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**PROTECTION OF OWNERSHIP AND LEGAL REFORM IN RUSSIA:
BETWEEN LEGISLATIVE DECLARATIONS AND PRACTICALLY
RELEVANT NORMATIVE IMPLICATIONS**

Introduction: defining central concerns

The study of the development of property relations in the society under transition rests in the analysis of civil legislation. The main criterion of an adequacy of the new inspirations and correspondent efforts of the reformers can be seen in the emergence of the civilized individualism as a central value of the civil society. The level of the achievements is reflected by the process of individualization of property in the legislative construction of the institution. The specificity of the legal reform in the transition period consists in the fact that the law does not only fixes the results of the normative development, but initialize them by offering to the reform-oriented elites new perspectives. The language of law, thus, reflects the achieved level of civilized discourse and its system of notions detect the maximum of aspirations of the reformers. However, the reverse way of the change which in this conditions rarely represents a reaction to the demands of the society, but mostly is provoked by the elites makes the legislation testify only about one side of the legal developments. The observer should verify the legislative innovations using the data of the current judicial practice, as the competitive procedure in the court ensure an adequate coordination of the opposite interests. The discrepancies between the legislative norms and judicial practice allow to detect a relevant base for generalizations.

Legal defense of ownership of property in modern Russia is effectuated not only by private law means, but includes constitutional, administrative, criminal law norms and institutions¹. Thus, art.2,1 of the Criminal Code (in the last redaction) places the defense of ownership to a second position, immediately after the defense of human rights and liberties, even before the defense of public order and societal security, devoting to it special chapter XXI “Crimes against property” (artt.158 ff). The complex perception of property in its legal dimension needs adequate scientific qualification. Such analysis should reveal the very existence of private ownership as specific juridical institution through the study of correspondent civil law means of defense.

In Russian the work “ownership” (“*собственность*”) is a relatively new term. It appears not earlier than in 18th century (from German “*Eigentum*”, which is in its turn taken from Latin “*proprietas*”, from “*proprius*” - “proper”, “own”) and is frequently and deliberately substituted by the term “possession” (“*владение*”) which is usual for expression of subjective aspect of relationship (subjective right). For expression of the objective aspect (object of right) the term “property” (“*имущество*”) is the same frequent. The term “ownership” occurs rarely in the sources of law during the 19th century and still lacks proper semantics, as there were no social and legal reality to nominate and it has not appeared today. There were no need in a special term

¹ Vitrianski V.V., Sukhanov E.A. Defense of ownership. Moscow, 1993 (In Russian: Витрянский В.В., Суханов Е.А. Защита собственности)

to sign legal and free disposal of property by individuals and their associations acting in a quality of autonomous subjects of property relations.

A significant role in the corruption of the meaning of this term in the Soviet period played the concept of state socialist ownership. In the terms of this concept the notion of ownership acquired the improper public meaning that falsified the semantics of the word through the idea of control alien to its scientifically relevant meaning. New connotations, such as “inalienable”, “put under the state control”, “centrally planned”, “protected by the force of the Soviet state and law”, have finally put in the place of private law cognitive structure the idea of property which is excluded from free commerce. The notion of “personal property” which should have compensate newly formed idea of public (state) property, in fact, indicated at the system of state governed distribution of good and services and did not contribute to the survival of private ownership even in theory.

This semantic and ideological process led to the identification of the terms “ownership” and “right of ownership” and special efforts from the part of most advanced scholarship was needed to specify two different notions. If “right of ownership” now is applied to the private relationship comprising the most full and unlimited right to thing (*in rem*) in its both subjective (as a right) and objective (as a legal institution) sense, the term “ownership” remains very indefinite in significance and equals “property” as an object of ownership or other right to thing or even property rights in general.

The Criminal Code of the Russian Federation apparently follows this terminological usage, saying in art.159 (1), for instance, that cheating is “an acquisition of right over somebody else’s property by fraud or abuse of confidence”. The set-phrase “right over property” which is analogous to the term “ownership” in fact substitutes the term “property” (Ch.21 of the Criminal Code) and points at all possible rights in rem and even to the non-material values, like intellectual property.

The revealed difficulties in interpretation of the term “ownership” are relevant for understanding of the declarations stating “equality of all forms of ownership” present both in the Constitution (art.8,2) and in the Civil Code of the Russian Federation (art.212,4): “Private, State, municipal, and other forms of ownership shall be equally recognized and defended in the Russian Federation”. The category of “form of ownership” is unknown to other legal systems and represents a legacy of the Soviet past. The declarations under study which were made with the purpose to minimize legal effect of such legacy, in fact, facilitate the perception of this category by the present-day legislation, thus, granting a new life to the useless and misleading relic. The norm which proclaims equal recognition and defense of all forms of ownership mentions besides private, state and municipal forms of ownership also some “other form of ownership”. This pleonasm seems to justify the categories of “collective ownership”, “group ownership”, “mixed ownership” advanced by the authoritative body of the doctrine². This new concepts were born with the intention to

