Subjective Rights in the Light of the Reform on Public Servitudes

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ABSTRACT

The article is dedicated to the results of the land law reform which was carried out in 2018, namely the introduction of updated provisions on public servitudes to the Land Code of the Russian Federation. It can be argued that today in the Land Code of the Russian Federation there are rules governing the two types of public servitudes — for the benefit of any number of unspecified persons (art. 23) and in favour of certain persons (Ch. V.7). Therewith, both types of public servitudes are established in accordance with the Land Code of the Russian Federation, i. e. the provisions of the Civil Code of the Russian Federation are inapplicable to the legal relationship created in connection with establishment, implementation and termination of public servitudes. In this connection the question of the legal nature of updated public servitudes arises, in particular, whether they are subjective property rights or not. The author of the article offers answers to this and some other questions.

Keywords: subjective right, property right, servitude, public servitude, bounds (limits) of subjective right

I. Introductory provisions

Federal law No. 341-FZ of 03.08.2018 "On Amendments to the Land Code of the Russian Federation and Some Particular Legislative Acts of the Russian Federation in Terms of Simplifying Construction of Infrastructural Facilities" (hereinafter — Law No. 341-FZ), came into force on September 1, 2018. The main goal of the reform was to create a legal framework to simplify construction of particular infrastructural facilities on other person's land plots.

It is noteworthy that Law No. 341-FZ is the implementation of the draft Federal law No. 187920-7, "On introduction of amendments to some particular legislative acts of the Russian Federation with regard to construction, renovation, overhaul and (or) operation of infrastructural facilities" enacted on May 29, 2017 in the State Duma of the Federal Assembly of the Russian Federation by the Government of the Russian Federation (hereinafter referred to as the draft law No. 187920-7)[1]. Reformers earlier addressed the issue of simplification of the construction of particular infrastructural facilities on other people's land plots. Nevertheless, both the previous draft laws and draft law No. 187920-7 were subjected to substantial criticism by the RF Presidential Council for codification and improvement of the Civil Code of the Russian Federation[2]. Meanwhile, this did not prevent draft law No. 187920-7 from becoming the federal law[3].

According to clause 2-3 of article 23 of the Land Code of the Russian Federation, a servitude may be established by a decision of an executive state authority or a local administration authority to satisfy state or municipal needs, and the needs of the local population, without confiscation of land plots (public servitude). A public servitude is established in accordance with the Land Code of the Russian Federation. Legal relationship created in connection with the establishment, implementation and termination of a public servitude, provisions of the Civil Code of the Russian Federation with regard to servitude and provisions of chapter V.3 of the Land Code of the Russian Federation shall not apply.

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[1] See text: Available at: http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgen t&RN=187920-7&02 (accessed 15.09.2019).

[2] See text : Available at: http://privlaw.ru/sovet-po-kodifikacii/2017-2/obzor2017-7/ (accessed 15.09.2019).

[3] Commentaries to Law No. 341-FZ are given in particular by: Boltanova E. S. Public Easement for Construction Activities: Addressing Citizens' Constitutional Rights and Balancing Interests [Publichnyi servitut v tselyakh stroitel'stva sooruzhenii: voprosy konstitutsionnykh prav grazhdan i obespecheniya balansa interesov] // Law [Zakon]. 2019. No. 2. PP. 45–55. (In rus); Krasnova T. S. Public Easement for Placing a Linear Object: Commentary on the Novels of the Land Code of the Russian Federation [Publichnyi servitut dlya razmeshcheniya lineinogo ob"ekta: kommentarii k novellam Zemel'nogo kodeksa Rossiyskoy Federatsii] // The Herald of Commercial Justice of Russia [Vestnik ehkonomicheskogo pravosudiya RF]. 2019. No. 3. PP. 124–144. (In rus); Melnikov N. N. A Critical Analysis of the Federal Law on the Simplification of the Placement of Linear Objects and the Implied Easement as a Mechanism for Eliminating Identified Shortcomings [Kriticheskii analiz Federal'nogo zakona ob uproshchenii razmeshcheniya lineinykh ob"ektov i podrazumevaemyi servitut kak mekhanizm ustraneniya vyyavlennykh nedostatkov] // Business and Law [Khozyaistvo i pravo]. 2018. No. 10. PP. 64–73 (In rus); A New Life of Public Easements. Event. Comments of experts [Novaya zhizn' publichnykh servitutov. Sobytie. Kommentarii ehkspertov] (A. A. Ivanov, A. O. Rybalov, R. S. Bevzenko, etc.) // Law [Zakon]. 2018. No. 10. PP. 17– 37. (In rus)

