IRSTI 10.55.01 https://doi.org/10.26577/JAPJ.2020.v96.i4.08

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ISSUES OF LEGAL REGULATION OF LAND SERVITUDES IN THE REPUBLIC OF KAZAKHSTAN AND FOREIGN STATES

The work describes stratification of a land servitude as a branch of civil and land law and as a part of regulation over exercise of real rights. The work identifies historical, ancestral and structural features of servitudes functioning with the goal to improve relations emerging in private-legal and public-formation areas. We have determined that servitudes on land resources are not only participants in relations, which are presented in the form of civil legal relations but also is a regulator of a general civil idea about the usage of owner's property including the necessary factors.

The relevancy of the research is based on the fact that for the first time land servitudes are examined not as a category of land law, whose source is the branch of civil law, but as a doctrinal system of legal competence from civil circulation. The article shows how the status of land changes when transferred from the branch of property transaction laws to its doctrinal understanding in the form of modernising branch principles of law.

Practical application of this aspect of the issue is possible under the condition of its functioning in countries that apply the servitude for purposes of structural functioning and development of the general legal system.

Key words: servitude, system of real rights, civil legislation, regulation, land law.

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ҚР және шет мемлекеттердегі жер сервитутын құқықтық реттеудің кейбір мәселелері

Жұмыста азаматтық құқық пен жер құқығы саласы арасындағы байланысты заттық құқықтардың пайдалану саласындағы құқықтық қатынастарды реттеу бөлігі ретінде жер сервитутының стратификациясы туралы сөз қозғалған. Сонымен қатар, жеке құқықтық ортада және қоғамдық-формациялық ортада туындайтын құқықтық қатынастарды жетілдіру мақсатында сервитут қызметінің тарихи, рулық және құрылымдық ерекшеліктері анықталған болатын. Біз жер ресурстары үшін азаматтық құқықтық қатынастар нысанында ұсынылған сервитуттық ұғымды қатысушы ретінде ғана емес, сонымен қатар міндетті факторларға ие ретінде заттарын пайдаланудың жалпы азаматтық идеясының реттеушісі болып табылатыны айқындалған.

Зерттеудің жаңалығы ретінде жер сервитуты алғаш рет жер құқығының санаты ретінде емес, өз кезегінде азаматтық құқық саласымен де зерттелетіндігімен, азаматтық айналым тарапынан құқықтық құзыреттіліктің доктриналық жүйесі анықталуы табылады. Мақалада жалпы алғанда құқықтың заттық айналымы саласынан құқықтың салалық қағидатын жаңғырту нысанында оны доктриналық түсінуге көшу кезінде жер сервитуты мәртебесі өзгеретіндігі көрсетілген.

Мәселенің осы аспектісін іс жүзінде қолдану сервитутты құрылымдық қызмет ету және жалпы құқықтық жүйенің даму мақсаттары үшін қолданатын елдерде жұмыс істеу шартымен ғана мүмкін.

Түйін сөздер: сервитут, мүліктік құқықтар жүйесі, азаматтық заңнама, реттеу, жер құқығы.

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Некоторые вопросы правового регулирования земельного сервитута в РК и зарубежных государствах

В статье рассматривается стратификация земельного сервитута как отрасли гражданского и земельного права и части регулирования области использования вещных прав. Авторами выявлены исторические, родовые и структурные особенности функционирования сервитута для целей совершенствования отношений, возникающих в частноправовой среде и общественно-формационной. Было определено, что сервитут для земельных ресурсов выступает не только как участник отношений, которые представлены в форме гражданских правоотношений, но также является регулятором общегражданской идеи пользования вещью владельца с обязательственными факторами.

Новизна данного исследования определятся тем, что впервые земельный сервитут исследуется не как категория земельного права, своим источником имеющая лишь отрасль гражданского права, а выявляется доктринальная система правовой компетенции со стороны гражданского оборота. В статье показано в целом, как изменяется статус земли при переходе от отрасли вещного оборота права к доктринальному его пониманию в форме модернизации отраслевого принципа права.

Практическое применение данного аспекта проблемы возможно при условии функционирования в странах, которые применяют сервитут для целей структурного функционирования и развития общей правовой системы.

Ключевые слова: сервитут, система вещных прав, гражданское законодательство, регулирование, земельное право.

Introduction

After former USSR and the Eastern Bloc countries gained independence, a question about creating their own legal system arose (Stasi 2016). External practice shows that the basis of the whole system of environmental protection in economically developed countries is an active state regulation, where key priorities are given to economic incentive and support of entrepreneurship, development of social production ecology (Yergobek 2018). The first important act in civil law was the property branch. However, it regulated only the capability of a property right, but it only mentioned the usage of a property by another person. In cases and under procedures, established by legislative acts of former USSR and the Eastern Bloc countries, owner's activity can be limited or suspended, or an owner can be obliged to allow limited use of their property by other individuals (Mousourakis 2015). The terms of servitudes were legally formalised in the fundamentals of land legislation (Himka 1988). The proper legal regulation of servitudes was established in land and civil codes of former USSR and the Eastern Bloc countries.

Literature review

There is no general definition of a "servitude" in the current legislation (Beckwith 2016). The civil legislation outlines its content as follows: the right to use the property of another (servitude) can be established regarding the land property, other natural resources (land servitude) or other immovable property to meet the need of other individuals, which cannot be satisfied by any other method (Strauss 2015). The land legislation has this definition of a land servitude: land servitude rights – are rights of an owner or a land user of a land property to a limited, fee-based or free of charge use of land property (properties) of another (Hinnant, 1988). Even though listed norms provide a general understanding about the basics of servitude relations, they do not define their features (Bazelet and Samways, 2011). It is possible to derive features of a servitude from the complex analysis of civil and land legislations (Harvey 2007).

