



Correlation of Private and Public Interests in Land Law: Continuation of the Optimal Combination Search

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Abstract

The article on the base of approach to history, analysis of Russia's laws and judicial practice explores a complicated legal and political issue about seeking an optimal balance between private and public interests in the sphere of land relations. The issue is most directly visible within the boundaries of the settlements, where the norms of the land, civil and town-planning law enter into a dynamic interaction. Its essence is in the necessity of securing the balance of a private owner interests (construction of a dwelling house or another real estate object) with the interests of the city's inhabitants (public interest), consisting in providing them with a comfortable and safe residence, work and rest.

No less difficulty the search of balance between private and public interests acquires in the event if private interests in use of a one natural resource overlap the public use of the other natural resource, located in that terrain. A classic example of this is the conflict of interests between private owners of land parcels and of an indeterminate number of citizens engaged in hunting within limits of such land parcels or on the adjacent territories. The article argues that this problem is equally intrinsic to the Russian Federation, countries of the former Socialist camp as well as the developed European countries.

The authors prove that in the sphere of land relations the law norms provide for a much wider range of public and private methods of legal regulation, than in the other branches of law. At the same time, an important

particularity of land relations is the variety of forms and methods of finding a compromise between private and public interests in use of land parcels, the impact on content of rights and duties of the land parcels' owners of town-planning requirements, specified in the building regulations (zoning) of the municipality.

Key words: Land parcel; Private interest; Public interest; Zoning; Town-planning legislation; Real estate property; Withdrawal for redemption

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History of the XX century witnesses that the states which tried to make emphasis on preferential protection of public interests to the prejudice of private ones, ceased to exist. In the case of the USSR nothing had helped, neither nuclear weapons availability nor the high prestige of the country which won over fascism nor tremendous reserves of natural resources sold for export. The triumph of public duties to the prejudice of private rights bumped off the Empire.

In order that the History would never have repeated twice it is a must to get lessons therewith. But where is that verge which segregates egoism of a separate citizen from interests of a society? And what is a criterion which allows in one case to waive interests of one person in favour of all, and in the other case to categorically ban such violation of private interests in the name of the common good?

To find answer to these questions let's apply to the history of international law. As a classical point to read off the beginning of the discussion concerning the correlation of private and public law are the roman's lawyer Ulpian words, who wrote that the *study of law* is subdivided into two positions: A public and a private law. The Public

Law refers to the regulations of the Roman state, and the Private one – to the favour of separate persons; there exists something useful in what refers to public relation and the useful in private relation hereby (Justinian's Digests, 2002, p.82-83)

We may note that in this case we spoke not about correlation of public and private branches of Law as such, but about necessity, at study the Law, to use different scientific approaches. And the same write contemporary representatives of the European science of law emphasizing that Ulpian considered rather the two different positions in his studies than one of the classifications of Law. The Private Law will always consider the good of separate persons as the top priority and in Public Law – the top priority of a collective (Garsia, 2005, p.148)

Confusion of the private and the public law, as V.A. Belov supposes, have occurred in the process of European reception of the Roman law subject of which was mainly the Private Law Norms. One of the most authoritative publications of the Roman law memorials undertaken in 1583 by Dionisii Gothofredus, was named *Corpus Juris Civilis*. This name *Code of Civil Law* turned out to be very successful and since that time had firmly secured for marking Justinian's sources of the Roman Private Law.

After that none neither the European nor the Russian pre-revolutionary civilistics would ever have tried to distinguish the private and the civil law (Civil Law: Actual problems of theory and practice, 2007, p.42-43).

Altogether, an objective look at contemporary law allows us to come to conclusion that the affirmation of some civilistic science representative that *Civil Law is Private Law* is barely persuasive. The Russian Federation Civil Law (hereinafter referred to as RF CL) as well as civil codes of many countries of the World contain constructions which do not, strictly saying the private ones, but may be characterized as public or private-public. Typical example of RF CL public legal constructions are public norms of State registration of titles for real estate or State registration of legal entities. Such striking example of reflection of mixed, private-public interests in the Civil Law is an Agreement of built up territories development.

The Russian XIX century civilist K.D. Kavelin wrote that the verge between private and public Law is rather conditional:

In reality the sphere of private interest does not differ much from that of social, public one; but if whenever such difference could ever happen, it would have not bring the results being expected, but on the contrary, would make private life and private juridical relations unbearable and impossible. (Kavelin, 2003, p.76).

It should be agreed with the afore-said approach concerning impossibility of harsh fencing off private from public origins.

The problem of correlation of private and public interests is more vividly seen not under the example of Civil Law which reflects all the same mainly to be exact

private interests, and in the sphere of the Land Law, which is being on the same cutting edge of conflict of private and public interests. So far as both private and public (dispositive and imperative) methods of legal land relations regulation have been laid in norms of the Law, we address to analysis of laid in them mechanism of the subjects of Law correlation hereof.

