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The Concept of Development of Civil Legislation on Usufruit

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Abstract. *The problem of defining the essence of usufruct is covered. The current aspect of this problem from the point of view of the Concept of developing the civil legislation is analyzed. Dominant features of this right are viewed, some trends of perfecting usufruct are defined.*

Key words: *Roman law, servitude, usufruct, habitatio, superficies, emphyteusis, common and social usufruct.*

The modern understanding of the concept of property rights is a historical development of those fundamental moments that received their legislative design in Roman law. At the same time, the history of the emergence of modern housing usufruct is associated with a long process of development of civilistic thought and many scientific views. Today, the legal nature of housing usufruct is classified as, in fact, independent property rights, however, only within the framework of usufruct. Turning to the history of the emergence of this legal phenomenon, it should be remembered that the very "birth" of the term "property right" is a rather complex process that has been taking place over many centuries, which has been assessed differently in the history of civilistic thought. The assessment of property rights in the scientific world, undoubtedly, is a subjective perception of those sources that have become available for research by scientists. Therefore, our vision of this legal category is largely based on the views on the delineation of property rights that have already become traditional in the literature. In particular, it is generally accepted that the concept of property rights came from Roman private law, in which limited property rights to other people's things (jura in re aliena) were supposedly contrasted with the most broad in content right of ownership. At the same time, as S.A. Muromtsev noted, this view reflected the "tendency to sanctify ideas and phenomena of modern origin with the veil of the age-old authority of Roman law" that has long become traditional in civil law[1]. According to the scholar, in reality, the sources of Roman private law that have come down to us did not contain and could not contain such a generalized, abstract concept as "property rights" or "limited property rights", since Roman jurisprudence was "almost completely alien to the distribution of material on the basis of general concepts and principles, which is a characteristic property of dogmatic classification".

Continuing this approach, D.D. Grimm emphasized that ancient Roman law in general "did not know the opposition between the right of ownership and limited property and personal rights to other people's things. Any relationship to a thing was conceived as a variety of a single right - the right of ownership"[2]. Turning to the position of S.A. Muromtsev, it can be noted that the servitude right was not initially at all "a right in someone else's thing" (which it became only in the imperial period), but was considered "as if a right to one's own thing, which was used only jointly with the owner of the servient estate"; due to this, the legal status (nature) of the servitude right "was originally similar in

[1] Muromtsev S.A. Essays on the General Theory of Civil Law // Selected Works on Roman and Civil Law. - M.: Statut, 2004. Page 234.

[2] Grimm D. The Problem of Property and Personal Rights in Ancient Roman Law // Bulletin of Civil Law. 2007. No. 3. Page 40.

everything to the legal status of ownership"[3]. In the same way, superficies and emphyteusis, usually considered as classical varieties of property rights known to Roman law, appeared in this capacity only at the end of the imperial period on the basis of long-term land lease, i.e. purely obligatory relations.

As noted in the literature, economic needs led to the development of servitudes first, and then usufruct with its well-known varieties - usus and habitatio. Researchers usually include superficies and emphyteusis, which appeared much later, as well as the right of pledge (in the forms of pignus and hypotheca), in this group of property rights. But even in the Digest of Justinian, which essentially completed the development of Roman private law, all these specific institutions were not considered as varieties of a certain single category of "rights to other people's things" or "limited property rights"[4].

The content of Roman private law consisted of fairly casuistic rules created on the basis of an analysis of various specific situations, often at different times by different persons, and therefore often contradicting each other. Their generalization, as is known, was only begun by glossators and, mainly, postglossators. It was completed by German civil law scholars in the late 18th – early 19th centuries, who created the pandectic doctrine based on the generalization and systematization of Roman sources, which has since then been usually considered as "Roman private law". The category of property rights in their modern sense appeared in continental European law in the early 19th century within the framework of the pandectic doctrine created by German lawyers, which formed the basis of "Roman private law". As a result of solving the above-mentioned problem by pandectic law, categories of limited property rights appeared. The pandectists attributed to it various rights to landed real estate, exercised by authorized persons directly, without any actions on the part of obligated persons: servitudes, usufruct, emphyteusis and superficies (which formed a group of property "rights to use" other people's things, as well as a pledge as the right to sell someone else's thing, including immovable property, under certain conditions (therefore attributed to the group of "rights to sell" another person's thing)). Then, “rights of acquisition” of someone else’s property (Erwerbsrechte) were added to them, for example, the “right of appropriation” of the results of hunting when implementing a “hunting easement” and the preemptive right to purchase real estate (a plot of land), including when establishing shared ownership of the relevant object.