² Egorov N.D. Civil law regulation of the social relations: unity and differentiation. Leningrad, 1988 (In Russian: Егоров Н.Д. Гражданско-правовое регулирование социальных отношений: единство и различия); Mosolin V.P. Law of ownership in Russian Federation in the period of transition to the market economy. Moscow, 1992 (In Russian: Мозолин В.П. Право собственности в Российской Федерации в

legitimize the property of workers' unions, of social associations, of rural communities, and so on, ascribing to them a nature of legal actors different from normal legal persons³. Such multiplication of legally recognized actors together with the resulting variety of regimes of belonging of property was blamed to be scientifically irrelevant and making the legal reform more difficult⁴. In fact, these theories deny the private nature of ownership and reflect the interests of those social groups which are still endeavour to oppress individual freedom and liberty and aspire a revival of ranged society.

The same qualification merit the very concept of "form of ownership": in a market economy there is no reason why the state or municipal formations should own property in a way which differs from other actors in property relations⁵. The fact that private ownership occupies in this list the first place is eloquent of the intention of the legislator to emphasize its significance and principle role which it is to play in the legal reform. However, the very presence in one and the same list of public entities together with private persons as relevant actors in property relations reveals just opposite ideology which recognizes as possible and normal the acting of public formation in the sphere of commerce. If other "forms of ownership" are existent, then private ownership loses the significance of the unique legal way of formalizing the individual's interest to possess property, to ensure the autonomy of the individual volition, and to create the sphere of individual freedom, necessary for realization of personality⁶.

The libertarian approach to the property relations is apparently denied by the very fact, that a simple opposition: "private - public" is destroyed by the presence of the category of "municipal ownership". The ownership is not elevated to the rank of the constitutionally protected values, but deprived of its libertarian significance. It is reduced to the role of indicator of factual distribution of property among social and political actors independently from juridical nature of the underlying relations. When ownership as private relation comes to lose its determined subject, it results in a factual possession granted to citizens. From the theoretical point of view, the concept of ownership implies its private law nature, so that only private person can act as its subject and every social actor can own property only as private person. That means that the state, its parts and its agencies can be present in the property relations only as private persons according to the norms of private law, equal to all its subjects. Such

период перехода к рыночной экономике); Andreev V.K. Law of ownership in Russia. Moscow, 1993 (In Russian: Андреев В.К. Право собственности в России)

³ Braginski M.I. Juridical persons (legislation models). - In: Civil legislation in Russian Federation: present state, problems, and perspectives. Moscow, 1993 (In Russian: Брагинский М.И. Юридические лица (законодательные модели). - Гражданское законодательство в Российской Федерации: современное состояние, проблемы и перспективы), 17 ff.

⁴ Sukhanov E.A. The development of the institution of real rights during the transition to the market economy. - In: Civil law of Russia during the transition to the market economy. Moscow, 1995 (In Russian: Суханов Е.А. Развитие института вещных прав при переходе к рынку. - Гражданское право России при переходе к рынку), 76.

⁵ Butler W.E.. Russian Law. Oxford, 1999, 346.

⁶ Nersessiants V.S. Philosophy of Law. Moscow, 1997 (In Russian: Нерсисянц В.С. Философия права), 28.

construction of ownership makes it always private one and is really apt to protect and to recognize the social significance of individual. The equality of ownership should have been expressed in the Civil Code in unique construction of private ownership and the libertarian equity of individuals should have been, thus, fixed in the civil legislation. Today the declaration of equal recognition and defense of all “forms of ownership” made both in the Constitution and in the Civil Code reflects that unique construction of ownership adequate to the civilian nature of property relations has not been created by the legal system and the notion of private law remains underdeveloped in the legal discourse. It reveals as well the fact that primacy of human rights and liberties remains a void phrase and the individual freedom as a central social value and form of social relations is still absent even in the legal texts.

From the point of view of the list of “subjects of ownership”⁷ present in concise form in the RF Constitution (art.8,2) and specified in the Civil Code (artt.212-215), the citizens and their associations (private legal persons) are the subjects of only one of legally recognized types of ownership, i.e. “the right of private ownership” (art.213), like the state is the subject of “the right of state ownership” (art.214), and the municipal formations are the subjects of “the right of municipal ownership” (art.215). That is equal to say that the citizens themselves are specific legal persons permitted by the law in addition to the existing types of public persons. Each type of legal persons is characterized by a specific property capacity it is entitled to. These types are “forms of ownership” envisages at the constitutional level. The multiplicity of these artificially created regimes of belonging of property determines the multiplicity of types of persons with their specific legal capacity. The legally established differences between them are only emphasized by the declarations of equality present in the legal texts. In such normative system the private persons and their specific title of possession of property are far from exercising the primacy role formally indicated by the first place which private “form of ownership” occupies in the list. The observer is facing an hierarchy of specific titles and actors qualified by these titles, and one should be naive not to detect the legitimized privilege of the state and its regional bodies. The specification of different forms of ownership made in the Civil Code (artt.212 ff), thus, has not a descriptive significance, but implies essential differentiation of three levels of actors within the sphere of property relations. Otherwise, the Civil Code, in the articles devoted to ownership, would mention an owner in general, and treat the specificity of participation of the state and other public entities in the private relations in the general part of the Code⁸.