The Land Law includes, at most of all branches of the Russian Law both methods of public relations regulation. Privacy legal origins are very strong in it in what to ownership and land parcels rotation is concerned. In issues of State land management (cadastral control, monitoring, etc.) is clearly seen an imperative method of legal regulation. Private-public legal constructions of the Russian Federation Land Law (hereinafter referred to as RF LL) are represented by establishing limits for owners of land parcels rights, conditioned by ecological requirements or by different targets on providing national security. Typical example of the latter is the RF LL ban for foreign citizens and legal entities to buy into ownership the land parcels located either on frontier territories or agricultural lands; but in other respects their legal status is in effect identical to that of the Russians in what to purchase-and-sale and other transactions with land parcels is concerned hereof.

No less striking is being revealed the problem of correlation of private and public interests at land parcels provision under different types of private (commercial) or public building up. Such conflicts may be conditioned by unwillingness of citizens to see another shopping center at a traditional place of recreation centers (parks), or building of combustion plants in immediate proximity to their homes. The conflicts are also possible on the occasion of creation at the place of citizens' residence specially protected natural territories banning their economic activities.

Thereby, the most completely the dynamics of private and public interests at legal land relations regulation is revealed exactly on lands of populated areas, where the norms of both land and town-planning law enter into dynamic interaction. The essence of such interaction, little expressed with regard to other land categories, lies in the necessity of providing balance of interests both of the private owner (building of a residential house or any other real estate object) and interests of a town citizens (public interests), consisting in securing their comfortable and safe residence, work and recreation.

This kind of compromise is achieved by means of the town-planning zoning, the homeland of which is the USA, and modification of this legal construction we may come across in every other European country. Its essence lies in the fact that the municipal formation territory is subdivided on territorial zones (residential, industrial, agricultural, recreational, etc.), for each of which the town-planning regulation is being fixed – i.e the aggregate

of parameters and kinds of allowed use of a land parcel and building (reconstruction) of real estate objects.

Town-planning regulation envisages maximal and minimal parameters allowing a land parcel's owner (possessor of other rights) to choose a convenient variant which need not be preliminarily coordinated with public power authorities. In a result, if town-planning regulation envisages building of a real estate object 2 to 4 floors high, then the land parcel's owner may choose both as 2 and 3 or four floors in the building project. Determination of one or another regulation for a territorial zone is carried out not in random order, but pursuant to availability of public interests (for example, bans may be established for the construction of a territory with the monuments of architecture found).

At the same time, to secure balance of private and public interests it is envisaged the participation of citizens at decision making by public power authorities by means of public hearings at the stage of the General Plan public discussions (urban district or a settlement), as well as the rules of land use and building. The order of organization and public hearings conduct is determined at the Charter of a municipal formation and (or) normative legal acts of a representative body of the municipal formation and must envisage the prior notification for people residing at the municipal formation about time and place of their conduct as well as other measures securing participation of local people.

A recommendatory character of public hearings procedure, on the one hand, is justified, as far as one cannot say that the public is always objective and is able to competently judge about technical and other aspects of a project and other documentation. On the other hand, lack of obligation in decisions of the public for public power authorities regarding issues of land use and building-up on the territory of the municipal formation in the whole, or its parts (right up to the *Point Construction*) entails the decrease of people activities in making decisions of such issues within legal forms and challenges a spontaneous displeasure of the citizens.

What is important for us is that in frames of public-and-legal regulation (and town-planning law refers specifically to such) the legislation of USA and the most of European countries, including Russia, envisages a big range of dispositiveness /permissiveness/ for independent choice of final parameters and types of real estate objects, built by citizens and legal entities.

At the same time, exactly in cities and in connection with public town-planning interests most frequently occur violations of rights of the land parcel owners. Typical example is the case *Sporrong & Lonnroth v. Sweden*, about which the important decision was taken at the European Court of Human Rights on September 23, 1982.

The story of the case is as follows: Mrs. M.Sporrong, Mr. S-O. Sporrong and Mrs. B.Atmer were the owners of the land parcel at Lower Normalm, Central district of

Stockholm, on which was located a structure built in 60-th of XIX century. In July 1956 the Government issued to the Municipality a permission for alienation, which touched upon the zone of 164 plots of land, including that one where Mr. Sporrong's property was situated as well. It was assumed to build an underpass and a parking for cars. In pursuance of law of alienation 1917, the Government established a 5-year term until the end of which the Municipality had to jointly with the land parcel's owners to determine amount of compensation at the Land Court. This term period had been more than once prolonged. In May 1979 the permission was cancelled at the requirement of the Municipality however for a period from 1954 through 1979 the ban was also propagated over construction of the afore-said land parcels. But over Mrs.I.M.Lonnroth's property, which is also located in Stockholm downtown, the permission for alienation had spread from 1971 through 1979 and ban for building from 1968 through 1980. This property was 17 times put on market sale, but potential buyers refused the transaction after had consulted with the Municipality.

