aimed at resolving possible disputes associated with the exercise of the right to neighbouring real estate units. The use of one real estate unit inevitably involves other real estate units which affects their owners' interests. In this regard, it is necessary to legislate on such neighbour influences, one of them being the use of water resources. For instance, the owner of a land parcel can divert surface water runoff towards other land parcels, dam natural streams, dewater lakes and swamps, install water drainage systems leading to the neighbouring property, etc. Therefore, the regulation of neighbourly water use has historically been an inseparable part of neighbour law.

Currently, the regulation of the use of water resources mainly comes under the sphere of public law. According to the Italian lawyer U. Mattei, legal relations concerning water use extend the scope of private law and are the object of administrative regulation. Nevertheless, the right of property in these

relations are of particular importance, since owners of land parcels adjacent to bodies of water come within the purview of the legislation on the use of these waters. Furthermore, water flow often goes through several land parcels owned by different people engaging them in the issues of water use. Thus, the activity of the owner of a waterside land parcel situated above the stream inevitably affects the land parcel situated below the stream. Consequently, it becomes important to legislate on neighbour relations in the sphere of water use [14, p. 186–187].

The absence of any regulations on this issue in the current Land Code of Ukraine caused lack of particular research interest in studying neighbourly water use by Ukrainian legal scholars. It should be noted, however, that the legal regulation of neighbourly water use was studied from a historical perspective by B. Y. Tyshchyk, V. Ye. Rybanyk, R. M. Lashchenko, and others.

This article is aimed at studying the regulations on neighbourly water use in the current international legislation, drawing conclusions, and outlining proposals for introducing similar regulations into Ukrainian legislation.

2. Analysis and Discussion

Neighbour relations are the relations arising between owners and tenants of neighbouring land parcels in connection with land use. Taking into account this definition as well as the legal definition of "water use" (given in Art. 1 of the Water Code of Ukraine [19]), neighbourly water use should be defined as the use of water resources (bodies of water) aimed at meeting the needs of owners and tenants of neighbouring land parcels.

Neighbourly water use is a fairly traditional aspect in governing neighbour relations. Regulations of this kind were contained in "The Statute of the Grand Duchy of Lithuania" (1588) (Items 20-21 of Title 9, Items 3-4 of Title 10) [1], "The Rights Whereby Malo-Russians Litigate" (1743) (Chapter 18) [1], and other historical legal documents. For instance, Chapter 18 of "The Rights Whereby Malo-Russians Litigate" (1743) contained the regulations governing the neighbourly use of rivers, dam construction, the use of water infrastructure and the maintenance of water mills [1, p. 631–635].

From the perspective of modern law, these laws seem to be old-fashioned, since nowadays the regulation of water use has come within the purview of public law. Thus, with regard to water fund lands, the mode of limited domestic use is established (Art. 86-88 of the Water Code of Ukraine [19]).

The current Land Code of Ukraine does not contain regulations on good neighbourly relations. However, they are contained in the legislation of many other countries (the Republic of Moldova, the Netherlands, the People's Republic of China, France, Japan, and other countries) and govern the private aspects of neighbourly water use.

In this regard, it is necessary to understand clearly the sphere of application of these regulations. Currently, they mainly concern surface waters and small bodies of water (primarily landlocked bodies of water) which can be considered as a constituent part of a land parcel. In the meantime, large bodies of water, especially the so-called "dynamic" ones (rivers, streams) are considered, as a rule, as belonging in the public domain and extending the scope of private matters. National legislation, depending on the importance of water bodies and the lay of the land, can differently define the degree of the inclusion of water use relations in the sphere of private law [14, p. 186–187]. For instance, the Civil Code of Germany [13] does not contain regulations governing neighbourly water use, since in this country the use of water resources is governed by the specific legislation applying the legal mechanism of permission. Landowners are deprived of the right to manage water resources and allowed only the limited use of them for their needs without reducing water quality. In those cases when there is a possibility for developing the legislation on water use following from the rights of the property owner to the free use of water resources, the necessity to consider the interests of all water users limits the entitlements of the owner of the upstream land parcel [14, p. 188–189].