The Civil Code, for instance, devotes a special article 217 “Privatization of State and Municipal Property” which envisages the fact that to the privatization “should be applied provisions of the present Code regulating the acquisition and termination of the right of ownership, if the laws on privatization do not provide otherwise”, i.e. establish a civil law nature of the privatization. In fact, privatization is

⁷ The art. 212 of the Civil Code is entitled “Subjects of ownership”.

⁸ In fact, the Civil Code contains the special chapter V “Participation of the Russian Federation, subjects of the Russian Federation, and municipal formation in relations regulated by civil legislation” saying that the public entities should participate at the civil relations on equal terms with the citizens and private legal persons (art.124). However, art.125 envisages that the status of the state agencies acting within the private law sphere is defined by the special public acts, thus, emphasising privilege position of the public actors.

an act of turning over of “the state or municipal ownership” into the private one on the decision of correspondent public powers, that is a means of disposition of property which is proper to the actors which are not equal to the private persons. The public act introduces the property which was alien to the civil turnover into the sphere of private property relations creating, thus, a necessary base for further transactions regulated by civil law. The very presence of an article regarding privatization in the body of civil legislation means that the Civil Code treats the state and other public entities as subjects which are different from other participants to the civil relations among whom it knows only citizens and private legal persons. The State is apparently not regarded a subject of civil law and is not recognized an equal actor in the sphere of property relations. The State prefers to preserve its privileges and even to introduce them into relations with private persons.

The revealed fail of the libertarian principles as they are embodied in the current legislation is not only theoretically relevant, but it acquires practical implications in cases when public interest clashes with the private one within property relations. The equality in the defense of all the forms of ownership, proclaimed in the Civil Code (art.212,4) regards the private law means of protection and does not take into account all possible conflicts between the interests of different owners. The confusion of public and private aspects of the institution of ownership demonstrates in such conflicts all its negative implications leaving citizens and their associations as private owners without an adequate defense from the demand of public powers aimed at the compulsory seizure of property.

Constitutional Guaranties of Ownership

The Constitution of the Russian Federation (art.55, 3) proclaims that “nobody can be deprived of his property otherwise than according to the judicial decision”. This principle corresponds to the art.1 of the Protocol n.1 from the 20th of March 1952 to the European Convention on Protection of Rights and Basic Liberties. At the same time, the RF Constitution does not include the right of private ownership into the list of absolute human rights and liberties, which cannot be submitted to limitations “in a measure necessary for defense of the basis of the constitutional order, morality, health, rights and legal interests of other persons, for securing of the defense of the country and state security” (art.55, 3). Thus, the art.35 dedicated to the right of ownership is not mentioned among the articles that containing absolute rights and liberties, are not to be limited even in the state of emergency nor in any other case (art.56, 3). However, if the owner is deprived of his property according to the art.242 of the Civil Code (requisition: deprivation in the interests of society without judicial procedure) in the circumstances of extraordinary character (natural disasters, epidemics, epizootic etc.), then upon the termination of the circumstances under which the requisition was carried out, the owner is entitled to claim for the restitution of the property which has been preserved (art.242, 3). Moreover, in accordance with the principle advanced in the RF Constitution (art.35, 3): “The compulsory taking of property from its owner for the public needs can be effectuated only on the condition of just consideration”, the Civil Code (art.242, 1) demands that the value of requisitioned property should be paid to the owner in advance. It can be, thus, summarized that the current Russian legislation envisages to types of guarantees to the owner: the judicial procedure and compensation of losses (art.306 of the Civil Code).

The Civil Code (art.235, 2) specifies a *numerus clausus* (exhaustive list) of cases when the law envisages the possibility of compulsory taking of property from an owner:

- 1) levy of execution on property for the obligations of the owner (art.237)
- 2) alienation of property which by virtue of the law cannot belong to the given person (art.238)
- 3) alienation of immovables in tail of the deprivation of a land plot (art.239)
- 4) compulsory purchase of cultural values or domestic animals that are improperly maintained by the owner (artt.240, 241)
- 5) requisition (art.242)
- 6) confiscation (art.243)
- 7) alienation of property in cases envisaged by the art.252,4; 272,2; 282; 285; 293 of the Civil Code.

The final part of the art.235 specifies one more case of the compulsory alienation of property - transfer of property belonging to private persons to state ownership (nationalization) with the compensation for the value of this property and other eventual damages.

The cases enumerated in this list and the correspondent legislation owe separate analysis.

1) Art.237 envisages the taking of property through the levy of execution thereon on the basis of a court decision. The levy of execution is regulated by the Code of Civil Procedure (art.24) and the laws on execution procedure (entered in force on the 6th November 1997).