Thus, the main achievement of the pandectists was the recognition of the category of property "rights of use" of other people's things and the definition of its main varieties. However, regarding the definition of the relationship between servitude, usufruct and the habitatio (right to personal use of housing) that interests us, there are different views in the literature.

Officially, the existence of personal servitudes was recognized within the framework of Justinian's compilation[5], which also concerns their distinction into usufruct (usufructus), usus (usus), habitatio (habitatio) and the right to use other people's slaves and animals (operae servorum vel animalium)[6].

As D.V. Dozhdev notes, in contrast to property, a special property right had as its object not the thing as such, but its separate economic function[7]. It seems that this predetermined the limited content of property "rights of use" of other people's things. It is no coincidence that within the framework of the Roman legal concept of property rights, an easement was considered only as the right to use someone else's thing, which was established either to create certain benefits during the exploitation of someone else's land plot, or for the benefit of certain persons[8]. The latter purpose of personal easements took place in the case of living in someone else's house due to various legal grounds (habitatio).

[3] Muromtsev S.A. Civil Law of Ancient Rome. - M.: Statut, 2003. Page 340.
[4] Property Rights to Land in Selected Fragments from the Digest of Justinian / Translated from Latin; Responsible. ed. L.L. Kofanov. - M., 2006. Page 57.
[5] Dozhdev D.V. Op. cit. Page 281.
[6] Actual Problems of Civil Law: Textbook. manual for university students majoring in Jurisprudence / Edited by N. M. Korshunov, Yu. N. Andreev, N. D. Eriashvili. 2nd ed., revised and enlarged. – M.: UNITY-DANA; Law and Right, 2010. Page 380.
[7] Dozhdev D. V. Op. cit. Page 283.
[8] Roman Private Law: Textbook / Edited by I. B. Novitsky and I. S. Peretersky. Page 128.

The modern Concept of the Development of Civil Legislation approaches the delineation of other property rights somewhat differently, drawing a clear line, firstly, between easements and usufruct and, secondly, not distinguishing such a variety of other property rights as habitatio, which is quite understandable from a philosophical point of view[9].

In particular, when assessing this legal situation, one should turn to the foundations of the philosophical understanding of the development of a particular phenomenon. Thus, over time, many scientific views undergo changes taking into account the needs of the time and the peculiarities of the economic development of society. However, everything in society, including legal phenomena, sooner or later repeats itself, but at a qualitatively different level. The direction of development is determined by the dialectical unity of two opposite tendencies - progressiveness and repetition. The interrelation of these tendencies in ascending development expresses the action of the law of negation of negation. Development as a whole is progressive, because the old, although it can slow down development, is not able to stop it. At the same time, development does not proceed in a straight line, since there is a relative, incomplete repetition. As noted in the literature, it consists in the fact that at a certain stage of development, some features and properties of the old, initial stage are reproduced. At the same time, repetition is not a complete return to the old, because it reproduces only some features of the old and occurs at a higher level of development, on a new basis.

Due to the fact that such repetitions exist in development, it represents a combination of two opposite tendencies - progressive movement forward and incomplete repetition of the old at certain stages. In this case, progressive movement forward is the leading one. Development, combining such tendencies, occurs as if in a spiral[10].

That is why, in order to analyze the specifics of legal regulation of housing usufruct in the modern understanding of it by the legislator and the formed scientific concept, it is necessary to compare such legal phenomena as the right to personal use of housing (habitatio) and the modern concept of usufruct and its variety - social usufruct.

We believe that it is of interest to determine the prospects for legal regulation of the content of the powers of the holder of this right, taking into account its historically established characteristics, which have undergone significant reception within the framework of the modern concept of the development of property rights.

Thus, the right to personal use of housing (habitatio) was of a strictly personal nature and was a type of right of use. The consequence of this was the impossibility of transferring housing to other persons, including the impossibility of subletting. An exception was made only for immediate relatives, in particular spouses. The right of residence was fixed-term or lifelong, without the right of free transfer to another person. It did not cease either as a result of the diminution of legal capacity or due to prolonged non-use. And only under Justinian, in certain cases, in particular with a legatee who received the right to housing, did such a disposal possibility as renting out residential premises for a fee appear in the content of this right[11]. This allowed modern scholars to interpret this right (habitatio) as an independent property right[12]. Thus, it can be argued that usufruct and the right to personal use of housing (habitatio) were considered as independent rights. The Russian servitude right of lifelong residence in a house (estate), granted to a certain person within the framework of a personal servitude, had many similarities with Roman habitation. Lifetime residence was established, for example, in the case of selling a house with the seller retaining the right to live in an outbuilding until the end of his life or indicating in a will the right to live for life in an estate bequeathed to one person[13]. In general, in pre-revolutionary law, habitatio did not receive its legislative registration. Civil law before the revolution among the sections of the Code of Civil Laws did not even contain the name "Property