A predial servitude has its features and principles that were strictly defined by Roman jurist (Nijeholt, 1910). Each predial servitude involves a joint exploitation of two land properties, one of which is used to improve the state of a second

one. One land property that receives certain benefits from a servitude is called praedium dominans (dominant estate), the second one, which bears the burden of "service", – is called praedium servians (servient estate).

Materials and methods

This work uses methods of historical research to determine ancestral and family sources of servitude relations. To separate these relations from the general system of civil law and property rights, a method of analytical control and synthetic perception was applied. The work attempts to use a synergetic method to create a position regarding the possibilities of development of the servitudes branch in the further evolution of the legal system. The work analyses legislative systems of former USSR and the Eastern Bloc countries as having the most equal content and regulation methods of public relation.

One of the methods used in this work is a public method. Since a servitude, in general, is limited in public interests, the same should be said about the possibility of forming an integral content of the specified category. It is also noted that application of public opinion allows calculating public realisation of an assigned task to form a branch of servitude usage.

Results and discussion

Predial servitudes are also called property, real and land servitudes. However, we prefer to use an adjective "predial" to denote these servitudes, regardless of the fact that the word "praedium" is Latin and translates as immovable property, land property, estate. On the first glance, it seems logical to stick to the term "land". But in legal science, the term "land servitude" is used in several meanings. The category of a land servitude is generally viewed by scientists in the following meanings. First, as a right, a legal capacity to use the land property of another. Followers of different variations of this understanding form the largest group (Yerkinbaeva 2014). Second, as a legal relation, the content of which is established in rights and responsibilities of parties, revealing its essence. Third, as a determined functional obligation (restriction) of one estate for the benefit of another estate, which grants one individual the right and assigns other certain responsibilities. Fourth, the land servitude is a limited use of a land property of another. Despite such broad usage of a term "land servitude", we think it is correct to use the term "predial servitude" for these in Roman law. It is worth noting that many researchers use an adjective "predial" despite its Latin origin (Davy 2017).

At the same time, we think that using "property servitude" and "real servitude" is incorrect. According to their legal nature, all servitudes are property servitudes since they belong to property rights to own property of others. Therefore, to compare personal servitudes with property servitudes (meaning predial) is illogical since personal servitudes are also property rights. Using the term "real servitude" poses a question: are personal servitudes not real but imagined? In order to avoid any misunderstanding in legal terminology, we think it is appropriate to use the term "predial servitudes".

Let us analyse features of predial servitudes. First, they can exist between the neighbouring land properties. Some scientists hold that it is necessary for land properties to be neighbouring, others accept the exchange of servitudes between parties who are not neighbours, but are close to each other. We think that the neighbouring estates should be understood not only as those necessaryly bordering each other (it can be necessary for such servitudes: tigni immittendi, oneris ferendi, slillicidii, fluminis) but also those that are situated in such places where they can benefit each other.

Second, the dominant estate must receive benefits from a servitude. Meaning a servitude establishes such relations that would meet the needs of the dominant estate. This means that the dominant tenant receives the ability to use an estate can do so only within the needs of a dominant estate. Although, a servitude cannot meet personal needs of an owner of a dominant estate (Glassner 1970).

When examining the question of benefits for the dominant estate, we note that it refers to the monetary gain, meaning an increase in profits of a dominant estate. It should be mentioned that the benefits can also be in the form of general conveniences, like a proper view from the window. Additionally, what could satisfy the needs of an individual, and not an estate, could not be the object of a land servitude. Rather, it is possible to establish a servitude that is not profitable for an individual, but is beneficial for an estate.

The content of a predial servitude depends on the needs of a dominant estate. For example, a servitude that gives the right to extract stone (lapidis eximendi) can be established only for the needs of a dominant estate, meaning that an ac-

tivity to satisfy the needs in construction of this estate. However, it is not possible to establish a servitude for stone extraction since it benefits the individual and not the estate. Thereby, a predial servitude can be established only to meet the needs of a dominant estate but not beyond these needs (Alimaev 2008).

Third, omnes servitutes praediorum perpetuas causes habere debenl – all predial servitudes must have a permanent reason (perpelua causa). Meaning a servitude is established only in the case when a servient estate can satisfy the needs of a dominant estate not temporary or accidentally, but through its permanent qualities. Therefore, for example, it is not possible to establish a servitude for water lines from a pond or a pool, but only from a permanent water source. Only the classical Roman law allowed to establish a servitude for water lines from a water storage. A servitude is not permitted when things of benefit for a servient estate are provided by the owner themselves (for example, when laying the line to water from another), or when they are provided to these estates externally by any means available (for example, the sand brought by water). However, it is a totally different situation when laying a water line to a dominant estate through a servient estate since perpetua causa will be the ground where the line would be laid (De Angelino 1931).