2) Art.238 demands that a person which owns property that cannot belong to him by virtue of law, should alienate it within one year from the moment of acquisition. In this case the alienation is to be effectuated by the owner himself. For example, a person who acquired a gun by inheritance and has no right to possess it according to the Law on Armament (art.13), should demand for a license to possess it and in the case of refusal in license - to alienate it (art. 238,3 of the Civil Code). If the owner does not effectuate alienation within the time limit imposed by the law, it is sold on the base of a court decision (on the claim of a state agency) with the restitution of money received to the former owner (art.238,2).

3) Art.239 envisages alienation of the immovable in tail of the deprivation of a land plot according to the artt.279-282 and 284-286 of the Civil Code. The cases should be brought to a court and the state agency claimant should prove that the use of the land plot for the purposes it is going to be alienated, is impossible without termination of the right of ownership of the private person who possesses the immovable situated in the land plot. The crux of the situation is that according to the art.271 of the Civil Code a person can own an immovable on the land plot which is owned by other person or by the state. The termination of the right of ownership on the land plot, thus, does not necessarily entails the termination of the right of ownership to the immovable situated in it. That is why the special regulation is needed.

4) Artt.240 and 241 envisage compulsory purchase of improperly maintained cultural values and domestic animals in case of their improper treatment. The purchase is effectuated by the state (art.240) on base of a court decision or by other person on his claim (art.241) with the compensation to the owner. The amount of compensation is determined by the parties or by the court.

5) Art.242 has been treated earlier.

6) Art.243 regard the confiscation - uncompensated disposition of property from the owner by decision of a court as a kind of penalty for committing a crime or other violation of law. The confiscation may be carried out by administrative decision, but such decision can be challenged in court (art.243,2).

Particularly, the confiscation is envisaged in the artt.169 and 179 which regulate transactions that are void because concluded for a purpose contrary to the principles of public order and morality or because concluded under the influence of fraud, coercion, threat, grave circumstances or as a result of ill-intentioned agreement of the representative of one party with the other party. In the first case, everything received by the parties (or due from one party to the other in compensation for what has been received) is recovered for the coffers of the Russian Federation. In the second case, only the property received by the victim from the other party and what is due to the victim in compensation of what was given to the other party is to be turned over to the coffers of the Russian Federation, while what the other party has received from the victim is to be returned to him or compensated in money.

7) Art. 252,4 envisages compulsory compensation of the value of share in common property what leads to the termination of the owner's right in the share.

Artt. 279 and 282 regulate purchase of the land plot for the public needs on the agreement with its owner or by a court decision. The state agency after taking decision on the purchase of a land plot is to file a petition to the court requesting sale.

Artt. 284 and 285 regulate the disposition of a land plot which is not being used in accordance with its purpose (for agricultural production or residential or other construction) or used improperly in violation of law. Art. 286 establishes the details of notification procedure to be undertaken by state agency on purpose of realization of the dispositions of the artt. 284 and 285. If the owner of a land plot does not agree with the decision of the administrative decision on disposition of his property, the state agency is to file a petition in a court requesting sale of the land plot.

Art. 293 establishes the procedure of termination of the right of ownership in the improperly maintained residential premise. If the owner of a dwelling premise systematically violates the rights and interests of neighbours or treats the dwelling improperly what leads to its destruction the agency of local self-government may warn the owner or to designate a commensurate time period for repair. If the owner continues after a warning to use the housing improperly or does not make the necessary repair, the court may at the suit of the local agency take a decision on sale of this dwelling at the public auction with payment to the owner of assets received from the sale deducing expenditures for execution of the judicial decision.

The conducted analysis allows the conclusion that the art.235 contributes to the defense of property in accordance with the guarantees established by the RF Constitution (art.35,3). At the same time, the civil legislation has own specificity which in some degree deteriorates said guarantees. The civil law implies equity of the persons participating at the relationship that is not true when the state or its agency acts as one of the parties. Thus, the cases when the property is recovered for the

coffers of the Russian Federation have explicit public character. In these cases even application to the court with petition from the part of the private owner, envisaged by the Civil Code, cannot ensure an adequate protection to him, for the relationship is regulated as having private nature and the acting person is regarded as private one, and not as a member of public organization (citizen in a public sense) like the constitutional norms imply. The determined separation of the private sphere, including ownership relationships treated as purely private ones, leaves an owner deprived from protection by the public order which is only effective against the state. The problem is that the state acts within the private law sphere as a public person which is by no means equal to other participants.

Thus, artt. 242 and 243 of the Civil Code regulating requisition and confiscation of property from its owner envisage the taking of ownership without a court decision: art.242 - in all the cases (“by decision of the state agencies”); art.243 - in the instances provided by law (“through an administrative procedure”). The owner is entitled to challenge the administrative decision in a court, but his civil claim results inadequate as the situation has public nature and the state agencies opposite to the owner are acting not as private persons, but as subjects of public law.

