

## Artículo de investigación

**General characteristics and types of proprietary rights on another's property (iura in re aliena) in civil legislation of Ukraine**

Загальна характеристика та види прав на чуже майно за цивільним законодавством України

Características generales y tipos de derechos de propiedad sobre la propiedad de otra persona (iura in re aliena) en la legislación civil de Ucrania

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**Capt. Shemonayev V.**<sup>196</sup>**Abstract**

The article is devoted to theoretical and law applications problems which connected with legal regulation and realisation of proprietary rights on another's property (iura in re aliena). The article studies the system of rights on property of another person under the civil legislation of Ukraine. Such as types of proprietary rights as possession, servitude, superficies, emphyteusis are analysed.

Special attention is paid to the analysis in the prospects of development of these rights in modern civil law of Ukraine and the need for appropriate changes to the existing legislation because there is still not able to provide a legal condition for the development of these rights on practice.

**Keywords:** Proprietary rights, iura in re aliena, possession, servitudes, emphyteusis, superficies, civil law of Ukraine.

**Анотація**

Стаття присвячена теоретичним та практичним проблемам, пов'язаним із правовим регулюванням та реалізацією речових прав на чуже майно (iura in re aliena). У статті досліджується система речових прав на чуже майно за цивільним законодавством України. Аналізуються такі види речових прав на чуже майно, як володіння, сервітут, суперфіцій, емфітевзис.

Особлива увага у роботі приділяється аналізу перспектив розвитку прав на чуже майно у сучасному цивільному праві України і необхідності внесення відповідних змін до чинного законодавства, яке потребує реформування, оскільки досі не в змозі забезпечити правові умови для розвитку прав на чуже майно на практиці.

**Ключові слова:** речові права на чуже майно, володіння, сервітут, емфітевзис, суперфіцій, цивільне право України.

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## Resumen

El artículo explora el sistema de derechos de propiedad de la propiedad de otra persona según la ley civil de Ucrania. El artículo está dedicado a problemas teóricos y prácticos relacionados con la regulación legal y la realización de los derechos de propiedad de la propiedad de otro (*iura in re aliena*). Se analizan tales tipos de derechos de propiedad sobre la propiedad de otras personas, como posesión, servidumbre, superficies, enfiteus. Se presta especial atención al análisis de las perspectivas para el desarrollo de los derechos de propiedad extranjera en el derecho civil moderno de Ucrania y la necesidad de enmendar la legislación existente que necesita reforma, ya que aún no puede proporcionar las condiciones legales para el desarrollo de los derechos de propiedad extranjera en la práctica.

**Palabras clave:** Derechos de propiedad sobre la propiedad de otro, posesión, servidumbre, enfiteísmo, superficies, derecho civil de Ucrania.

## Introduction

With the adoption of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) and the inclusion in it of a system of proprietary rights to another's property (*iura in re aliena*), scientific interest in such institutions of property law as possession, servitudes, emphyteusis, superficies has increased. At the same time, it would be wrong to say today about sufficient study of these institutions under the civil law of Ukraine. Although the problems of legal regulation of the relations of possession, servitudes, emphyteusis, superficies have long been paid attention to by scientists, but in the modern legal science there has not been a comprehensive study of these institutions. Today, there are a number of unexplained theoretical problems, the analysis of which will help to resolve the contradictions in law-enforcement practices relating to possession, servitudes, emphyteusis, superficies.

## Methodology

System of rights to another's property (*iura in re aliena*) has been studied in the light of their historical development, ranging from Roman private law to the present time. Such a detailed historical-comparative approach is conditioned by the development of civil law in Ukraine as a private (rather than subordinate to public law), which in turn requires recourse to the origins of private law and exploring the positive aspects of its implementation at different times and in different countries.

Several methodological approaches to the study have been used in the research of the proprietary rights to another's property (*iura in re aliena*). In analyzing the connection between absolute and relative relationships, a general scientific dialectical method was applied to study the proprietary right to another's property (*iura in re aliena*) from the standpoint of the indissoluble

connection with the factual basis from which this right arises.

The historical method has been applied to clarify the conditions of emergence and formation of the proprietary rights to another's property (*iura in re aliena*) under the civil law of Ukraine. In identifying the signs of possession, servitudes, emphyteusis, superficies, the system-structural method was also used, which made it possible to investigate the causal relationships between legal phenomena, between the whole and a part thereof; the method of logical analysis was used in formulating the best options for legal regulation of possession, servitudes, emphyteusis, superficies, as well as the definition of a theoretical model of relations, which was compared with the existing legislative model, which allowed on this basis to make proposals for improvement of the current legislation. The use of the comparative legal method made it possible to compare the legal norms for possession, servitudes, emphyteusis, superficies in modern civil law at different stages of its development with the provisions of the legislation of foreign countries.