Therefore, the public servitude is not regulated by the rules of servitude set out in articles 216, 274-277 of the Civil Code of the Russian Federation, as well as the rules of law governing servitudes, as set out in chapter V. 3 of the Land Code of the Russian Federation. This raises questions about the legal qualification of a public servitude:

- Is a public servitude a subjective right?
- Is a public servitude a subjective property right?
- Does a public servitude determines the scope (limits) of a subjective right? Let's attempt to clarify these points.

II. Two types of public servitudes

Based on the systematic interpretation of the rules of the Land Code of the Russian Federation, in particular article 23 and chapter V. 7, it can be concluded that public servitudes are established either in the interests of an indefinite number of persons, or to the benefit of a particular person.

In the interests of the indefinite circle of persons public servitudes are established for vehicular and pedestrian traffic through a land plot, and inter alia, to provide free access for individuals to a common use water body and to its foreshore; for land marks to be fixed on a land plot, for geodetic points of geodetic networks, for gravity stations, for levelling points and the access ways to them; for execution of work for construction of drainage facilities on the land plots; for withdrawal (removal) of water resources from water bodies and for watering; for run of farm animals across the land plot; for hay purposes, for grazing agricultural animals in the prescribed manner on the land plots within the timeframe which corresponds to the local conditions and customs; for use of land plots for hunting, fishing, and aquaculture (fish farming) (subclause 1-7, clause 4 of article 23 of the Land Code of the Russian Federation).

Public servitudes are established to the benefit of particular individuals for placing of infrastructural facilities, for their integral process parts, if such facilities have the federal, regional and local status, or are required for organization of electricity, gas, heat, water supply and sanitation, connection to utilities, or relocated in connection with the seizure of land plots whereon they were previously located, for public purposes; for stockpiling of construction and other materials, for placement of temporary or auxiliary structures (including fences, cabins, sheds) and (or) construction equipment required for support of construction, renovation, repair of transport infrastructure of the federal, regional, local status, for the period of the said construction, renovation, repair; construction of crossings of highways or railway tracks with common use rail tracks on the land plots held in state ownership, within the boundaries of railway precincts, and for construction of crossings of motor roads or rail tracks crossings with motor roads or junctions of motor roads to other motor roads on the land plots held in public property, within the boundaries of the right of way; construction of motor roads and railway tracks in tunnels; conducting engineering surveys for preparation of documentation for planning of the territory, providing for accommodation of infrastructural facilities of the federal, regional, local status, for engineering surveys to be carried on for construction and reconstruction of the said facilities, and aforesaid infrastructural facilities (subclause 8, clause 4 of article 23, chapter V.7 of the Land Code of the Russian Federation).

There are also differences in the procedures for establishing the two types of public servitudes. The first ones (in the interests of indefinite number of persons) are created on the basis of decisions of executive state authorities or local administration authorities (clause 2 of article 23 of the Land Code of the Russian Federation). It should be noted that previously such servitudes were established in a more strict manner — by law or other regulatory legal act of the Russian Federation, by a regulatory legal act of a subject of the Russian Federation, by a regulatory legal act of a local administration authority, with allowance for results of public hearings. In our view, simplification of the procedure for establishing public servitudes in the interests of an indefinite range of persons is unreasonable, since the previously applied procedure did not always effectively protect the rights and legitimate interests of the owners of servient land plots. The new regulation will hardly change this situation.

