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# The Concept of Ownership in Current Russian Law

## Introduction

Russia's shift from a communist regime to a market economy has resulted in a fundamental change with respect to how the concepts of property and ownership are understood within different economic systems and how they are expressed in law. To this end, the legislative formulation of the right of ownership has undergone significant changes through the adoption of laws, which now govern these types of legal relations. This evolution can be traced through a series of legislative enactments. The USSR Ownership Act was the first law formulating new approaches to the right of ownership. Subsequently, the federal Ownership Act considerably expanded and developed the approaches of the previous law. Next was the implementation of section 2 of the Fundamentals of Civil Legislation of the USSR and Union Republics Act, which is applicable in the territory of the Russian Federation to the extent that it does not run contrary to new Russian laws. Finally Division 2 was added to the new Civil Code of the Russian Federation of 1994.

During this period of development, the political declarations and statements that were characteristic of the old approach to law-making were abandoned. Instead, new legal concepts and structures were canvassed in the new legislation. This new framework also established a diversity of property rights, which were not limited to the right of ownership. In the federal Ownership Act of 1990, the legislator for the first time abandoned the economic categories of the "forms of ownership" — a tendency that became more explicit in the rules enacted as the Fundamentals — and the right of ownership itself became an integral part of a broader concept of rights *in rem*. Thus, the contemporary civil law concept of real rights — the right of ownership being the most important right — was established in law. In essence, this concept reflects a clear distinction between the economic and legal understandings of the relations to which ownership gives rise.

Ownership is understood as an economic or factual relationship subject to legal formalisation. Firstly, ownership implies a human relationship to specific things. Such property is appropriated by one individual, the owner, to the exclusion of all others. Secondly, the concept of ownership also includes the attitude of the owner to the appropriated property, since people treat their own property differently from property belonging to others. The law must therefore address these two critical aspects of the ownership equation: the relations of property owners to third parties, and the owner's power over the property itself.

At the same time, it is important to recognise that the objects of ownership are commodities, which in a free market may include not only things, but also the fruits of work and services. Such objects include commodities of non-material value and the non-material products of creative activity, as well

as other rights.<sup>37</sup> Civil law relations in these matters can involve not only real rights, but also personal rights — *i.e.* obligations — and exclusive rights — *i.e.* patents and trademarks. Even under the heading of real rights alone, the relations one might have to property are not limited to the right of ownership. In other words, a commodity in the economic sense does not always constitute an object of the right of ownership in the law. Only individually determined things form the objects of ownership.

Economic relationships resulting from an appropriation occur in various forms depending on whether the entity that appropriates a thing is an individual, a group or collective, the State, or society at large. Thus there are individual, group, public, and mixed forms of appropriation. These economic forms of appropriation are traditionally called “forms of ownership”. A form of ownership is an economic concept, not a legal one. In proclaiming recognition and equal protection of private, public, and other “forms of ownership”, subsection 212 (1) of the Civil Code evokes economic categories, not legal ones. The private form of ownership, also in the terms of the Constitution of the Russian Federation, is a concept for appropriation by any private non-state, non-public persons, distinguished in this sense from public or communal appropriation (state and municipal or public ownership).<sup>38</sup>

The transfer of property under a market economy requires, as a matter of principle, that commodity owners have equal rights of alienation and acquisition in relation to property. Therefore, the principle of equality among all forms of ownership, which is of an economic and not of a legal nature, becomes necessary. However, to provide for the “equality of all forms of ownership” in the legal sense is impossible. For instance, any property, including that which is withdrawn from commerce, may be held in state ownership. The state may acquire such property in ways that are not available to natural persons and legal entities, for example, by way of taxes, duties, seizure, confiscation, and nationalisation. On the other hand, legal entities and public legal bodies are liable for their debts with all their property, whereas individuals benefit from certain exemptions established by law.<sup>39</sup>

As such, section 212 of the Civil Code mentions only the “recognition” of different forms of property and the equal protection of the rights of all owners, but not “the equality of all forms of property” as provided in the USSR Ownership Act. The equality of private and public owners is manifested through the recognition of equal legal capacity. This equality is further demonstrated by the ability of private owners, both individuals and legal entities, to own any property except property withdrawn from commerce or limited in commerce by law. Such property is not limited either in quantity or value, unless such limitations are established by law for the public benefit. Moreover, the advantages and protection given to public owners under the former legal regime are absent from the new Civil Code.