## Results and discussion

It is well known how difficult to give a precise definition of proprietary right as a civil law category. That is why it is absent in the civil law of most countries of the world, existing exclusively at the level of civil doctrine.

The concept of proprietary rights as a legal category began to take shape during the formation of Roman private law. During this period there is an understanding of property rights as giving direct dominance over things. Under this tradition, it refers to rights *in rem*, i.e. rights of a person directly related to an asset (as

opposed to a right for a person action, who is under an obligation to perform any kind of act or omission).

While defining proprietary right as the direct domination under a thing in relation to others, it should be emphasized that these legal relations arise only on the basis of norms of law, are determined by the norm of positive law, and the property interests of participants in such legal relationships are taken by law under protection. Civil law literature contains various definitions of proprietary right, sometimes very sophisticated. However, today there is no legal definition of proprietary right in the legislation of Ukraine. Proprietary right in modern civil science is the right that ensures the satisfaction of the interests of the authorized person by directly influencing the thing in the sphere of its economic domination.

The Roman division of the proprietary rights to the right to own property (property right) and proprietary rights on another's property (*iura in re aliena*) is accepted in Ukrainian civil law. Book III of the Civil Code of Ukraine (Civil Code of Ukraine, 2003), entitled "Property Rights and Other Property Rights", in its logical and semantic interpretation, concludes that all rights to a thing are their own property rights, and proprietary rights on another's property (*iura in re aliena*) are only their kind. In such construction, it is logical that the fundamental right in such a right is the property right, and specific are the proprietary rights to another's property (*iura in re aliena*).

The essence of the proprietary rights to another's property (*iura in re aliena*) under the Civil Code of Ukraine (Civil Code of Ukraine, 2003) is that the property right belongs to one person, while the other person has the same (direct) proprietary right to the same property, only narrower in content. Thus, the proprietary rights on another's property (*iura in re aliena*) are independent (but derived from property rights) proprietary rights that give the person who owns them the opportunity to directly use certain property for a specific purpose and within the established limits.

Part 1 of Art. 395 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) provides a list of the proprietary rights on another's property (*iura in re aliena*): the right of possession (possession), the right to use (easement, servitudes), the right to use the land for agricultural purposes (emphyteusis), the right to use another's land for construction (superficies). It should be noted

that, at the same time, Part 2 of Art. 395 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) provides that the law may establish other proprietary rights on another's property. Any title possession is a proprietary right and may arise also on the basis of a contract. Thus, the lease creates not only a binding legal relationship between the parties, but also a proprietary right that arises between the tenant and an indefinite number of persons. The same thing can be the object of both obligatory and proprietary relations. Due to the fact that civil rights and duties arise not only from the grounds stipulated by law and other legal acts, but also from the actions of natural and legal persons, although not provided for by law, but because of the general principles and content of the law give rise to civil rights and duties, these actions can be the reason of appearance of special proprietary rights. Such types of the proprietary rights on another's property (*iura in re aliena*) that arise on the basis of the prescription of special legislation may be: the pledge (Law of Ukraine "On pledge", 1992), the mortgage (Law of Ukraine "On mortgage", 2003), holding, the right of full economic management (Article 136 of the Economic Code of Ukraine (Economic Code of Ukraine, 2003)), the right of operational management (Article 137 of the Economic Code of Ukraine (Economic Code of Ukraine, 2003)), the right of family members of the tenant of the premises in the houses of the state and public fund to use housing (Articles 64, 65 of the Housing Code of Ukraine (Housing Code of Ukraine, 1983)), the right of family members of the homeowner to use it (Article 405 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003)) etc.

Below we briefly describe the proprietary rights on another's property (*iura in re aliena*) from Part 1 of Art. 395 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003).

*The right of possession (possession).* Possession as an independent proprietary right is the actual possession of things combined with the intention to own these things for oneself.

In its basic characteristics, possession is similar to ownership: the subjects of ownership may be the same persons as possessors; its object is things which a person may own. However, these two categories shouldn't be confused. Ownership is a kind of proprietary rights, expresses the status of appropriation of property. Possession reflects the actual state of affairs, not the right on real thing.

Highlighting these differences, Roman lawyers have come up with short but precise formulas to characterize these concepts: ownership is "I have a right to a thing", possession is "I have a thing" (Novitsky, 1997).

Possession consists of two elements: the corpus-element, relating to the actual physical control exercised over the things, and the animus-element, which refers to the intention with which the possessor exercises physical control. The possessor has the intention to behave with respect to the thing like an owner (e.g. the thief or the buyer under an invalid sales contract).