Similar situation is present in the land ownership: compulsory purchase of the land plot for public needs (art.279) and taking of the land plot which is used not in accordance with its purpose (art.284) or with violation of legislation (art.285) are conducted by a decision of the state agencies which may to file a petition in a court in case if the owner does not agree (art.286,3). The petition is, however, envisaged by land legislation, i.e. administrative order (art.286,1) and the dispute, thus, acquires public dimension and the defense given to the private owner by the Civil Code results inadequate. There no means of protection of private property envisaged in the norms of public law which might have given to an owner correspondent public rights (what is impossible for the legal persons even in theory). The private person - subject of the right of private ownership (art.213) - is unequal to the public agencies acting within the private sphere with all the powers proper to them.

In indirect way the lack of defense of the citizens and their property facing the public powers is stressed by the presence in the Civil Code of the art.16 “Compensation of losses caused by the state agencies and agencies of local self-government”⁹. This statute envisages the right of the private persons who have experienced property offences from the part of the public powers to suit them in a court, thus, establishing the private law liability of the state before the private persons. The problem, however, is that the state agencies are acting within the private law sphere as public, and not private persons.

The detected problem reveals itself in the most explicit way in the conflict of the taxation laws with the civil legislation. In such a conflict the constitution principles of protection of private property can be hardly realized due to the low level of protection and recognition of public status of an individual. The norms of the federal law “On the Federal Agencies of the Taxation Police” from the 24th of June 1993 (art.11,2-3) entitle the agencies of the taxation police to impose penalties from

⁹ Makovsky A.L. Civil law liability of the state for the acts of power. In: Civil Code of Russia. Problems. Theory. Practice. A Survey to the Memory of S.A.Khokhlov. Moscow, 1996 (In Russian: Маковский А.Л. Гражданская ответственность государства за акты власти. - Гражданский кодекс России. Проблемы. Теория. Практика. Сборник памяти С.А.Хохлова), 67-112.

the legal persons without a court decision in case of a delay in the payment of taxes. Such provision apparently violates the constitutional principle that nobody can be deprived of his property without a court decision (art.35,3).

However, the Constitutional Court of the Russian Federation in the decree from the 17th of December 1996 on the inspection of correspondence of taxation legislation to the RF Constitution points out that imposition of penalties does not contradict to the Constitution¹⁰, as “the taxation should be regarded as a legal withdrawal of a part of property deriving from the constitutional public duty” (argumentation part of the Decree, p.3 l.2). The Decree juxtaposes this constitutional public duty to the private law obligation saying: “Taxation relationships are based on the powerful domination of one party over the other... (p.3 l.1). Right of the taxation agency and taxation obligation of a person obliged to the taxes are derived not from an agreement, but from law. The public law character of the taxation and taxation sovereignty of the state determine legislative form of the taxation imposition, obligatory and compulsory character of its taking, and unilateral nature of the taxation obligations. The contention on purpose of the delay in the payment of taxes belongs to the realm of public law, and not to that of the private (p.3 l.4)”.

The Constitutional Court evidently ignores the fact that the domination of one party of the public relationship over the other detects the deprivation of rights of an owner that constitutes an explicit violation of the Constitution.

In development of these statements the Decree of the Constitutional Court goes on to detect the correlation between the forms of ownership and the types of the subjects of the right of ownership: “In virtue of the art.8,2 of the Constitution of the Russian Federation in the Russian Federation are recognized and equally protected private ownership, state ownership, municipal ownership and other forms of ownership. The legal persons, independently from the forms of ownership (private or public), is applied one and the same compulsory order of taking of the penalties, and in case of a protest - one and the same order of legal protection, that is through petition addressed to the taxation agencies or to a court. That is how the judicial protection of the right of ownership is guaranteed to the legal persons” (p.7 l.3).

It is to emphasize that equity of physical and legal persons is an axiom of law and its violation is in open contradiction with the principles of justice.

Finally, the Constitutional Court admits that compulsory order of taking of the penalties from physical persons would have signified an administrative interference of powers into the private law relations accompanied by violation of human rights and of the principle of equity: “The difference in the order of taking of the penalties from physical and legal persons is not due to the intention to establish unequal status of them in the sphere of taxation relations, but to the intention not to admit administrative interference into the rights of an individual under the condition that the issue in contention can be solved through judicial procedure. The compulsory taking of the penalties from physical persons would have represent an extension of limits proper to the taxation public law relations and interference into the civil law relations

¹⁰ Constitution of the Russian Federation. Problem comment. [V.A.Tchetvernin, ed.], Moscow, 1997 (In Russian: Конституция Российской Федерации. Проблемный комментарий. Под ред. Четвернина В.А.), 245

which are characterized by equality of the parties so that one party cannot act in a powerful way regarding the other party” (p.4 l.4)¹¹.