The right of ownership is the most comprehensive right, giving the broadest legal power over property. Yet ownership is not the only right *in rem*; there are other more limited real rights, all sharing characteristics with the right of ownership. Firstly, all real rights formalise the relationship between a person and a thing, giving the person an opportunity to use the thing in his own interests without the participation of other persons. Secondly, real rights may be invoked to protect other types of rights. For example, in the setting of contractual obligations, the person claiming the right to performance may satisfy his interest through some type of claim over real property. Real rights are protected by the specific features they exhibit. Finally, only individually determined things may be the object of real rights. If the specific thing is destroyed or lost, all real rights associated with it are automatically terminated. This differs from the law of obligations where the object is to control the conduct of the debtor. Where the debtor dies, the obligation is not extinguished, and it may be passed on to other persons through the mechanism of legal succession.

As long as the property exists, limited real rights continue to exist even if the owner of the property changes — for example, if the thing is sold or transferred by succession. Thus, real rights encumber a thing; they follow the thing, not the owner. This “right to follow” is thus another characteristic feature of real rights. However, limited real rights are of a derivative nature, dependant on the right of ownership as the basic real right. Therefore, in the case of absence or termination of the right of

<sup>37</sup> For instance, those formalised in the form of securities or a deposit with a credit organisation.

<sup>38</sup> The federal Ownership Act specified “the right of ownership of public organisations” along with the right of private ownership of individuals and legal entities. Today, according to subsection 213 (4) of the Civil Code, legal persons, including political parties, are private owners of the property belonging to them.

<sup>39</sup> Annex 1 to the Code of Civil Procedure of the Russian Federation.

ownership to a thing, it is impossible to establish or retain a limited real right over it as in the case, for example, of ownerless property. Finally, because limited real rights usually arise independently from the will of the owner, the nature and content of these rights is determined by law, not by contract. Therefore, the law itself establishes all the types of limited real rights and determines their scope and content. This results in the law fixing an exhaustive list, or *numerus clausus*, of limited real rights. Contracting parties can neither create a new right yet unknown to the law, nor can they change the scope of any existing real right.

Under Russian civil law, the objects of all limited real rights, with the exception of the pledge and the right of retention, are immovable objects. These rights can be divided into three groups. The first group contains the real rights of certain legal entities over the economic activity of property owned by another. These are the rights of economic management and of operative administration, which characterise the independence of property of such legal entities as unitary enterprises and institutions.

The second group confers limited real rights with respect to the use of another person's land. These rights include the right for life of inheritable possession to land belonging to individuals, the right of permanent and unlimited use of land, servitudes, and the right to develop another person's land parcel. This right belongs to those holding a right of inheritable possession or permanent use, and entails the power to erect buildings, structures, and other objects of real estate, which become the property of the developer.

The third group contains rights of limited use over other real estate, mainly housing premises. These rights are the rights of relatives of the owner of the housing premises to a limited use of the housing premises and the right to use specific housing premises — *e.g.* a dwelling house or another object of real estate like a land parcel — for life. The latter right arises through either contract or testamentary refusal. This right allows an individual to reside in housing premises belonging to another person, or to make limited and purposeful use of another person's real estate. It is debatable whether the right to pledge a thing — where a thing is the object of a pledge instead of a real right — and the right to withhold a thing should be categorised as real rights.

The above categories of real rights upon which Russian concepts were modelled were originally defined in German-based legal systems seen today in Germany, Austria and Switzerland. Somewhat different types of real rights are also found in French legislation and in other countries of continental Europe. A special section of the first Civil Code of 1922 was devoted to real rights. When Soviet civil legislation was codified in the 1960s, this category was omitted because the state's right to land was effectively exclusive and did not allow for the existence of other real rights, including servitudes. Real rights were reinstated in the federal Ownership Act, and were described in detail and legally fixed in section 49 of the Fundamentals. The current Civil Code explicitly treats the right of ownership as the principal type of real right.

## The right of ownership

The right of ownership is the broadest real right. It allows its holder to exclusively determine the nature and use of the property and, in the process, confers complete economic dominion over the property. In subsection 209 (1) of the Civil Code, the legal capacity of the owner is described through the use of the “triad” of legal powers: possession, use, and disposal.