According to the civil law of Ukraine, possession is only that possession that arises on the basis of an agreement with its owner or for other reasons established by law (Article 398 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003)). Possession is divided into legal and illegal. Legal possession is one that has a legal basis (title). Illegal possession does not have a sufficient (legal) basis. Illegal possession is divided into fair (bona fide) and unfair possession. A bona fide illegal owner does not know and should not know about the illegality of owning a thing. An unfair illegal owner knows or ought to know that he/she owns a thing illegally. Only lawful and unlawful bona fide possession falls under the concept of "right of possession" ("possession") under the civil law of Ukraine. Illegal unfair possession of property is not a legal institution, but only a fixation of the fact of violation of property rights.

The subject of possession is the person who actually holds it. It can be either a natural person or a legal entity. In this case, possession may belong simultaneously to two or more persons. This does not imply the termination of joint ownership relations, but merely indicates that granting to one person the right to own certain property does not deprive the owner or his authorized person of the right to grant that opportunity to another person.

The object of possession may be any thing in respect of which ownership may be established. Content of possession covers the right to the possessor's own behavior in relation to certain property, the right to demand from other persons not to impede the exercise of rights, the right to apply to court or other public authorities for protection.

Possession may occur:

- 1) As a result of appropriation (primary ways to acquire possession);
- 2) As a result of transfer of ownership of property from one person to another (secondary ways to acquire possession).

Possession is terminated by the loss of one of the elements - objective (loss of actual possession of property) or subjective (abandonment of possession, that is, termination of intention to own property for oneself).

The protection of legal possession is exercised in the same manner by the same claims as the right of ownership.

Protection of illegal bona fide possession is carried out against third parties in the same way as protection of property rights, and against the owner – by the proof that the thing was acquired bona fide and for a payment.

Special legal protection options exist against illegal unfair possessors. They are established in Art. 400 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003), which provides that an unfair possessor is obliged to return immediately the property not only to the owner, but to any person who has other right to it under the contract or law, or who is the bona fide possessor of the property. If not, the interested person has the right to petition to the court with vindication claim.

Therefore, any person who is not the owner of the property, but was its legal or illegal, but bona fide possessor, can protect his/her possession by vindication the property from the illegal unfair owner.

*Servitudes.* Servitude is a right of restricted use of property of other person for a specific purpose and within the established limits. The purpose of a servitude is to allow the user to use the thing that belong to another person.

The subjects of servitude are the owner or the legal owner of the thing and the subject of the servitude right for that thing. In this case, the owner of servitude is recognized as the person whose possession arose on the basis of the contract with the owner of the thing or the person whose property was transferred by the owner, as well as on other grounds established by law in the presence of appropriate authority from the owner.

A special regulation is contained in the legislation regarding such servitude object as a land plot: according to Art. 100 of the Land Code of Ukraine (Land Code of Ukraine, 2001) servitude for the land plot is established exclusively by agreement between the owners of the land plots. In respect of other real estate, the liable person may be the owner as well as any legal owner of the property.

The object of the servitude is real estate that is owned by another person (not the person claiming the servitude).

According to Art. 397 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) a servitude may be established in respect of land, other natural resources (land servitude) or other real property to meet the needs of others which cannot be otherwise realized. The servitude may also belong to the owner (possessor) of a neighboring land plot, as well as to another, specifically designated person (personal servitude).

Therefore, the Civil Code of Ukraine (Civil Code of Ukraine, 2003) recognizes the existence of two types of servitudes - land (or praedial) and personal. If a servitude is established on certain property in interests of a particular person, then it is personal. If, however, a servitude is established in respect of certain property in favor of the owner (possessor) of that property (but not a specific person), then it is land (predial). A praedial servitude is a burden created on one piece of land (fundus) for the advantage and utility of another piece of land. The land which suffers the servitude is called the servient land: that which benefits there from, the dominant land.

A servitude, which is a real right, actively follows the dominant land and passively the servient land into whatever hands it passes. Roman law divides praedial servitudes into urban and rural servitudes. If we refer to the Institutes of Justinian, rural servitudes would be those the creation of which does not imply the existence of buildings; urban, servitudes which can have meaning only by recognizing the existence of land with buildings. Thus, a right of way for the benefit of one fundus over another fundus would constitute a rural servitude, for it does not imply in the least the idea of land with buildings; on the contrary, the servitude "ne luminibus officiatur" (prohibition on blocking up or obstructing windows) would be an urban servitude, since it cannot be conceived of without the existence of a building.