In the countries that have regulations governing the private aspects of neighbourly water use, legislators either confined themselves to formulating the main principles governing this issue (Art. 86 of the Law of the PRC "On the estate rights") [12] or outlined general rules concerning the prohibition

of water resources manipulation adversely affecting the neighbouring property (Art. 177 of the Civil Code of Georgia [3], Art. 198 of the Civil Code of Turkmenistan [3], Art. 170 of the Civil Code of the Republic of Azerbaijan [4], Art. 163 of the Law of Estonia "On the estate right" [15]). There are also examples of the extended regulation of this kind of neighbour relations (Art. 382-385 of the Civil Code of the Republic of Moldova [5], Art. 1094-1096 of "The Civil Law of the Republic of Latvia" [7]).

The key points of the legal governance of these neighbour relations are reflected in the Regulation of Art. 163 of the Law of Estonia "On the estate right" [11]: the property owner is not entitled to obstruct access to the land parcel or impede the natural flow of rain, thawed, spring, ground or any other type of water coming naturally from the upstream land parcel; it is prohibited to reduce natural water quality, divert or impede its natural runoff to the detriment of the neighbour, whereas any impediment to natural water flow, needed for the downstream land parcel is only possible to the extent to which it is necessary for the upstream land parcel; for the purpose of land drainage the owner of the downstream area is obliged to allow the diversion of natural water to their land parcel at no additional charge if it flew and soaked into it earlier; if this diversion is damaging, the owner of the lower area is entitled to request that the owner of the upper land parcel extend a drain through the downstream land parcel at his own cost.

In the relevant literature on this topic, there are classifications of regulations on neighbour relations concerning water use. For instance, the Civil Code of Japan contains the following types of regulations: regulations on water runoff, on water drainage, on the use of running water [17, p. 183]. In French legal literature neighbouring easements concerning water use are divided into those governing: water runoff, the encumbrances laid upon the owner of the downstream land parcel in connection with the activity of the owner of the upper area, irrigation and drainage procedures [14, p. 58–59]. Moldovian legislation contains general and specific regulations on water use [9, p. 143].

However, such classifications are applicable only to particular national legislation; they reflect the contents and the peculiarities of their governance of neighbourly water use. For instance, in Moldovian legislation neighbourly water use is governed by the six articles of the Civil Code of Moldova (Art. 381–386); in Georgian and Romanian – by one article of their National Civil Codes (Art. 198 of the Civil Code of Turkmenistan, Art. 177 of the Civil Code of Georgia).

In this regard, this article offers a review of international regulations on neighbourly water use in terms of their wide acceptance, beginning with the most widespread.

1) <u>The regulation on water runoff.</u> It applies to water runoff flowing naturally without human interference. These regulations are contained in almost all international legislation governing neighbourly water use. Moreover, the legislation on neighbourly water use in certain countries is limited to these regulations (for instance, Turkmen and Georgian).

The most general regulation on this issue is the one prohibiting to divert natural water flow causing damage to owners of neighbouring land parcels. To provide an example, the regulation of Art. 170.3 of the Civil Code of Azerbaijan declares that "no person is entitled to divert natural water flow to the detriment of his neighbour".

The regulation of this kind must apply to all the cases of natural water movement. The French lawyer G. de la Morandiere notes that this regulation does not apply to water drainage related to the household activity of the owner of the upstream land parcel [15, p. 58]. Estonian legislation contains certain clarifications on this issue, i.e. it is applied to rain, thawed, spring, ground or any other type of natural water runoff (P. 1-2 of Art. 163 of the Law of Estonia "On the estate right").

The regulation prohibiting the diversion of natural water flow to the detriment of one's neighbour underlies the legal governance of neighbourly water use. The regulations on natural water runoff that ensue from it are as follows:

- an obligation not to impede natural water flow coming from the neighbouring land parcel.

Thus, in accordance with P. 2 of Art. 381 of the Civil Code of the Republic of Moldova, the owner of the downstream land parcel is not entitled to cause any impediment to natural water flow coming from the upstream land parcel. The regulation that is analogous in content to the above-mentioned one is

contained in Art. 38 of the Civil Code of the Netherlands: no person is entitled to impede natural water flow coming from the upstream land parcel to the downstream land parcel [6, p. 253].

This regulation does not entail any compensation to be paid in case of any inconvenience or damage caused by the movement of natural water flow to the neighbouring property. It is reflected in Azerbaijani legislation: the owner of the downstream land parcel is not entitled to demand compensation for the water runoff from the upstream land parcel if it came naturally to his area before (P. 3 of Art. 170 of the Civil Code of the Republic of Azerbaijan) [4].