Predial servitudes in the Roman law are divided into two types: servitutes praediorum rusticorum (rural predial servitudes) and servitutes praediorum urbanorum (urban predial servitudes). The reason behind such division has been widely discussed in the literature. Several opinions have arisen. The most widespread one is that the basis for such division of predial servitudes on rural and urban is the fact that praedium dominans is a rural estate, a building. The other group of scientists divides predial servitudes depending on the status of praedium serviens – as an estate of a building (Barriere 2017). The third group thinks that servitutes praediorum rusticorum (rural predial servitudes) exist between two unoccupied estates, while servitutes praediorum urbanorum (urban predial servitudes) exist between estates when either one (regardless of which one) or both of them have a building. The next proposal concerning the division of rural and urban predial servitudes is a method of use of a servient estate and not its location (Stanziani 2018).

The biggest problem is still the question of dividing predial servitudes into two classes with qualities of praedium dominans. Although, this theory is not phrased identically. In Germany, it is considered that an estate, whose needs are satisfied by predial servitudes, can be under crop (sown) or built up. Since the needs of unsown (field) estate are different than the needs of a build up estate, servitudes connected to an unbuilt up estate, in general, receive the same meaning as servitudes connected to a built up estate; though the changes in their content are not unthinkable. Taking into account that the content of every specific servitude mentions either unsown or built up estates, this servitude is named as either rural or urban. Many other scientists thought it is correct to determine the servitude as either rural or urban, considering whether it is established to benefit an unsown or built up estate (Engerman 1986).

Scientific dispute regarding the division of rural and urban servitudes is connected to their ambiguous interpretations in sources of the Roman law. Thus, some servitudes were considered rural, and other – urban, despite the fact that in extraordinary circumstance the former could be established for the benefit of an urban estate (praedii urbani) (for example, the right to lay the water line to aquae ductus, the right of passage (iter)), while the latter – for the benefit of a rural estate (praedii rustici) (for example, the right for sunlight or the view from a window – servitus ne luminibus velprospectui officiatur). The confusion concerning sources is explained by the fact that Romans changed their views on the division between rural and urban estate: at first, a literal understanding was predominant (depending on their location), later, a quality of profit emerges (praedium rusticorum gives natural profit (in natura), praedium urbanorum – financial profit). I the Institutes of Justinian it is told that urban servitudes are bound by houses. Thus, we think that rural predial servitudes are established for the benefit of unbuilt up estates, while urban predial servitudes – for the benefit of built up estates.

Rural predial servitudes are divided into several types, in particular (Zhang 2014):

Road servitudes:

1. Iter (ius eundi) – the servitude of passage (or a footpath servitude). Gives the right to traverse on foot, on horse or to carry on a litter through an estate of another. The ability to ride on horse or be carried on a litter was at the time when these actions were not forbidden according to an agreement of this servitude.

2. Actus (ius agendi) – the servitude of driving. Gives the right of driving livestock and a carriage track across private land. This servitude

includes the servitude of going. It is logical since every drive of livestock requires a shepherd. Thus, these two servitudes are closely linked with each other. A path for traversing is not separated from the road for driving livestock, meaning it is one road. Though there is a difference between driving livestock and a passage: a passage is possible where all traverse on foot or by transport, while driving livestock is only allowed

3. Via (ius eundi el agendi) – the servitude of roads. It provides the right to use a road on private land to traverse or transport goods. It includes the right to bear arms, but it should be done in a manner as not to harm the yield. Additionally, the servitude of roads includes two previous servitudes, therefore it provides the right to traverse and drive livestock along this road The width of the road for via should be 8 feet on straight parts and 16 on bends.

4. Servitus navigandi – the right to swim across a lake of another to reach your land property.

Water servitudes:

1. aquae haustus (aquae hauriendae) – the right to draw the water from private land of another. This servitude provides a right to establish the necessary tools for drawing the water and the right to have an access to water (iter ad aqua/n). The one with the right to draw water is considered to have the right to traverse (iter) to access water. It is possible to draw water from a water source. Originally, it was not possible to conduct the search for water The servitude to conduct the search for or use water can be established for a source of a well, though today it is established for any place. It is possible to establish a servitude that would allow to search for water and only then to draw the found water. This way, it was possible to establish the servitude of water. The right to search for water and draw it to your estate can be granted.

Moreover, the servitude to draw water could be established by hours and days, and water could be provided to several individuals (Iroanya 2018).

The servitude aquae haustus can be predial or personal. This conclusion is based on the statement that personal use of water is not hereditary. Meanwhile, there is a presumption that the servitude is not profitable.

2. pecoris ad aquam appulsus – the right to water livestock. This servitude covers the right to drive the livestock (czc/m).

3. aquae ductus – the right to carry water through the estate of another. Carrying water can be performed by means of pipes or open ditches. The order of performance and realisation of this servitude, and also the choice of direction for water pipes are determined by the parties on the grounds of an agreement, while disputes can be settled in court by a judge's decision (arbitrium). Parties choose time and days of using pipes. Pipe construction water usage in the same place can be provided by different individuals, it is also possible that water can be delivered on different days and time.

4. The servitude aquae ductus should be distinguished from the servitude aquae immitendae vel elucendae, which provides the ability to

Economic servitudes:

1. Servitus pascendi – the right of pasture on an estate of another. This servitude belongs to both predial and personal servitudes. There are rare mentions of it in sources. This type of servitude only appeared in the German law. Additionally, there are enough pastures meant to be used by the owners of the neighbouring estates. That is why this servitude is not prevalent in private law.