The power to possess is understood as the legal authority to have the property and keep it in one's household or enterprise. The power to use the property is a legal permission to exploit it for economic or other purposes by utilising the property's useful qualities. Use is closely related to the legal power to possess, because in most cases, one cannot use property without actually possessing it. The power to dispose of property confers an authority to determine the fate of property by changing its holder, state, or designation through alienation under a contract, transfer by inheritance, destruction, or loss.

In the aggregate, these legal powers fully cover all the possibilities of acting granted to the owner by law. Suggestions that other legal powers — *e.g.* the power of management — could be added to this triad have been unsuccessful. A more detailed consideration of these legal powers shows that they are not independent possibilities provided to the owner, but only ways to exercise the legal powers inherent in ownership.

All three powers are concentrated in the owner. However, separately and sometimes simultaneously, they may not belong to the owner but be vested in another legal possessor of the property such as a lessee. A lessee not only possesses the property of the owner (lessor) and uses it under the contract

with the lessor, but is also entitled, with the lessor's consent, to sublease it to another person or to make considerable improvements to the property. Such actions may change the property's original state to a considerable degree, or constitute its disposal within certain limits. Thus, it can be said that the triad of powers is not really sufficient to fully characterise the rights of the owner.<sup>40</sup> The essence of the right of ownership lies not in the number and designation of legal powers, but in the degree of real legal power which is granted and guaranteed to the owner by the legal system. For example, the 1964 Civil Code formally granted equal powers of possession, use, and disposal to all owners. However, the legal powers of the state as an owner with respect to the nature and scope of rights could never be compared to the legal powers of individual owners. Practically speaking, the power of individual owners was subject to numerous limitations.

From this perspective, the main feature of the owner's rights in Russian civil law is the power to exercise these rights "at [the owner's] discretion" (subsection 209 (2) of the Civil Code). The owner can make an independent decision about what to do with his property and may be guided exclusively by his own interests, provided that the decision does not conflict with any statute or other legal act, and that it does not violate the rights and legal interests of other persons. This is the essence of the legal power of the owner over property.

An important feature of the owner's legal rights is that they allow the owner to exclude all other persons from any action affecting the owner's property. In contrast, the powers of any other legal possessor — even those powers having the same designation as the legal powers of the owner — are insufficient to exclude the rights of the property owner. Instead, the possessor's powers usually arise through the will of the owner and operate within the limits provided by the owner, as with, for example, a contract of lease.

On the other hand, the right of ownership is not absolute; the law establishes certain limitations to the content of the right. According to subsection 209 (2) of the Civil Code, the owner has the right with respect to his property to take "any actions not contrary to a statute or other legal acts and not violating the rights or interests protected by a statute of other persons." Thus, since under legislation housing premises are intended only for dwelling by citizens, their use for other purposes such as offices or warehouses — even by the will or with the consent of their owner — is allowed only if the classification of these premises is changed from that of housing to non-housing in accordance with the procedure provided by legislation. The owner also has no right to use his property with the intention of causing harm to another person. Thus, the legal rights of the owner are restricted by certain legal limitations of purpose.

A law or statute may also provide for restrictions on the exercise of ownership. For example, the pledgor, while remaining the owner of a pledged thing, does not have the authority to dispose of the thing without the consent of the pledgee. Moreover, the rights of the owner of immovable property acquired under a contract of lifetime support with maintenance do not include the power to alienate or dispose of the property without the consent of the recipient of the rent.

The right of ownership over land and other natural resources is subject to the greatest number of restrictions. Firstly, the very possibility of private ownership of such objects, recognised by subsection 9 (2) of the Constitution of the Russian Federation, is considerably limited with respect to land parcels and is completely excluded for a number of natural resources. Secondly, the possibility that these objects become the object of civil law transactions, including alienation, is also limited (subsection 129 (3) of the Civil Code), which restricts the owner's power to dispose of them. Thirdly, even those rights permitted by statute to owners of land and other natural resources are subject to environmental prescriptions and prohibitions and, in a number of cases, to the designated purpose of the property.