At that time the laws of Sweden did not envisage any possibility to achieve a reduction of the term of validity for such permissions or demand a compensation for losses caused by long period of the land disuse.

In August 1975 a claim was filed to European Court of Human Rights from heirs of the dominion Sporrong and from Mrs. Lonnroth, contending that there took place an unjustified interference to their rights for unimpeded use of their ownership guaranteed at Art. 1, Protocol № 1 of the Convention for protection of human rights and fundamental freedoms (Rome, No. 4, 1950). Also they affirmed the fact of violation of Item 1 Art. 6 of the Convention, as far as the issues of alienation and compensation were not settled at the Sweden courts in reasonable terms, as well as violation of Art. 13 because of lack of effective means of violation of their rights legal protection. As a result, the Court with ten over nine votes had adjudged and decreed the violation of Art. 1, Protocol № 1 in relation to both the petitioners (European Court of Human Rights, 2000).

In this case we see a typical example of how the decision made by the municipal authorities, addressed towards securing the public interests under town-planning legal means inflicted damage towards property interests of the owners of urban land parcels. At the same time, in the course of consideration of the case at the European Court of Human Rights there they were not talking about any ban for limitation of private land parcels owners' rights concerning a such parcels building-up, but only about proportionality of such limitations towards citizens' interests afforded by the Municipality.

As another example of a proportional limitation of the owners' rights should be considered a ban to build self-willed constructions in cities. As the RF Constitutional Court noted RF CC regulation of Item 3, Art. 22,

establishing that the right of property for a self-willed construction cannot be recognized for a person in whose use an ownership, a life inheritable possession of a land parcel, permanent (life-long) is, where the construction took place, if conservation of the building violates rights and protected by law interests of the other people or endangers life and health of citizens, aimed at protection of human rights as well as provision of public and private interests balance and thus – for realization of the RF Constitution Art. Art. 17 (p. 3) and 55 (p.3), cannot be considered as violating Constitutional rights and freedoms of the petitioner, listed in claim hereof (Definition of the Constitutional Court of the Russian Federation dd. June 19, 2012 №1192-0 *Nonsuit of claim of the citizen Dubinin Igor Vladimirovich concerning violation of his Constitutional rights under the regulation of the Civil Code of the Russian Federation Item 3 Article 222*).

The search of balance between private and public interests gets the most complicity in case if private interests in use of a natural resource are overlapping public use of another natural resource situated in that locality. As a classical example of such overlapping is a conflict of interests of private land parcels owners and interests of indefinite groups of citizens hunting in limits of such land parcels or on adjacent territories. It is impossible not to note that this problem is to the same extent is intrinsic both for the Russian Federation and countries of the former Socialist camp, and for the developed European countries.

Essence of the problem is that Russian legislation secures a hunting ground as a big in size land parcel, which may include lands of different categories and kinds of allowed use, including agricultural lands, lands of water and forest funds, reserve lands, defense and security lands (RF LL i. 5.1 Art. 93), partially lands of specially protected territories (lands of recreational use) and some others hereof. Such lands can be free and limited in rotation (RG LL, Art. 27).

Meanwhile the hunting territories borders are being determined at the Russian Federation by means of their simple description without landmark works, preparation of a cadastral passport of such land parcels, and registration of a tenant right at an agency of registration of title for real estate and transactions therewith. The rules currently in force allow that the description of hunting grounds may be carried out without use of navigational devises according to precise visible on the ground and for a long time remaining reference points: a coast lines or waterways of internal permanent and outer water bodies, operating railway lines, hard surface motor roads or roads with ditches, mountain ridges and peaks, operating high-voltage transmission lines (Order of Ministry of Natural Resources and Environment of Russian Federation dd. August 6, 2010 № 306 *Establishment of requirements to the description of hunting grounds borders*).

It means that the lawmaker anticipates the possibility

of the object's (land parcel – a hunting ground) lease, which do not respond to basic rules of a real estate rotation which are obligatory for the land parcels.

Thus, lack of duly confirmed borders and a cadastral number does not allow to come to conclusion that a hunting ground is a land parcel. In respect of the other objects of land relations (the land as a natural object and a natural resource) conclusion of a civil-and-legal lease agreement is impossible in principle.