This remarkable recognition of the essence of the conflict shows the awareness of the Constitutional Court of the problem and stresses the fact the Court ignores the core problem of public vs. private relations regarding the defense of private property. The violation of the Constitution is represented by the very transfer of the property relations into the public sphere, as the Constitution guarantees the rights of an individual in a public law key. The interference of the taxation agencies and other state agencies in the sphere of private relations would have been successfully prevented by the private persons through the private law means, if the private sphere had acquired its proper nature and had been protected by the Constitution in its integrity.

Civil Law Defense of Ownership

The civil law means of protection of ownership should be regarded as proper forms of defense of ownership correspondent to the nature of the institution. The present-day Civil Code abrogated the previous privileges of the state regarding the civil law means of protection of ownership (like an exception of the state from the rules regarding expiry of the period of limitations) and established at least in this field the alleged equality of the subjects of property relations. Let us examine them in the order in which the Civil Code exposes them.

The main means of protection of the right of an owner consists in the claim to recover his thing from the possession of a third person, so called vindication. The Civil Code grants such a claim to an owner, though limited by the case of unlawful possession of the thing by a third person (art.301). Under the latter the possession exercised against the owner’s will is envisaged, i.e. the cases when the thing has been acquired from a person not entitled to the alienation of it or has been unlawfully taken from the owner (e.g. stolen). Thus, if the owner has given his thing to another person by his own will, for instance, on the accomplishment of an obligation, he cannot advance the vindication, but should pursue the counter-party with the contract claim. In this way the primacy of contract claim operates in all civil law systems.

The Code establishes another limitation on the right to recover the thing from possession of a third person. If the thing was acquired for a consideration from a person who had no right to alienate it and the purchaser was in good faith, the owner can vindicate it from the purchaser only in the case when the thing had been lost or stolen from the owner or from a person to whom it had been transferred by the owner for possession (art.302,1). If the thing, thus, was given by the owner to another person (e.g. in lease) and the possessor alienated it to a third person, the owner should prove that the thing had been acquired by the third person without consideration (gratuitously) or was not in good faith. The Civil Code establishes that the good faith

¹¹ It is to empacise that in other Decree, slightly prior to that under analysis (from the 24th of October 1996), explicitly recognized that the legal persons are nothing else but associations of citizens “created for the realization of their interests and in order to use their abilities and property for the purposes of commerce which allow to possess, to use, and dispose their property in the terms equal to phisical persons” (p.4 l.1).

of a person is presumed (art.10,3). To break the presumption, the owner should prove that the purchaser knew or could have known that the seller had no right to alienation (art.302,1). If the owner failed to vindicate the thing from the good faith purchaser, he has nothing left, but to recover the losses from the person to whom he had given the thing to (usually, his debtor). If there was no contract between the owner and the person to whom he had transferred the possession, there is subsidiary claim on the unjust enrichment (art.1103). The latter will be examined in its place.

Let us summarize the vindication rules. The owner is protected only in the case if he lost the thing against his will. The owner loses his property if he transferred the thing in possession to other person and the thing was subsequently alienated by consideration. The contractual claim against the first possessor remains the only means of protection of the interests of the deprived owner. The rule needs a special analysis. The limitation on the vindication imposed by the Civil Code (art.302) implies the transfer of possession by an owner leaves him without means of defense proper to the right of ownership. The owner is to recover the damages from the first possessor who has broken his confidence and to apply the contractual claim arisen from obligation. It is the old German principle “Hand muß Hand wahren”, embodied in the majority of modern civil codes (French, art.2279; German §1006, and others), which is operating here. The rule substitutes the claim in rem with the claim in personam and denies the main principle of the right to a thing, that it should follow the thing whenever it is present (so called *ius sequelae*). The corollary would mean that the owner by transfer of possession implicitly legitimizes the first possessor to alienation of the thing to a third person. Otherwise, there is no base to refuse the vindication. The vindication is permitted only in the cases when the possession of the thing is lost against the will of the owner (or of the first possessor), that attributes to this claim a penal character. The law of ownership, thus, is converted into the law of torts.

The positive side of the limitation of vindication might be seen (as it is usually made in the doctrine) in the defense of the good faith purchaser that reveals a coherent recognition of the needs of the stability of the commercial turnover¹². However, the analysis of the current judicial practice gives no support to such expectations. In a typical case regarding the privatization of residential premises the first private owner (A) who alienates it, violates the rights of other person (B) living in the same accommodation having limited juridical capacity. The good faith purchaser (C) alienates the accommodation to the next person (D) who shares his own residential with other owners (E and F) who profit from the transaction by acquiring the share of D left free and sell the whole accommodation to the realtor (G) and so on. When B or his tutor declares the first transaction void the court takes a decision to recover the accommodation from D, but the latter makes an appeal against the decision because it did not effect all the transactions which should have been recognized void as dependent from the first one. The same objection makes G. The Supreme Court, finally, recommends to the first court to reconsider the case and to apply the restitution to all the parties to all the transactions. The last recommendation being not very realistic, the first court prefers to recognize the privatization valid and, thus, to solve the multiple problem¹³. Apparently, we are facing the situation when the

¹² Sklovsky K.I. Ownership in the civil law. Moscow, 1999 (In Russian: Сковский К.И. Собственность в гражданском праве), 220 ff.