The second public servitudes (in favor of certain persons) are created on the basis of decisions of the authorities of the relevant levels upon requests of certain persons being the subjects of natural monopolies; communication organizations; owners of transport infrastructural facilities of the federal, regional, local status; organizations provided for in clause 1 of article 56.4 of the Land Code of the Russian Federation and who submitted applications for withdrawal of land plots for public needs (clause 18 of article 23, chap. V.7 of the Land Code of the Russian Federation).

At the same time, it is worth noting the fact that, despite the difference in the goals of public servitudes, both types are established in the imperative manner — by decisions of the state authorities. We fundamentally disagree with this procedure for establishing servitudes for a number of political and

legal reasons. In particular, this is associated with the need to focus on the fundamental relevance of the autonomy of the will in servitude law, and specifically, on the priority of the voluntary and voluntary-compulsory disposal of the property right to real estate, on conditions agreed with the property owner, with allowance for specific characteristics of the real estate property. However, this is a topic for a separate publication[4].

III. Legal qualification of a public servitude in the interests of an indefinite range of persons

Regarding the legal qualification of public servitudes, the following should be noted.

When considering public servitudes that are established in the interests of an indefinite range of persons, we find out that the reform did not affect the legal nature of this institution. Public servitude of this type both before and currently provides the possibility for indefinite range of people to use someone else's land plot on limited terms. In this regard, in the civilist doctrine, there is almost a unanimous opinion that when a public servitude is established in the interests of an indefinite range of persons, a subjective property right is not created, but the boundaries (limits) of the property right to employee land plot do arise. Today, this conclusion is confirmed, for example, by the fact that, by virtue of clause 3 of article 23 of the Land Code of the Russian Federation, public servitude is not regulated by the rules of the Civil Code of the Russian Federation.

The negative attitude, which was formed in the doctrine to the qualification of the public servitude in the interests of the indefinite range of persons as an encumbrance of the property right to real estate property, i.e., as a limited real right, is substantiated by the provisions set out below. The legal treatment applicable to public servitude in the interests of the indefinite range of persons is determined by the rules of public rather than by private law; such a servitude does not require dominant tenement and servient estate, and does not imply specific servitude holders[5]. Apart from the aforesaid, if a public servitude in the interests of the indefinite range of persons violates the rights and legitimate interests of the owner of the servient land plot, the owner may challenge in court the act establishing the deed of the servitude or may file a negatory claim with a court to protect the right of ownership to the servient land plot. In the event of violation of the entitlement created on the basis of such public servitude to limited use of the servient land plot, such entitlement, as a rule, is protected by public legal methods and solely in rare cases by a non-compensatory claim (and even in such cases indirectly).

It is noteworthy that in pursuance with articles 295, 295.2 of the Draft Federal law No. 47538-6 "On making changes to parts one, two, three and four of the Civil Code of the Russian Federation, as well as in pursuance with some other particular legislative acts of the Russian Federation" it is also proposed to qualify a public servitude in the interests of the indefinite range of persons as the boundary (limit) of the property right to real estate. Therewith, the authors of this Project propose rules for public servitude in the interests of an indefinite range of persons, as stipulated in article 23 of the Land Code of the Russian Federation, be slightly modified and transferred to the Civil Code of the Russian Federation.

We cannot accept that public servitude in the interests of an indefinite range of persons is proposed to be used as a tool setting the boundaries (limits) of property rights to real estate. This conclusion is connected at least with the fact that this public servitude in the imperative manner gives everyone the possibility to use someone else's private land plot in a limited way, often indefinitely and free of charge. In this connection the right of the owner of the land plot is unreasonably violated.

At the same time, the rejection of the unsuccessful legislative regulation should not entail the rejection from securing the objectively existing interests of the indefinite range of persons in the limited use of someone else's real estate. In our view, the legal means for satisfying these interests should not be imperatively established boundaries (limits) of the ownership right to real estate, but dispositively or dispositively-imperatively established subjective property rights. For the purpose of implementation of this idea, and inter alia, for the "public servitude" concept, the appropriate meaning corresponding to its origin shall be attached to it.