The procedure of forming of a separately taken hunting ground (land parcel) does not foresee any public hearings or another form of control of the opinion of the population residing in corresponding localities (municipal districts) as well as getting the land parcels owners' consent for inclusion of their land parcels into the structure of hunting grounds.

If we speak about State ownership of the land, then the procedure stipulated in hunting laws completely justifies itself. However, considering that the hunting grounds can be located on agricultural lands, most part of which is in private, but not in a State ownership, self-willed establishment of burdens of titles for private owners, to our opinion, do not correspond to the Constitution of Russia. For example, in Volkhovsky district of Orlov region out of 14300 hectares of leased hunting grounds only 60 relate to the lands of forest fund.

The rest lands are the fields, meadows, waste lands and others, i.e. agricultural enterprises' lands, lands of citizens and other owners.

Similar problems have European land parcels owners also. Thus, the European Court of Human Rights in case *Hermann v. Germany* in its Decree of January 20, 2011 № 9300/07 has established that the owner had his land parcel in Germany. Being such owner he automatically became a member of a hunting association in accordance with the Federal Law on hunting and had to suffer hunting on his land. Arguing against hunting due to ethical considerations, he applied to the hunting body demanding cessation of his membership at the association, which was vacated. An analogous appeal was vacated at the administrative courts as well. In December 2006 the Federal Constitutional Court of Germany in its proceedings vacated the petitioner's claim under order of constitutional proceedings, having specified in particular that the legislation followed legal purposes and did not impose extra burdens over the land owners. It was also noted that the legislation pursued the goal of securing wildfowl by means adapted to agricultural conditions guaranteeing healthy and variable nature, but the obligatory membership in hunting association was a necessary means for achievement of such goals and did not violate property titles of the petitioner, neither his rights for freedom, religious rights nor any association with the other people. His right for equal appeal was not violated also so far as the Law was a necessity for each of

the land parcel owners.

The court came to conclusion that the situation in Germany, which is one of the most populated territories of Central Europe, made necessary to permit general hunting on all land parcels fit for hunting. The Court found that the State-respondent had established a fair balance between protection of property rights and requirements of public interest (Peredelsky, 2011).

Thus, the analysis of legislation and judicial practice of Russia and other countries shows that the conflict of private and public interests is possible not only in the part of town-planning requirements, but in part of the rational use of objects of the wild world (hunted animals) when extra burdens are being imposed over a land parcel owner.

In conclusion we would like to pay attention to one more issue in the sphere of property right protection which does not have any precise legislative decision and which is rarely being discussed by the legal science of Russia and CIS countries. Its essence may be formulated as such: is it possible to withdraw a land parcel or any other real estate from one private owner for state needs, and then transfer it to another private owner? In the USA a forced withdrawal for redemption of real estate from a private owner will be legal in case both, if in future such withdrawn estate is being transferred to a public owner for building purposes, and in case of its transfer to another private person for public use, for example, for building a stadium. At the beginning of the XX century the reason of such approach had become a public requirement for construction of roads, canals, bridges and other infrastructural objects for what the state did not have any funds.

Therefore, it delegated construction of these objects to private companies, entitling them to confiscation of lands from private owners. At the same time as an indispensable condition for realization of plenary powers in frames of *Public Use* was its close interrelation with the concept of a just compensation. Thus, in the USA exist two categories of public objects, for the construction of which a real estate can be withdrawn from the private owners: one of them may remain in public ownership only while the others may be in private ownership as well, but at the same time may fulfill some public function.

This tendency in complete extent exists in Russia also. Its modern example is the withdrawal of land parcels and other kinds of real estate from private persons into public ownership with further construction of Olympic objects on them. In the future such an example will become the development of motor roads networks as far as the Law mentions private motor roads hereof. Though the RF

LL, Art. 49 at present does not envisage possibility of withdrawal land parcels from the citizens and legal entities aiming their building up, appearance of such normative decisions is inevitable (Charkin, 2012, p.210-211)

Thus, in the sphere of land relations the norms of law envisage much wider spectrum of public and private methods of legal regulation if compared with the other branches of Law. At the same time as an essential singularity of land relations is the diversity of forms and methods of search of a compromise between private and public interests concerning land parcels use, influence on the content of rights and responsibilities of the land parcels' owners of town-planning requirements specified in building-up rules (zoning) of the municipality.

We think that there is no hard watershed between private and public interests. A correctly formulated in Law compromise between private land interests in aggregate may rather effectively protect both public land and town-planning (or nature-and-resources) interest and vice versa. At the same time both an imperative and a dispositive method of legal regulation do not *Mirror* a public or a private interest as far as private interests may only be protected with the help of public interests and public interests may only be protected by dispositive norms and methods. Consequently the interrelation between them is more complicated if compared with some considerations in science of the Russian Land Law.

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