¹³ The Bulletin of the Supreme Court of the Russian Federation, 1998, n.4, 5-6.

interests of the turnover were respected and even preferred to the interests of the owner. But in fact, here none of the parties can be viewed as a good faith purchaser, as everyone was able to know the defects of the previous acquisitive transactions. On the other side, the interests of the disabled person (B) in final analysis resulted violated and it was not the limitation imposed on the vindication by the Civil Code that was responsible for that.

Very odd situation can appear when the property is alienated as a transfer of a participatory share in a charter capital of a newly founded company. The legal person that in the case is an acquirer from the person not entitled to alienation can successfully defend itself from the vindication of the owner. From one side, the good faith of the company should be determined according to the good faith of its founders, one of whom is not in good faith. From the other, the founder who has transferred a share in a charter capital is alienator, and not an acquirer, and the claim of the owner will not be successful even if he proves the conscious unlawful behavior of this founder. The only remedy he has is to recognize the transaction void. And it is this way of defense that is recommended by the Supreme Arbitration Court¹⁴. The recognition of the constitutive documents of a company invalid automatically entails the restitution of property in possession of the alienator so that the owner can vindicate his things.

Such practice, however, can result useless, if a physical person was acquirer in good faith. In case of the recognition of the transaction void the alienator can refuse to take the thing back and the acquirer will not insist on the restitution of the consideration. The vindication of the owner will still be excluded, as the good faith of purchaser is determined in the moment of transfer (art.302,1).

The limitations imposed on the vindication by the art.302 are coherent to the fact that every lawful possessor is entitled to the claim analogous to the vindication (art.305). The lawful possessor is defined by the Civil Code as a person who has received the thing on the grounds specified by law or contract. Such possessor is protected even against the owner. Since the typical case of the application of this means of defense is unconscious lost of possession when the thing has not been given by the owner to the other person on the ground of a contract, the lawful possessor results better protected than an owner. At the same time, as it has been pointed out, in the case when possession was lost by the owner against his will, no limitations on the vindication are imposed by the Code. The norms can be well coordinated under assumption that the vindication envisaged in the Civil Code is aimed primarily at the defense of possession. The analysis of this means of judicial protection confirms the conclusion drawn above that the private ownership is regarded by the current legislation mainly as a factual situation of belonging.

The Civil Code protects the owner possessing the thing by the so called negatory claim (art.304), that is the right to demand the elimination of any violations of his rights which are not connected with the loss of possession. This means of protection is valid against any third person who is not entitled to the right to the same thing. The very name of the claim (from the Latin “nego”, “I deny”) indicates that the claim consists in denial of a third person being entitled to any right (servitude) to the

¹⁴ Information Letter of the Supreme Arbitration Court of the Russian Federation from the 28th of April 1997, n.13.

same thing. The claim protects, thus, the immediate and exclusive character of the formal link of the owner to his thing.

However, the Civil Code apparently treats this means of defense as given against the committed tort, in the same line as has been detected for the nature and reason of the vindication. This becomes obvious in a situation when a third person acts in good faith: the violator may have not known that the thing belonged to another. The general rule implies that in such case the owner is still entitled to demand the termination of disturbance. The Civil Code envisages such situation regarding the land ownership (art.262,2): “If a land plot is not fenced off or its owner has not clearly designated by other means that entry to the plot without his authorization is prohibited, any person may pass through the area on condition that this does not cause damages or disturbance to the owner”.

In this case the person entered onto the area could not know that his behaviour violated the right of another and the law sees no grounds to demand him to give a necessary respect to the property. The condition not to cause damages or disturbance to the owner is addressed here to the owner and means that he is entitled to prohibit the entry only if the real damages are caused. The owner should have a right to forbid the passing through his plot in any case, be the damages or disturbances caused or not. He has an exclusive right to the thing and can apply it, independently from the reasons. The condition about damages and disturbances implies that the right of an owner is treated by the Code from the tort law point of view. The condition of awareness of a third person equates the grounds of imputation to the fault as it is normal regarding the principles of liability for causing harm. The deduction to be made is that the defense of property as such (non delictual) is not envisaged by the legislator. The conflict of interests in this case is regulated by giving an evident privilege to the societal ones, while the interests of owner are ignored.