Therefore, a public servitude in the interests of the indefinite range of persons could be qualified as a special servitude — a public real right, i.e. a subjective real right established in favor of an indefinite

[4] Krasnova T. S. Autonomy of Will and Its Restriction in Easement Law [Avtonomiya voli i ee ogranichenie v servitutnom prave]. M., 2019. PP. 50–144 (In rus)

[5] Rybalov A. O. Legal Easement in Russian Law [Legal'nyi servitut v rossiiskom prave] // Civil Law Review [Vestnik grazhdanskogo prava]. 2010. No. 5. PP. 7–8. (In rus). Certain Issues of Establishing Public Easements (as Illustrated by Courts Practice) [Nekotorye voprosy ustanovleniya publichnykh servitutov (na primerakh iz sudebnoi praktiki)] // Law [Zakon]. 2016. No. 6. PP. 42–52. (In rus)

group of persons, similar to particular servitudes that exist in some particular western legal systems. For example, in Germany, all proprietary legal relationship (both in private and public law) are based on a single private legal understanding of property, which is modified, depending on the subjects, objects, and goals of establishing legal relationship. In case of establishing encumbrance of the right of ownership to real estate in the form of the possibility of limited use by indefinite range of persons, the real right of limited use is created, which is protected by absolute private legal means, i.e. a public real right, qualified as a "modified" subjective real right (right in rem).[6]

This direction is seen to be interesting for both theoretical and practical research. It is interesting for both because, on the one hand, it is traditionally considered that the existence of a subjective property right for everyone is unacceptable. On the other hand, administrative and judicial practice have demonstrated that the refusal to qualify such rights as subjective real rights entails their qualification as public legal restrictions (boundaries [limits] of right), which does not meet the interests of specific subjects of civil turnover, who are at least able to protect these rights in private law action.

In this sense, a dispositive or dispositive-imperative introduction of the public servitude to the benefit of the indefinite range of persons would help to ensure the inalienable rights and freedoms of various participants in civil turnover: on the one hand, on private legal grounds, to oppose an servitude to the owner of servient estate (and inter alia, with the private legal claim-an analogue of *actio popularis*) granted to such owner, on the other hand, to agree on the terms of such opposition with such owner in the manner established by private law (by way of entering into an agreement or on the basis of a court ruling).

It is interesting that in draft law No. 187920-7, which was not successful as a whole, there was made a noteworthy attempt to qualify the rights of the indefinite range of persons to use in a limited manner other person's land plots as subjective property rights of servitude type. It's a different matter that the provisions of draft law No. 187920-7, which are relative to the aforesaid provisions, are beneath the criticism. In particular, it is impossible to agree with the imperative order of establishing such servitudes; with the refusal to take into account the target purpose and permitted use of the servient land plots; with the provision of the possibility to the servitude holders to demand commensurable fees for the establishment of servitudes solely in cases of significant difficulties in the use of servient land plots; with the lack of provisions on protection of such servitudes. It cannot be excluded that the grant of subjective property rights to an indefinite number of persons was a technical error in draft law No. 187920-7 and its developers did not put such a deep meaning into the above provisions.

IV. Legal qualification of a public servitude in favor of a particular person

Several interesting questions arise with regard to public servitudes established in favor of particular individuals.

On the one hand, these public servitudes cannot be defined as introducing boundaries (limits) of property rights to real estate, at least for the reason that they are established in favor of certain persons listed in chapter V. 7 of the Land Code of the Russian Federation. It is important to emphasize here that when a public servitude is established in favor of a particular person, such person directly exploits someone else's land plot in order to achieve specific goals (for example, for construction of infrastructural facility) and solely indirectly satisfies the interests of the society (for example, for obtaining a particular resource) In this connection, the term "public" in relation to the servitude arising on the basis of chapter V.7 of the Land Code of the Russian Federation is a subject of disputes. On the other hand, it is also difficult to define these public servitudes as subjective property rights of the servitude type, since, as expressly stated in clause 3 of article 23 of the Land Code of the Russian Federation they are not subject to the servitudes rules of the Civil Code of the Russian Federation and chapter V. 3 of the Land Code of the Russian Federation.