It has to be said that despite their logic and clarity, these regulations are not enshrined in Ukrainian legislation. It, therefore, leads to disputes that cannot be settled unequivocally.

In certain cases, there are more detailed regulations on this issue. For instance, Japanese legislation states that if the owner of the upstream land parcel disrupts natural water runoff, he shall be obliged to carry out repair work on the downstream land parcel at his own expense [17, p. 183]. According to Azerbaijani legislation, the person affected by the damage from the upstream water runoff is entitled to demand that the owner of the upstream land parcel construct a ditch through the downstream land parcel at his own expense (Art. 170.3. of the Civil Code of the Republic of Azerbaijan). Being more specific, however, these regulations do not alter the essence of the general regulation:

- *the prohibition to unduly impede natural water runoff to the downstream land parcel.* For instance, according to Art. 163 of the Law of Estonia "On the estate right", P. 3 of Art. 689 of the Civil Code of Switzerland [18], Art. 170.3 of the Civil Code of the Republic of Azerbaijan, any impediment to natural water flow, needed for the downstream land parcel is only possible to the extent to which it is necessary for the upstream land parcel;

- *the prohibition to alter or divert water runoff causing its reduction on neighbouring land parcels.* Regulations of this kind are contained in Art. 177 of the Civil Code of Georgia, Art. 198 of the Civil Code of Turkmenistan, etc. They have to be considered as the elaborations of the above-mentioned regulation;

- *the prohibition to reduce the quality of water flowing to the neighbouring land parcel.* Regulations of this kind are contained in Moldovian and Azerbaijani legislation (P. 1. of Art. 381 of the Civil Code of the Republic of Moldova, Art. 170.4 of the Civil Code of the Republic of Azerbaijan). The fact that such regulations are enshrined in civil law is disputable, since water conservation matters are mandatorily governed by environmental law, including the issues of water quality maintenance and responsibility for water pollution.

2) <u>The Regulation on water drainage.</u> It applies to the artificial removal of water by landowners. According to Art. 640 of the Civil Code of France, water is drained "due to human activity" [16].

To provide an example, the regulation in Moldovian legislation declares that the owner of the downstream land parcel is prohibited from obstructing water drainage arranged by the owner of the upstream land parcel due to his household work if water is drained into a ditch or a watercourse provided that there is not a country estate or a cemetery situated on it (P. 1, 3 of Art. 382 of the Civil Code of the Republic of Moldova); the interested party is obliged to provide a water drainage system that will cause the least damage to the neighbouring land parcel and pay adequate compensation in advance (P. 2 of Art. 382 of the Civil Code of the Republic of Moldova).

In some legislation the construction of water drainage systems is related to certain types of work on a land parcel: in Swiss and Estonian legislation – to land drainage (Art. 690 of the Civil Code of Switzerland, P. 3 of Art. 163 of the Law of Estonia "On the estate right"); in French legislation – to surface drilling and underground work causing water to appear on the surface (P. 4 of Art. 641 of the Civil Code of France). The most general approach can be found in Moldovian legislation: water drainage systems are established due to underground work, marshy land drainage, the use of water for household, agricultural, and industrial purposes (P. 1 of Art. 382 of the Republic of Moldova).

In some cases, the possibility to arrange water drainage to the neighbouring land parcel depends on certain conditions. For instance, in Swiss and Estonian legislation water drainage is allowed if it has been established before, and in case it causes damage to the neighbouring land parcel, the guilty party is obliged to construct a drain through this area at his own expense; compensation is not to be paid in

this case (Art. 690 of the Civil Code of Switzerland, P. 3 of Art. 163 of the Law of Estonia "On the estate right").

It has to be noted that certain legislation containing regulations on neighbour relations concerning natural water runoff do not contain regulations on water drainage (Georgia, the Republic of Azerbaijan, Turkmenistan, and other countries). The possible reason for this may be the fact that the diversion of water to the neighbouring land parcel is governed by easement law, known since Roman times. Therefore, legislators in these countries refused to legislate on matters concerning the diversion of water to the neighbouring property within "neighbour law" and resolved to apply regulations on land easements.