Furthermore, the "benefit" of holding property and receiving income from it must be considered along with the "burden" of bearing the expenses, costs, and risks related thereto. Section 210 of the Civil Code specifically points out the owner's responsibility to maintain the property, unless a statute or contract places this burden or a part of it on another person. For example, the protection of leased

<sup>40</sup> The description of legal powers of the owner as a "triad" of possibilities is typical of the Russian legal system. It was legally fixed for the first time in 1832 in vol. 10, part 1, section 420 of the Code Laws of the Russian Empire. Following in this tradition, the "triad" passed on to the Civil Codes of 1922 and 1964, and later to the Fundamentals of 1961 and 1991, as well as to the current C.C.R. There are other definitions of this right in different foreign laws. For instance, under subsection 903 (1) of the Civil Code of Germany, the owner "may dispose of a thing at his own discretion and to the exclusion of all others on it". Under section 544 of the Civil Code of France, the owner "uses and disposes of things in the most absolute manner". In Anglo-American law, scholars count up to twelve different legal powers of the owner which different persons may have in various combinations; a consequence of the nature of the common law that does not lend itself to a legally-fixed definition of the right of ownership.

property may be carried out by the lessee, or the management of a bankrupt's assets may be assumed by a bankruptcy manager.

The owner also bears the risk of damage to or destruction of his property if this occurs in the absence of fault. In fact, this risk is part of the burden of the owner. However, this risk can be transferred to other persons under a contract as well as by force of statute. For instance, such risk may be borne by a guardian who becomes the administrator of the property of an owner who is under guardianship.

The owner is entitled to transfer his rights of possession, use, and disposition while remaining the owner of the property. This occurs, for example, when an owner leases his property. Subsection 209 (4) of the Civil Code specifically addresses this situation and empowers the owner to transfer property to another person without transferring the right of ownership to the property. This device, called "entrusted administration", is a way for the owner to exercise legal powers of disposal without establishing a new right of ownership to the property.

The concept of entrusted administration provided in the Civil Code has nothing in common with the concept of the "trust". There were attempts to introduce this concept into Russian civil legislation under the influence of absolutely alien Anglo-American approaches.<sup>41</sup> With entrusted administration, the administrator — *e.g.* the guardian of the ward's property or the testamentary executor who holds the property of the succession — uses another person's property without becoming the owner. The administrator does not act for his own benefit, but in the interests of the owner, ward, beneficiary, or heir. This situation may arise either through the prescription of a statute or under a contract between the owner and the entrusted administrator. For example, the owner may, for compensation, entrust the administrator to use his securities to receive income. The entrusted administrator has the power to possess, use, and even dispose of the property. He may also perform operations with this property in his own name, but not for his own benefit.

In the case of a trust, the settlor transfers his rights or a certain part thereof to the trustee who acts in the interests of the beneficiary. It is also possible for the settlor and the beneficiary to be the same person. Each of the participants in the trust relationship has the legal powers of the owner to some degree, *i.e.* each of them is vested with a right of ownership.

Under the approach used in continental European legal systems, the trust allows the right of ownership to be split among several subjects, and for that reason it is impossible to say who the real owner of the property placed under trust management is. Under Anglo-American systems, such a situation does not purport any contradictions since the right of ownership is by definition constituted by multiple and independent rights of ownership. Such an approach is alien to continental European legal systems where a key postulate is the impossibility of establishing two equal rights of ownership in the same property. Therefore, the transfer by the owner of part or even all his legal powers to another person, including to a manager, does not lead to the loss of the right of ownership because the transfer is not limited to these legal powers, *i.e.* to the "triad".

From a practical perspective, borrowing the trust concept in the absence of the common law system of equity leads to a lack of control over the trustee's relations with the settlor who, among other things, acts as a beneficiary. It is clear, then, that negative consequences could result from a broad application of the trust concept, which was designed for the more efficient management of state and municipal property through the transfer thereof to private managers.

## Remedies

The new civil legislation of Russia places particular emphasis on the protection of ownership and other real rights. In conformity with the fundamental principle of inviolability of the right of ownership, the new Civil Code creates a special system aimed at protecting the rights and interests of private owners from various encroachments on their property.