[9] Bulletin of the Supreme Arbitration Court of the Russian Federation. 2009. No. 4
[10] Danilenko D. I., Syusyukalov B. I., Galdyaev P. K. Marxist-Leninist Philosophy: Textbook for students of higher party schools. – M.: Mysl, 1965. S.
[11] Dozhdev D.V. Op. cit. S. 290.
[12] Dozhdev D.V. Op. cit. S. 290.
[13] Actual Problems of Civil Law: Textbook for University Students majoring in Jurisprudence. S. 383.

Law", and the main, central concept was "ownership right", which was divided into full and incomplete[14].

The current legislation does not contain such a concept as usufruct, and accordingly does not contain its definition. Certain rights, close in their content to usufruct, for example, the rights of family members of the owner, the rights of the legatee and some others, are not disclosed in the legislation in content, the type of property right is not defined, which gives rise to the emergence of legal surrogates - concepts that today cannot be classified either as property or as an obligatory category. This leads to the formation of contradictory law enforcement practices, which significantly narrows the level of protection for participants in civil legal relations. According to the authors of the Concept of Development of Civil Legislation, there is a need to introduce property rights into legislation, which in its content is close to usufruct, which has a strictly expressed personal character18 (hereinafter referred to as the Concept). Modern usufruct is considered as personal enjoyment, different from servitude, where the right of ownership is absent. Its variety, apparently, should be housing usufruct.

The modern Concept allows us to identify some continuity in the legal regulation of modern housing usufruct, the prototype of which was such a right as habitatio (the right to personal use of housing). Thus, its strictly personal nature, inalienability and non-transferability, its urgency or lifelong nature have been preserved. At the same time, the authors of the Concept see the modern content of this right as more comprehensive. For example, unlike Roman law, the owner of a modern housing usufruct can obtain the right to benefit from a thing, the ability to change it with the consent of the owner. Usufruct is also preserved when the owner changes, whose freedom of disposal has no restrictions. In relation to the usufructuary, a statute of limitations from one to three years may apply, when non-use of a thing may entail the termination of the usufruct. Thus, spiral development is manifested. The analysis of the Concept allows us to state the civil-law nature of usufruct, since according to the Concept the basis for its emergence is a civil-law transaction, concluded both on a paid and gratuitous basis exclusively in writing. The most typical of such transactions include: a testamentary refusal, lifelong maintenance with dependency while maintaining residence, a marriage contract and an agreement for the privatization of residential premises in the event of the tenant's refusal to acquire the right of ownership. Although the basis for the emergence of usufruct may also be a court decision. Taking into account the characteristics of usufruct set out in the Concept, it is possible to give its definition. Thus, usufruct is an inalienable and non-transferable right of a person to own and use a thing, established by an agreement or a court decision, according to which the usufructuary exercises his powers for a fee or free of charge, derives benefits from the use of the thing and bears the costs of its maintenance for a certain period or for life, preserving this right when the owner changes. The authors of the Concept also identify a set of mandatory features of social (family) usufruct (including housing): family relations, the presence of the owner's obligations to support these persons, cohabitation with the owner of the residential premises, the absence of residential premises in the ownership of these persons or by other right. At the same time, the grounds for the emergence of social (family) usufruct (including housing) are identified: the expression of the will of the owner or a court decision, which is possible, in our opinion, only in relation to persons whose circle is determined by law. Among them, the authors of the Concept include spouses, minor children, elderly parents, disabled dependents, etc.

From these positions, we will try to look at the current legislation.

It is difficult to agree with the authors of the Concept on the following points. In our opinion, the owner's expression of will should not be the basis for the emergence of social (family) housing usufruct, since, in essence, the circle of persons whom the owner of the residential premises is obliged to support has been exhausted. It would be possible to admit contractual principles in this situation provided that the authors of the Concept reject the set of mandatory features of social (family) usufruct, excluding, in particular, such a feature as the presence of the owner's obligations to support these persons. By the way, this corresponds to the idea of the authors of the Concept regarding the

[14] Shchennikova L.V. Property Law: Textbook. – M.: Jurist, 2006. S. 156.

termination of social usufruct for minors in the event that they acquire civil capacity. We believe that this problem is very multifaceted and requires its further serious scientific research. Within the framework of this article, the author drew attention only to some problems of a new phenomenon for our legislation - housing usufruct.

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