It is a well-known fact that the list of property rights in article 216 of the Civil Code of the Russian Federation is not formally closed. Thus, it would be possible to assume that a public servitude in favor

[6] Vinnitsky A. V. Public property [Publichnaya sobstvennost']. M., 2013. PP. 22–180, 405–445. (In rus) Interesting discussions on this and related topics see, in particular, here: Bogusz B. Land: Balancing Competing Economic and Social Interests // Modern Studies in Property Law / Ed. by W. Barr. Oxford — Portland, Oregon. 2015. Vol. 8. PP. 85–95; Parchomovsky G., Bell A. Land Burdens in the Service of Conservation // Towards a Unified System of Land Burdens? Intersentia Antwerpen — Oxford, 2006. PP. 137–162; Resta G. Systems of Public Ownership // Comparative Property Law. Global Perspective; ed. by M. Graziadei, L. Smith. Cheltenham, UK, 2017. PP. 216–257; Van Erp S., Akkermans B. Cases, Materials and Text on National, Supranational and International Property Law. Oxford and Portland, Oregon, 2012. P3. 137–138, 251–252, 319–329.

of a particular person is a separate limited property right. The aforesaid could be confirmed by the rule stated in clause 3 of article 5 of the Land Code of the Russian Federation, whereunder the owners of a public servitude are persons who have the right of limited use of land and (or) other people's land plots, established in accordance with chapter V. 7 of the Land Code of the Russian Federation.

That is, according to the thought of the legislator, where a public servitude is established in the interests of an indefinite range of persons, no holders of subjective rights will emerge, while where a public servitude is established in favor of a particular person, such holders do emerge.

However, it is not clear whether it makes sense to create a new limited real right, which is so similar to servitude, and even to call it servitude.

It is also important that a public servitude in favor of a particular person emerges in imperative manner, and specifically, by decision of the state authority. Whereas, as follows from clause 3 of article 2 of the Civil Code of the Russian Federation, civil law does not apply to property relationship based on administrative or other subordination of a party to the other party, including taxation and other financial and administrative relationship, unless otherwise is provided for by law. In accordance with subclause 2, clause 1 of article 8 of the Civil Code of the Russian Federation, civil rights and obligations arise from acts of authorities that are provided for by law as the basis for emergence of civil rights and responsibilities. Therefore, it cannot be excluded that, unless it is specifically stated otherwise in the law, public servitude is not subject not only to the rules of the Civil Code of the Russian Federation applicable to servitudes, but is neither subject to any other rules of civil law, and inter alia, rules applicable to real rights.

On the basis of the aforesaid, it can be asserted that currently the provisions on subjective real rights that are established imperatively and that are not subject to the norms of civil law appeared to be stipulated in chapter V. 7 of the Land Code of the Russian Federation. In our view, such decision is far from being obvious and clearly does not meet the interests of a number of parties of civil law transactions.

V. Conclusion

Summing up the aforesaid in this article, it should be concluded that, according to the legislator, servitudes currently function in the Russian law and order as:

- traditionally understood servitudes granting subjective property rights to the servitude holders (articles 216, 274-277 of the Civil Code of the Russian Federation);
- modified servitudes treated in their traditional meaning, intended to be established in respect of public land plots and granting subjective real rights to the servitude holders (chapter V. 3 of the Land Code of the Russian Federation.
- public servitudes that are not actually servitudes, but set the boundaries (limits) of the property right to real estate, i.e., they do not grant subjective property rights (subclause 1-7, clause 4 of article 23 of the Land Code of the Russian Federation);
- public servitudes for direct realization of the interests of particular persons and for merely indirect realization of public interests, essentially granting subjective property rights, but it is not formally clear, what kind of rights exactly — private or public (subclause 8, clause 4 of article 23, chapter V.7 of the Land Code of the Russian Federation).

And the aforesaid list of servitudes is not a complete list of servitude encumbrances, because there are also servitudes (including public ones) that are stipulated in particular federal and regional laws. In this context, we put the following question to the readers in the end of this article: To what extent such complication of the Russian servitude law is justified?

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