In the event of direct violation of the right of ownership through, for example, theft or unlawful expropriation, Russian legislation provides real remedies in the form of absolute claims or claims filed against any third person having violated a right *in rem*. The Civil Code traditionally provides for two real actions, which protect the right of ownership and certain rights in things. The first is true recovery action (*actio rei vindicatio*), a claim for demanding and obtaining property from another

<sup>41</sup> See section 1, Presidential Decree No. 2296 on Trust Ownership (Trust) (24 December 1993). In connection with the adoption of Parts 1 and 2 of the Civil Code which directly regulate the relationships of property trust management, Presidential Decree No. 2296 has now lost its legal force.

person's unlawful possession. The second is negatory action (*actio negatoria*), an action for elimination of obstacles to the use of property where no deprivation of possession has occurred. Both means of protection are aimed at protecting the owner's right to the object itself. If the object is lost or cannot be returned to the owner, it is possible to speak only about compensation for inflicted losses, which is categorised as a personal action and not an action in protection of real rights. Therefore, real rights protection of property interests only has as its object individually determined things, not substituted property.

A right of ownership may also be violated indirectly as a consequence of a violation of another, often personal right. For example, a person to whom the owner transferred property under a contract might refuse to return the property to its owner or might return it damaged. This is a case for the application of real rights protection under the law of obligations. These rules are specially designed for instances when the owner is bound to the violator by relations *in personam*, most often contractual relations. These methods of protection are usually applied to the defaulting party under the contract, taking account of the specific nature of the parties' relationship. Remedies in the law of obligations are, therefore, of a relative nature and may have as their object any property, including both things and rights.

Since both of these types of remedies may apply at the same time, a question arises as to which of the two kinds of civil law protection — that of real rights protection or that of the law of obligations — is the appropriate remedy. Russian legislation does not allow the claimant to choose an action and does not allow the so-called "competition of suits" typical of Anglo-American law. In the event of breached contractual relations or other relations *in personam*, the law of obligations and not real rights should be used to obtain a remedy, since the legal relations existing between the parties are of a relative nature and not absolute.<sup>\*42</sup> A real action cannot be filed when an individually determined thing is absent as a subject of dispute.

Suits against state agencies or local self-governing bodies are a new and independent group of civil law remedies, which serve to protect the right of ownership. The powers that these agencies enjoy preclude the possibility of filing traditional real actions or personal actions against them in instances when they do not act as equal participants in commerce. Thus, public authorities may violate real rights of private persons or infringe upon them through lawful and unlawful actions, both of which require special means of protection for private owners.

Two types of actions are used to provide the necessary protection. First, the law allows claims for full compensation of damages inflicted upon private persons as the result of unlawful acts or omissions by state agencies, local self-government bodies, or their officials. The remedy also applies where damage is inflicted through the issuance of a regulatory or non-regulatory act which runs contrary to a statute or other legal act.

Secondly, a claim for invalidation of an unlawful act of a state or municipal agency, which contradicts a statute or other legal act, may also be made. Such actions are brought against tax and customs agencies, for example, in the event of an unjustified levy of execution against an individual's property.<sup>\*43</sup>

Lawful actions by public authorities, which infringe upon the interests of private owners, require special means of protection. For example, termination of a private person's right of ownership through nationalisation of his property conforms to federal law, and is therefore a lawful action. In this situation, the owner's rights are subordinated to the law and the owner has no right to claim the return of withdrawn property. However, full compensation may be claimed, including loss of income and the value of the property lost by the owner. An owner of land expropriated for state or municipal needs through a decision of executive agencies is granted the same right.

Thus, the new civil legislation of Russia provides for thorough legal formalisation of ownership relations, including comprehensive protection of the rights and interests of private owners.

<sup>42</sup> This reasoning can be extended to instances when limited real rights arise due to a contract with the owner of a thing; the parties are protected by absolute real rights and not by the law of obligations, for the relation is of an absolute and not a relative nature. The owner of a thing in this instance is bound to the subject of a limited real right by contract and, therefore, in its relationship with the latter cannot resort to the law of obligations to protect his interests.

<sup>43</sup> Naturally, tax and customs relations, or relations with respect to state property management are of a civil law nature. At the same time, unjustified interference of public power into the property sphere leads in many instances to the violation of real rights, and therefore requires special means of protection. It is no accident that rules on suits against public power appeared for the first time in laws on ownership.