The other side of the problem of defense of ownership violated without loss of possession is represented by the cases when the disturbance is caused by other owner acting in his own property (neighbour law). Two provisions of the Civil Code are eloquent on the purpose. The limitations on the activity of the owner directed to his own thing are imposed in general way by the wording of art.209,2: “The owner shall the right at his discretion to perform with his property any actions which... do not violate the rights and the legally protected interests of other persons...”. The neighbour law provision may be recovered from the norm regarding the use of land property (art.209,3): “The possession, use, and disposal of land... shall be effectuated by its owner unless this causes damage to the environment and violates the rights and legal interests of other persons”. The last provision actually reproduces the text of the RF Constitution (art.36,2) regarding the right of private ownership on the land and is aimed to defend any third person and the societal interest in a whole. The principle is coordinated with the general prohibition of the abuse of one’s right (art.10,2). The article imposes for the abuse of a right a sanction consisting in the refusal of judicial defense of the right (art.10,3), that facilitates the self-defense against the violator according to the art.14.

Any special regulation of the neighbour relations is absent in the civil legislation. The only provision regarding the violation of rights of the neighbours by systematical causing of disturbances is given by the article 293 of the Civil Code “Termination of the right of ownership in the improperly maintained residential premise” (mentioned above).

A considerable body of legislation regulates the obligation means of defense of ownership. Such obligations arise as consequence either of causing harm or of unjust enrichment.

The compensation of property damage (harm) is regulated by the norm of Chapter 59 of the Civil Code. The liability for causing harm rests on the general principle (so called general delict), that the damage caused unlawfully should be compensated. The principle criterion of liability of the delict consists in the fault of the violator, but in some cases the strict liability is applied, e.g. liability for damages caused by “activity creating increased danger for surrounding persons” (art.1079). The damages “should be compensated in full by the person who caused the harm” (art.1064,1)¹⁵, or by the legal person or citizen for the harm caused by their worker when performing labor duties (art.1068,1), or by the partnership for the harm caused by its partners (art.1068,2). The harm caused by the state agencies, or by private persons as a result of illegal actions of the state agencies, should be compensated at the expense of the treasury of the Russian Federation, or of the subject of the Russian Federation, or of the municipal formation (art.1069).

A particular situation is envisaged by the article 1065 according to which the activity creating the danger of causing harm in the future (so called *damnum infectum*) may be prohibited by a court decision. The damage in such case is not yet arisen (and, thus, cannot be compensated) and the right to a claim in principle belongs to every person, as there is no victim. This right reveals the control of the owner over general situation around his property and demonstrates the natural coincident of the societal and individual interests in the sphere of defense of ownership.

The liability for the unjust enrichment is not subordinate neither to the fault of the defendant, nor to the causation link (art.1102): the obligation of compensation arises from the objective fact of enrichment “at the expense of another person” against his will. The cases of the unjust enrichment regarding ownership offences can be detected from the article 1103 where are enumerated the demands which correlate with the claim on return of unjust enrichment. These are demand concerning recover of property by the owner from another’s unlawful possession and demand concerning “compensation of harm, including that caused by the behavior not in good faith by the person enriched”. In both cases the rules on unjust enrichment give to the owner a subsidiary means of defense when he has no other legal way to protect his interests. The general principle of law that everything that has been acquired illegally should be restituted is embodied in a universal means of protection (so called “general condition”¹⁶) which permits to the owner, in particular, to receive compensation for all his losses, caused by unlawful acts of the other persons.

¹⁵ Exception made for the case when the person caused harm acted in the interests of the other person (art.1067), and for the responsibility of the parents for the harm caused by minors under the age of fourteen (art.1073-1076).

¹⁶ The wording used by A.L.Makovsky, Head of the Working Group that elaborated the text of the Civil Code: Makovsky A.L. Obligations arising as consequence of unjust enrichment (Chapter 60). In: Civil Code of the Russian Federation. Part second. Text, comments, index. Moscow, 1996 (In Russian: Маковский А.Л. Обязательства вследствие неосновательного обогащения (глава 60). - Гражданский кодекс Российской Федерации. Часть вторая. Текст, комментарии, предметно-алфавитный указатель), 598.

Both remedies are applicable for defense of the owner deprived of possession when the vindication is excluded in virtue of the article 302 examined above. The purchaser cannot be considered in good faith after the suit advanced by the owner: the very limitation of vindication indicates that the owner preserves ownership and the awareness of purchaser thereof is a natural implication of the claim that hardly could be put into doubt. The norm regarding the unjust enrichment establishes that the defendant should return to the victim all revenues which he should have derived from property from the time he knew or should have known about the lack of justification to his enrichment (1107,1). The resulting competence of remedies reveals several inconsistencies of the system. The Civil Code entitles only good faith possessor to fruits and benefits. Then the good faith purchaser can be suited by the owner for fruits and (or) unjust enrichment immediately after the latter has lost his good faith. Such measure can even contribute to the restitution of the thing¹⁷. At the same time that means that the alleged legislative reason for the limitations imposed on the vindication cannot consist in facilitating the turnover of property, as in modern economy the main interest in property rest namely in the expected benefits.

The practically relevant implications of the normative assets of the new Russian Civil Code detected through the conducted analysis correspond to the revealed shortcomings of the level of recognition and protection of the private interest and the social value of a single individual present in the legal discourse of the new Russian democracy.

¹⁷ Sklovsky K.I. The Ownership, cit., 326 ff.