2. Servitus calcis coquendae – the right to extract and cook limestone

3. Servitus arenae fodiendae – the right to extract sand.

4. Servitus silvae ceduae – the right to cut wood. It also covers the right to collect branches and acorns.

5. Servitus lapidis eximendae – the right to extract stones.

6. The right to store fruits in the neighbour's building.

7. The right to pile stones on the neighbouring estate when using a quarry.

8. The right to place a tent for a shepherd on an estate of another. This servitude was possible if the servitude of pasture

9. The servitude that states that a neighbour cannot take water on their estate as not to lessen the water supply for their neighbour. This servitude is considered to be the only negative rural servitude.

The listed servitudes should be used within the needs of estates they have to serve. It is forbidden to establish a servitude with a commercial or entrepreneurial goal.

Urban predial servitudes include:

Rights regarding buildings (structures):

1. Servitus oneris ferendi – when the building or its part needs to be sustained by a wall or beam of the neighbour's house. While the owner of the servient building is required to keep it in a state so

that it could hold the weight of the neighbouring building. A beam supporting the neighbouring building needs to be kept in a proper state by the owner of a building, which is imposed with a servitude, and not the one who would impose weight on it. Meaning that in case the repairs of a wall or a beam, which support the neighbouring house, are needed, such repairs have to be performed by the owner of a house with supporting walls or beams support. It is evident that this servitude places responsibilities on the owner of a servient building. At first glance, this contradicts one of the main principles of servitudes – servitus in faciendo consistere non potest (a servitude cannot consist in performing active actions) (Karagussov, 2015). Regarding the legal nature of such double regulation existing – the impossibility to oblige the owner of a servient estate with responsibilities in the form of performing active actions and simultaneous responsibility to repair the walls or beams in the servitude oneris ferendi – there are two positions. Some scientists think that the responsibility to keep the wall in a proper condition and its repairs have to be performed by its owner in order for the servitude to exist, therefore it logically follows from the servitude oneris jerendi itself. Under every predial servitude, a servient house, taking into account causam perpeluam (long-term benefit), has to be in such state, which will enable the connected servitude's fulfillment. When the owner of a servient house neglected repairments of that part of the servient house supporting the neighbouring house, it would make it impossible for the neighbour to exercise their rights, and consequently it would violate the servitude.

Other scientists think that the servitude and the responsibility to keep the wall in a proper condition and to repair it – are different categories, connected with each other. The owner of a servient house is obliged with the main responsibility to endure and the secondary responsibility to keep the house in a proper condition. The responsibility, with which the owner of the house is obliged, does not emerge from the servitude itself but from the responsibility. The owner of the house has to take care of that part of the house, which is used by the owner of a dominant house, and in case there is a need for repairments (obligation ad parietem reficiendam). Its inaction would indicate the violation of the servitude and the unfulfillment of the responsibility. Such duty is not a direct manifestation of the servitude but rather a result of a responsibility emerging from the law at the time when the wall requires repairments. Therefore, the stated responsibility of an owner of a servient house does not contradict the principle servitus in faciendo consistere non potest (a servitude cannot consist in performing active actions) (Yerkinbaeva 2015).

We hold to the first position because unfulfillment of wall repairments by its owner makes it impossible to realize such servitude of support. Thereby, the responsibility to support the wall in a proper condition derives from the servitude in order for it to exist. Thus, an exception from the general rule about the impossibility of establishing responsibilities for preadium servient has been established for the servitude oneris ferendi.

2. Servitus tigni immitendi – the right to place joists on the neighbour's wall. The owner of a wall, in which joists were placed, could not repair the wall.

3. Servitus projiciendi el protegendi – the right to build a roof or a balcony in the open space belonging to one's neighbour.

Servitudes regarding drainage:

1. servitus stillicidii (recipiendi, immittendi, avertendi) – the right to dispose of rainwater on a neighbouring estate. A special type of it is servitus fluminis – when water flows down through pipes.

2. servitus Jiimi immitendi – the right to vent excessive smoke from the building on the neighbouring estate.

3. servitus cuniculi balnaerii habendi – the right to vent excessive steam from a bathhouse on the neighbouring estate.

4. servitus cloacae immittendae – the right to dispose of sewage by using pipes onto the neighbouring estate or through it. The dominant tenant is also given the right to clean and repair this pipe, thereby the owner of an estate is obliged to give access to such pipe for the dominant tenant to repair. The servitude cloacae immittendae is the oldest predial urban servitude. It is worth noting that according to law, pipes passing along a public road and having an exit to the city pipes cannot be subjects of servitudes since it is not allowed to establish personal rights on the public property.

5. servitus latrinae vel sterculinii – the right to place a liquid-manure pit near the neighbouring house.

Servitudes regarding sunlight and a window view:

1. servitus altius non tollendi – the right to prohibit one's neighbour to construct any building beyond a certain height as to not prevent access to sunlight or a proper window view.

2. servitus ne luminibus officiatin' – the right to demand from one's neighbour to not hinder sunlight by any possible means (rising or lowering the building, planting trees etc).

3. servitus ne prospectui officiatur – the right to demand from one's neighbour not to hinder the window view.

Sunlight was defined as when the sky can be seen. The window view can exist in places below, while the light

4. servitus luminis immitendi (servitus luminum) –the right to put a window in the neighbour's wall or the joint wall.