Personal servitudes are established over a thing for the benefit of a person. Types are: usufructus, usus, habitatio. Usufructus is the right to make use of a thing the ownership of which belongs to another and of gathering the fruits but without altering its substance. Usufruct can be created either mortis causa, by will; or inter vivos by the civil modes in jure cessio, adjudicatio and mancipatio. Usus is a usufruct which lacks the *ius fruendi*. Thus he who should have the *usus* of a flock could indeed make use of its manure but he could not take either the milk or the wool. Thus altered, *usus* is no more than a restricted usufruct. *Usus*, differing from usufructus, is non-transferable; it is created and extinguished like usufructus. *Habitatio* is the *usus* of a house; he who was favored with it had the right to occupy the immovables with his family, but not to let (to lease) it.

In Roman Law servitudes, personal as well as praedial, are protected by the *actio confessoria*: this action is given to him who wishes to show the existence of a servitude in himself or in his land (Zom, 1916). The *actio negatoria*, on the contrary, is given to him who wishes to establish the freedom of his land as against his adversary who claims that it is encumbered with a servitude for his benefit. Possessory protection does not exist for all praedial servitudes: it exists, as to rural praedial servitudes, only in water rights and rights of way, and then is made the object of special interdicts.

The most typical personal servitude established by civil law of Ukraine is the right of family members of the homeowner to use this home. According to Part 1 of Art. 405 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) family members of the homeowner who live with him are entitled to use this home in accordance with the law. According to Part 2 of Art. 405 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) a family member of a homeowner loses the right to use this home in the absence of a family member without valid reasons for more than one year, unless otherwise agreed by him and the homeowner or by law. A similar rule is contained in Art. 71 of the Housing Code of Ukraine (Housing Code of Ukraine, 1983) on the preservation of home in the houses of the state and public fund for temporarily absent tenants or members of his family for six months. So it is a competition of the rules of civil and housing legislation in terms for termination of a personal servitude. It can be resolved by using of the rule provided for in Part 2 of Art. 405 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003) for the housing privately owned. In the case

where the use of housing occurs on the basis of a contract of rent (lease) of a house in state or public fund, the term of six months provided for in Art. 71 the Housing Code of Ukraine (Housing Code of Ukraine, 1983) have to be applied.

*Emphyteusis.* In Roman private law emphyteusis was an imitation of a perpetual lease which the cities were accustomed to grant to those who were charged with cultivating and especially with clearing their domains. The lessee could sell his right, transmit to his heirs, acquire the fruits by mere separation before any gathering. He had to pay to the owner of the soil a rent (vectigal if land granted by a city, pensio, canon, reditus where the agreement took place between mere individuals), and his right could be declared forfeited if he failed for two years to pay this rent. In Ukraine emphyteusis is a right that can be alienated and inherited, except when land for state or community property is transferred to agricultural use. Such a land plot cannot be alienated by its land user to other persons, contributed to the statutory fund or pledged (part 2, 3 of Article 407 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003)).

Superficies is a long-term, alienated and inherited right to use the land, transferred free of charge or for a fee for the construction of industrial, household, socio-cultural, residential and other buildings (Part 1 of Art. 413 the Civil Code of Ukraine (Civil Code of Ukraine, 2003)). The right to use the land provided for construction may be alienated or transferred by the land user in the manner of inheritance, except in cases provided for in Part 3 of Art. 413 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003), according to the provisions of which the right to use the land of state or community property for construction cannot be alienated by its land user to other persons (except in cases of transfer of ownership of buildings and structures located on such land), is included in the statutory fund, pledged.

### Conclusions

Based on the study, we can conclude that the consolidation of servitudes, emphyteusis and superficies in the civil legislation of Ukraine corresponds to the development of private law relations in the field of land use. However, some provisions of the land and civil legislation of Ukraine require additional coordination and relevant changes. In particular, the norms of the Civil Code and the Land Code of Ukraine contain repetitions of normative material on servitudes,

emphyteusis and superficies. An undoubted fact is that the institution of proprietary rights, including land rights, is an institution of civil law. Of course, any branch codified act, and in particular, the Land Code of Ukraine, has elements of complexity (Popondopulo, 2002), however, the inclusion in the Land Code of Ukraine of norms of civil law (private law) is not justifiable (Sukhanov, 1998). Such mixing leads only to contradictions and artificial complication of legal regulation, and in practice to weakening of state control over land use. Therefore, it is thought that the provisions of chapter 16-1 of the Land Code of Ukraine on emphyteusis and superficies should contain only the reference norm to the relevant articles of the Civil Code of Ukraine.

The provisions of the Civil Code of Ukraine on the right of possession, servitutus, emphyteusis, superficies, as well as the provisions of chapter 16-1 of the Land Code of Ukraine, also found their direct realization in the Law of Ukraine "On State Registration of Real Estate Rights and Burdens", which expanded the list of proprietary rights on real estate. Thus, expanding the list of these rights will provide protection of proprietary rights on another's property (*iura in re aliena*).

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