3) The Regulation on water distribution. Certain international legislation also govern the issue of water abstraction for a land parcel. For instance, regulations of this kind are contained in Art. 383 "Water Abstraction" and Art. 384 "Surplus of Water" of the Civil Code of the Republic of Moldova, Art. 40 of Title 5 of the Civil Code of the Netherlands, Art. 643 of the Civil Code of France.

Thus, according to Art. 385 of the Civil Code of the Republic of Moldova, the landowner who has a water surplus for daily needs is obliged to give water to other owners who need it with compensation to be paid by them. Regulations of similar kind are contained in Art. 643 of the Civil Code of France. According to Dutch legislation, the landowner is entitled to use running water and water for public use to satisfy his needs if he does not commit a delict by inflicting damage on other landowners (Art. 40 of Title 5 of the Civil Code of the Netherlands).

Such regulations on water distribution, however, are not widely spread and reflect, for the most part, the peculiarities of certain legislation caused by local conditions and traditions.

Ukrainian legislation contains a few regulations on water use. For instance, according to Art. 80 of the Water Code of Ukraine, in order to conserve the water of minor rivers it is prohibited: to alter the relief of a river basin; to damage drying river beds, streams and watercourses; to straighten river beds, deepen river bottoms below their natural level or dam up rivers without constructing watercourses; to carry out work having an adverse effect on river water and its quality, etc. The construction of reservoirs or hydraulic structures on rivers and in river basins influencing the natural flow of surface waters and the state of groundwaters is allowed only with special permission (P. 2 of Art. 82 of the Water Code of Ukraine).

However, it has to be taken into account that these regulations are aimed, first and foremost, at conserving water resources rather than governing neighbour relations. According to U. Mattei, if water flow has essential significance, the general tendency for civil law systems is to shift to the administrative regulation of water resources; consequently, the role of the operation of courts and the guarantee of property rights is minimized and are on the periphery of water law [14, p. 189-190]. Ukrainian legislation also contains regulations prohibiting to divert water runoffs from roofs to the neighbouring property but they belong to construction regulations (item 5.25* SBN 360-92 „Town-planning. Planning and building of city and rural settlements") [8]. Therefore, there exists a necessity to make amendments to the regulations on neighbour relations in Ukrainian legislation.

3. CONCLUSIONS

Neighbourly water use should be defined as the use of water resources aimed at meeting the needs of owners or tenants of neighbouring land parcels. Currently, the regulation of the use of water resources mainly comes under the sphere of public law. Nevertheless, a study of international legislation and regulation policies on neighbourly relations emphasizes the necessity to legislate on the private aspects of neighbourly water use. They mainly concern the prohibition to divert natural water flow if it violates the rights or legal interests of owners or tenants of the neighbouring property.

The study has made it possible to formulate the amendments that need to be introduced into Chapter 17 of the Land Code of Ukraine.

"Neighbourly Water Use

1. The owner or tenant of the downstream land parcel is obliged to allow natural water runoff from the upstream land parcel to pass through his area without hindrance.

2. It is prohibited to divert or impede natural water runoff if it causes damage to the owner or tenant of the downstream land parcel.

3. Impediment to natural water runoff or any reduction of it needed for the downstream land parcel is only possible to the extent to which it is necessary for satisfying the justified needs of the owner or tenant of the upstream land parcel.

4. It is prohibited to impede water drainage from the upstream land parcel caused by the household activity of its owner or tenant (land drainage, underground work, etc.) on condition that water is drained into a ditch or a natural watercourse, unless otherwise required by law".

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У статті розглянуто окремі питання правового регулювання відносин добросусідства. Під сусідським водокористуванням слід розуміти використання вод для задоволення потреб власників чи землекористувачів сусідніх земельних ділянок. Його регулювання здавна було частиною законодавства щодо регламентації сусідських відносин. Положення з даного питання містилися в багатьох пам'ятках українського права, включаючи „Литовські статути". На сьогодні в нашій державі використання водних ресурсів регламентується в межах публічного права. Внаслідок цього в чинному Земельному кодексі України відповідні положення відсутні. Однак вивчення зарубіжного законодавства та практики правового регулювання вказує на необхідність регламентації приватних аспектів відносин щодо сусідського водокористування. За результатами дослідження сформульовано пропозиції щодо вдосконалення чинного законодавства з даного питання.

Ключові слова: сусідські відносини, добросусідство, право сусідства, сусідське водокористування, водні відносини.