Sources of law along with the purpose of servitudes stillicidii and fluminis recipiendi (averlendi), (servitude of draining rainwater), allius non tollendi (servitude prohibiting construction over a certain height), ne luminibus ofllciatur (servitude prohibiting hindrance of sunlight) mention the opposing servitudes – slillicidii ifluminis turn recipiendi (non averlendi) – the right not to accept rainwater, altius tollendi – the right to build higher, oficiendi luminibus vicini – the right to obstruct sunlight for a neighbour, although any detailed description of them is absent. The reasons for it to exist and contain the specified opposing servitudes are disputable since the rights they cover originate from the property law. A question arises: why these servitudes are needed if the rights they cover are already provided by the property law? The answer to this was sought by many scientists. Some believed that the removal of the servitude altius non tollettdi should be understood not as absolution of an estate from a servitude but as establishment of a new positive servitude altius tollendi. They consider that the servitude altius non tollendi was including some part of it, so its return was attainment of a positive right. However, this theory contradicts one of the main principles of the established servitudes – even though they burden the right of property, they do not take away any of its parts.

Another point of view determines these servitudes as a special method of terminating existing servitudes (Radin, 2015). Although, it is difficult to agree with this since the servitude is not terminated by establishing an opposing servitude. Restoring the previous position cannot be called a servitude (Pirzadeh, 2016).

The most prevalent position is the following. There exist common law and rules, which obliged owners with specific limitations taking into account public interests or neighbour's interests, including the right to build houses up to a certain norm. Then by establishing opposing rules in an agreement, the designated laws could be evaded, Altius tollendi, officiendi luminibus, stillicidii non avertendi are such opposing rules. They are actually servitudes, and if they are terminated the lawful position will be restored. Although such position is hardly acceptable since the law contains the principle ius publicum privatorum pactis mutari non potest – public rights cannot be changed by private legal agreements.

The most optimal explanation of sources having "opposing servitudes" seems to be the idea that establishing the servitude altius tollendi had a goal of partial application of already an existing servitude altius non tollendi. The specified explanation does not remove the double meaning regarding servitudes officiendi luminibus and stillicidii non avertendi. On one hand, it is possible to identify these two servitudes since changes in the way of exercising rights are possible if they do not violate neighbours' interests (Gibb, 1996).

Thus, predial servitudes existed between estates directly bordering each other or are placed close to each other under the condition that the servient estate using their permanent quality can benefit the dominant estate. Predial servitudes are divided into rural and urban according to the condition of the dominant estate (Esplugues, 2015).

Rural predial servitudes can be divided into three groups: road, water and economic servitudes. Urban predial servitudes can be divided by buildings, sunlight, window view and liquid disposal.

The servitude – is a real right to someone else's property. Although legislators do not provide a definition for real rights, the literature contains a number of their attributes. First, they are absolute rights. This means that the rightsholder's right over the property of another corresponds with responsibilities of the surrounding parties. Second, real rights are exclusive, meaning if one party has the right to own and use the property of another within specific capacity no one else cannot have the same rights within the same boundaries and capacity. Third, real rights are characterised by "resale rights", meaning a right is connected to a property and does not exist without it, the change of ownership does not terminate real rights of another party. Fourth, real rights are secured within specific boundaries, defined by the act that established them (Abramov, 2016). Fifth, real rights have an absolute protection, including from the owner of the property. In their works, scientists have identified other, besides listed, attributes of

real rights, such as them originating from property rights, the advantage of real rights over responsibilities, securing real rights with property rights (Janusz-Pawletta, 2015).

Servitudes are only possible regarding someone's items. One's own items cannot be the subject of a servitude. It is reasonable since legal power of the owner covers rights that constitute the contents of a servitude.

Servitudes can exist only regarding items. An item is a physical object, regarding which civil rights and responsibilities can emerge. An object of a servitude can be movable and immovable, individually specified property. However, this statement does not fully correspond with the branch of civil legislation. The list of items that can be objects of a servitude is limited in the legislation. The right to use the property of another can be established regarding an estate, other natural resources or other immovable property (building, structure etc). Other items that could be an object of a servitude are not mentioned. Thus, the object of a servitude can only be real property. It is worth noting that the project of civil legislation within the Eastern Bloc contains provisions regarding establishment of servitudes for movable property, though during adoption of codes in the 90s these provisions were removed from the texts. The only opportunity to establish personal servitude over movable property is obtained by establishing such real right in a testamentary gift since an object of a testamentary gift can be movable items

Servitudes are granted in order to satisfy the needs of other parties, which cannot be satisfied in another way. The main criterion for determining the possibility of establishing a servitude is the needs for it of an estate or a specific person. While such needs cannot be satisfied in other ways. The land servitude is determined in the least burdensome for an owner of an estate way This provision should be expanded to personal servitudes, and consequently appropriate changes should be introduced into the branch of civil legislation.

Servitudes are unalienable. They are established for a specific estate or person. This conclusion follows from the legislative provision about the inability to alienate a servitude. Therefore, it is impossible to alienate a servitude from this person or estate and transfer it to another person or estate.

Establishing a servitude does not deprive a property's owner of a right to ownership, acquisition and disposition of this property. However, the actual realisation of owner's legal power is limited by establishing a servitude. Thereby, the owner cannot secure their rights if they prevent the dominant tenant from realising their servitude rights.

For personal servitudes the type must be based on the specific acts, particularly an agreement, law, will or a court decision. Additionally, the land servitude is subject to state registration under procedures established for state registration of rights to real property. That is why land servitude will be effective after its registrations.

The content of a servitude involves receiving the right to use someone's property. The capacity of use is determined by an act that establishes a servitude. Servitude rights are stronger than property rights: first, the needs of a dominant tenant are satisfied, then – the needs of an owner.

Servitudes can be established for a certain period or an uncertain one. Whereas, servitudes do not involve single-use or temporary actions.

In the current legislation, the most important attributes of a servitude that exist in land law are not formalised – a servitude cannot involve performing an action. This means that the owner of a servient item does not have to perform any actions benefiting a dominant tenant. The behaviour of a servient item's owner is defined as granting a permission for something when they have to endure other's actions in relation to their property (for example, the right of passage across an estate); and also as performing specific actions when the owner of a servient item does not have to perform any actions that would limit the rights of a dominant tenant. These attributes of a servitude should be formalised in the civil legislation (Yerkinbaeva, 2016; Yerkinbaeva, 2008; Yerkinbaeva and Bekturganov, 2013; Yerkinbaeva and Nurmukhankyzy, 2014).

The legislations do not mention about such attribute as indivisibility. This means that in case a servient item was divided, the servitude will continue to exist in the same way as before its division, and it also means that a servitude cannot be partially prohibited or partially forfeited, only in its entirety. Formalising this attribute will remove any possible contradictions in the case of division of a servient item or existence of several dominant tenants within one servitude relation.

Legislations of former USSR and the Eastern Bloc countries know two main types of servitudes – land and personal. Meanwhile, the forest legislation of former USSR and the Eastern Bloc countries states that forest servitudes are a right

to a limited fee-paying and non-fee paying use of someone's forest area. Forest servitudes include provisions of civil and land legislations that do not contradict the requirements of the forest legislation of former USSR and the Eastern Bloc countries. Therefore, forest servitudes – are just land servitudes regarding a forest area.

While public servitudes are established by authorities through their decision to burden the available estate with a servitude, private servitudes are established based on the contract, and therefore all general provisions about the contract are also applicable to them (chapters 22-24 of the Civil Code of the Republic of Kazakhstan) (Land Code of the Republic of Kazakhstan...).

In particular, the procedure of entering such contract expects adherence to the pre-trial procedure – offering a party to enter a contract, and only after being refused – filing a court action.

It should be taken into account that the contract about the limited targeted use of someone's estate can be imposed with provisions of article 399 of the Civil code of the Republic of Kazakhstan regulating cases where it is obligatory to conclude a contract. This conclusion follows from the content of article 67 of the Land Code, according to which, in cases outlined in the Code or other legislative acts, an owner or a land user has to provide interested real and legal individuals the right for the limited targeted use of an estate, over which they have an ownership or a land use right.

The obligation to provide such right should not be understood as gratuitous and perpetual. A servitude (including public, established over a state-owned land) is granted for payment and is temporal.

Essential contractual conditions of establishing a private servitude are:

- the area of someone's estate granted for the limited targeted use;
- the goal, for which a servitude is granted;
- payment;

The Law of the Republic of Kazakhstan on the Registration of Real Estate Rights and Transactions distinguishes these two notions: "personal servitude" and "servitude benefiting the dominant estate or other real property".

The servitude benefiting the dominant estate or other real property is defined as a servitude established for the benefit of an owner (another rightsholder) of other, usually neighbouring immovable property to satisfy their needs, including passage, pipe placing or other goals (article 1 paragraph 29 of the Law) (Yerkinbaeva, 2015b).

Personal servitude is defined as a servitude benefiting a specific person, not associated with that person's ownership of a real property (article 1 paragraph 4 of the Law).

Article 39 paragraph 3 of the Land Code of the Republic of Kazakhstan envisages that the personal servitude over the neighbouring or other estate is established by the contract with private property rightsholders or land users, while article 67 paragraph 3 envisages that if a normative legal act outlines the establishment of a servitude based on the contract of an interested person with an owner or a land user, a refusal of the latter to enter into such contract or contractual conditions proposed by an owner of land user that can be contested in court by an interested person through filing a claim against an owner or land user.

Article 69 paragraph 5 of the Land Code envisages that the owner or land user of an estate burdened with private servitude has a right to demand commensurable payment from individuals in whose interests this servitude was established unless legislative acts of the Republic of Kazakhstan provide otherwise. It must be assumed that it refers not single but periodic payments.

Additionally, article 69 paragraph 3 of the Code establishes that a limited use rightsholder has to compensate a private owner or land user all damages tied to the servitude.

Finally, the Land Code introduces quite an interesting rule for some cases of public servitudes: when an irresolvable opposition between a public servitude and private law, the legislator judging from the priority of the public interest sides with these interest to the detriment of private owner's interests.

It should be noted that the rules of charging fees for public servitudes are drastically different to rules of charging for private servitudes. Article 69 paragraph 7 of the Land Code of the Republic of Kazakhstan states that the owner or land user of an estate burdened with public servitude has a right to demand commensurable payment from state authorities who established this public servitude only in that case when the establishment of a servitude result in significant complications in the use of an estate. How significant these complications are should be determined by courts.

In particular, article 69 paragraph 7 of the Code states that in cases when establishing public servitude will result in inability to use the estate, the owner of the estate or the land user have a right to demand either seizure, including by way of repurchase, of this estate from them with com-

pensations for damages in full by the authorities who established this servitude at the moment of termination of the property right or the land use, or provision of an equivalent estate or another estate plus its price difference.

In accordance with article 67 paragraphs 1, 2 of the Land Code, in cases outlined by the Code or other legislative acts of the Republic of Kazakhstan, the owner or land user has to provide interested real and legal individuals with the right for the limited targeted use of an estate, for which the former has an ownership right or a land use.

According to article 69 paragraphs 1, 2 of the Code, a private owner or land user have the right to demand the right for the limited targeted use (private servitude) from a rightsholder or land user over a neighbouring estate, and if necessary – over another estate.

The right for the limited targeted use of someone's estate (servitude) can emerge on the basis of the court decision. While the court considers only the question about establishing a servitude while according to article 69 paragraph 2 of the Code, the procedure of the private servitude is resolved between parties by concluding a contract.

According to article 69 paragraph 3, 5 of the Code, a limited use rightsholder of an estate has to compensate a private owner or land user all damages in connection to this servitude.

The owner or land user of an estate burdened with a servitude have the right to demand commensurable payment from parties in whose interest this servitude was established unless legislative acts of the Republic of Kazakhstan provide otherwise.

Conclusion

Simultaneous regulation of land servitudes in accordance with land and civil law caused a number of disagreements in such regulation. In our opinion, land servitudes have to be regulated by a single branch of law but not by two simultaneously. This would eliminate all existing disagreements and make it impossible for practical problems connected with the correlation between norms and their application to exist. There is a need for regulations of land servitudes with land law, while civil law can have an appendant application. We think that all norms concerning servitudes should be contained in one normative act. This will ensure complex and complete regulation of servitudes, eliminate disagreements and collisions, and will remove the need to adjust corresponding provisions with each other when implementing changes and additions. Since initially servitudes appeared within civil law and they cover not only land but also personal servitudes, it would be appropriate to regulate servitude relations in the civil legislation. We justify the need for legal regulation of servitudes by means of land law based on the principles of legal regulation of lands (responsibilities to use lands sensibly and protect them, the priority of environmental safety demands, combination of land use as a natural resource, territorial basis, part of the biosphere that is a source and the and the main condition for human activity), the principle of differentiation of legal regulation, goals of legal regulation – increase in effective use of lands, regulation of relations concerning realisation of servitude rights to estates guided by a complex approach that secures land rights through establishment of certain imperatives and specific responsibilities of subjects, the importance of lands. It is also worth noting that norms of land servitudes in the land legislation almost copy analogous provisions in the civil legislation, which also defines general provisions about classifying servitudes as real rights to someone's property, their protection etc. Because civil and land laws are connected with each other, it is a very long dispute concerning what branch is more important and has to regulate servitude relations. But it is not important for the effective legal regulation which branch of law contains the necessary norms. Therefore, either norms on land servitude should be excluded from the land legislation and regulation of servitude relations should be ensured only by the civil legislation, or general provisions about servitude in the civil legislation should be introduced, while land servitudes will purely focus on regulating land relations.

References

Abramov R.A. Regional economic policy based on industrial sector clustering in the context of sustainable development. Research Journal of Pharmaceutical, Biological and Chemical Sciences. 2016; (2), 2100-2106.

Alimaev II, Jr RHB. Ideology, Land Tenure and Livestock Mobility in Kazakhstan. In: Galvin KA, Reid RS, Jr RHB, Hobbs NT, eds. Fragmentation in Semi-Arid and Arid Landscapes: Consequences for Human and Natural Systems. Dordrecht: Springer Netherlands; 2008:151-178. doi:10.1007/978-1-4020-4906-4_7.

Barriere O. Human Relationship to the Land from a Legal Perspective as a Human and Environmental Security Challenge. In: Behnassi M, McGlade K, eds. Environmental Change and Human Security in Africa and the Middle East. Cham: Springer International Publishing; 2017:259-304. doi:10.1007/978-3-319-45648-5_14.

Bazelet CS, Samways MJ. Relative importance of management vs. design for implementation of large-scale ecological networks. Landsc Ecol. 2011;26(3):341-353. doi:10.1007/s10980-010-9557-z.

Beckwith R-M. Institutional Peonage and Involuntary Servitude in Segregated ``Employment'' Settings. In: Disability Servitude: From Peonage to Poverty. New York: Palgrave Macmillan US; 2016:113-140. doi:10.1057/9781137540317_7.

Davy B. Human Dignity and Property in Land---A Human Rights Approach. In: Pellissery S, Davy B, Jacobs HM, eds. Land Policies in India: Promises, Practices and Challenges. Singapore: Springer Singapore; 2017:1-33. doi:10.1007/978-981-10-4208-9_1.

De Angelino ADAK. Labour Legislation. In: Colonial Policy: Volume II The Dutch East Indies. Dordrecht: Springer Netherlands; 1931:492-610. doi:10.1007/978-94-011-8904-0_7.

Engerman SL. Servants to slaves to servants: contract labour and European expansion. In: Emmer PC, ed. Colonialism and Migration; Indentured Labour Before and After Slavery. Dordrecht: Springer Netherlands; 1986:263-294. doi:10.1007/978-94-009-4354-4_12.

Yergobek Sh.K., Saltanat K. Atakhanova, Kamilya Zh. Altayeva, Lyazzat B. Nyssanbekova, Zhuldyz B. Umbetbayeva Ecological Interstate Systems as an Object of Legal Research, Journal of Environmental Accounting and Management 6(1) (2018) 47-58

Yerkinbaeva L.K. Legal and Economic Problems of the Governmental Regulation of Renewable Energy Sources Usage and Development in the Republic of Kazakhstan, Journal of Advanced Research in Law and Economics, Volume VII, Issue 6(20), Fall 2016

Yerkinbaeva L.K. Legal problems of state regulation of the production and the use of alternative energy in the Republic of Kazakhstan, Current issues of economy, Ukraine, 9-(171), 2015 (Scopus) ISSN 1993-6788

Yerkinbaeva L.K. (2008) Some Remarks about the Subject of Agrarian Law of the Republic of Kazakhstan, Kiel Journal European Law. Jahrgang, C. 29-33

Yerkinbaeva L.K., A.E. Bekturganov. Legal problems of modern agricultural policy of the Republic of Kazakhstan. Procedia-Social and Behavioral Journal, 81, 2013, pp. 514-519.

Yerkinbaeva L.K., Nurmukhankyzy D. Investments in Environmental Protection under Conditions of A «Green Economy" (Comparative Legal Analysis on the Example of Kazakhstan)» Proceedings of 3rd European Business Research Conference. 4 – 5 September 2014. Italy. ISBN: 978-1-922069-59-7

Esplugues C. General Report: New Developments in Civil and Commercial Mediation – Global Comparative Perspectives. In: Esplugues C, Marquis L, eds. New Developments in Civil and Commercial Mediation: Global Comparative Perspectives. Cham: Springer International Publishing; 2015:1-88. doi:10.1007/978-3-319-18135-6_1.

Gibb JG. Wealth, Property, Land, and Labor. In: The Archaeology of Wealth: Consumer Behavior in English America. Boston, MA: Springer US; 1996:47-73. doi:10.1007/978-1-4613-0345-9_4.

Glassner MI. Development of International Law with Respect to Land-Locked States. In: Access to the Sea for Developing Land-Locked States. Dordrecht: Springer Netherlands; 1970:16-38. doi:10.1007/978-94-015-1176-6_2.

Harvey J. A Colonial Settler Nation and A Slaveholding One. In: Whiteness and Morality: Pursuing Racial Justice through Reparations and Sovereignty. New York: Palgrave Macmillan US; 2007:51-94. doi:10.1057/9780230604940_3.

Himka J-P. Serfdom and Servitudes. In: Galician Villagers and the Ukrainian National Movement in the Nineteenth Century. London: Palgrave Macmillan UK; 1988:1-58. doi:10.1007/978-1-349-19386-8_1.

Hinnant CH. Desire, Emulation and the Dialectic of Domination and Servitude in Irene. In: Samuel Johnson: An Analysis. London: Palgrave Macmillan UK; 1988:27-46. doi:10.1007/978-1-349-19208-3_3.

Iroanya RO. Overview of Human Trafficking as a Global Phenomenon. In: Human Trafficking and Security in Southern Africa: The South African and Mozambican Experience. Cham: Springer International Publishing; 2018:67-117. doi:10.1007/978-3-319-71988-7_3.

Janusz-Pawletta B. Interrelations Between Territorial Delimitation and the Regime of the Use of the Caspian Sea. In: The Legal Status of the Caspian Sea: Current Challenges and Prospects for Future Development. Berlin, Heidelberg: Springer Berlin Heidelberg; 2015:51-73. doi:10.1007/978-3-662-44730-7_5.

Karagussov F. The Legal Framework for Mediation in Kazakhstan: Current State, Expectations of Public Recognition and Perspectives for Development. In: Esplugues C, Marquis L, eds. New Developments in Civil and Commercial Mediation: Global Comparative Perspectives. Cham: Springer International Publishing; 2015:393-431. doi:10.1007/978-3-319-18135-6_13.

Mousourakis G. The Private Law. In: Roman Law and the Origins of the Civil Law Tradition. Cham: Springer International Publishing; 2015:95-157. doi:10.1007/978-3-319-12268-7_3.

Nijeholt JFL. Juridical Position of the Airspace. In: Air Sovereignty. Dordrecht: Springer Netherlands; 1910:9-51. doi:10.1007/978-94-017-6329-5_2.

Pirzadeh A. Qajar Period and the Constitutional Revolution. In: Iran Revisited: Exploring the Historical Roots of Culture, Economics, and Society. Cham: Springer International Publishing; 2016:137-184. doi:10.1007/978-3-319-30485-4_6.

Radin M. Persons I: Fundamental Concepts of Roman Law. In: Broekman JM, Catá Backer L, eds. Signs In Law – A Source Book: The Semiotics of Law in Legal Education III. Cham: Springer International Publishing; 2015:165-181. doi:10.1007/978-3-319-09837-1_21.

Stanziani A. Utilitarianism and the Abolition of Slavery in India. In: Labor on the Fringes of Empire: Voice, Exit and the Law. Cham: Springer International Publishing; 2018:67-136. doi:10.1007/978-3-319-70392-3_3.

Stasi A. Property Law. In: General Principles of Thai Private Law. Singapore: Springer Singapore; 2016:183-219. doi:10.1007/978-981-10-2191-6_4.

Strauss MJ. Nations Outside Their Borders: How Extraterritorial Concessions Reinforce Sovereignty. In: Szary A-LA, Giraut F, eds. Borderities and the Politics of Contemporary Mobile Borders. London: Palgrave Macmillan UK; 2015:53-67. doi:10.1057/9781137468857_3.

Zhang J. Advocating Impartiality, Emphasizing Criminal Law and Neglecting Civil Law. In: The Tradition and Modern Transition of Chinese Law. Berlin, Heidelberg: Springer Berlin Heidelberg; 2014:85-127. doi:10.1007/978-3-642-23266-4_4.

Land Code of the Republic of Kazakhstan. Available at: https://online.zakon.kz/document/?doc_id=1040583