

Some Views on the Grounds for Rethinking the Doctrine of Ownership

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The article looks at the possibility of to revise property regulation and property law doctrine. The author identifies the most important factors that may influence the evolution of property law and provides an assessment whether today's conditions can change the content of property law and whether they are doing it. The article further discusses changes in the objects of property, the model of economic ties, the motivation of owners and the possibilities of implementing property law.

Keywords: ownership, objects, private property, public property, content of property rights, doctrine of property rights.

Pastabos dėl nuosavybės teisės doktrinos peržiūros pagrindų

Straipsnyje apžvelgiama nuosavybės reguliavimo ir nuosavybės teisės doktrinos peržiūros galimybė. Autorė išskiria svarbiausius veiksnius, kurie gali turėti įtakos nuosavybės teisės evoliucijai, bei pateikia vertinimą, ar dabartinės sąlygos gali pakeisti ir aktyviai keičia nuosavybės teisės turinį. Aptariami pokyčiai, susiję su nuosavybės objektais, ekonominio ryšio modeliu, šalininkų motyvacija ir nuosavybės teisės įgyvendinimo galimybėmis.

Pagrindiniai žodžiai: nuosavybė, objektai, privati nuosavybė, viešoji nuosavybė, nuosavybės teisės turinys, nuosavybės teisės doktrina.

Introduction

Consideration of any social institution requires penetration into its “genetic code”, which will allow to trace its paradigm and predict further existence. For the institution of ownership, such a genetic code is the close connection of its economic and legal components, like in biology are connections in DNA, RNA and proteins. Drawing parallels, we can see that the economy and law are also bound by certain actions and even efforts on the part of various subjects. Labour (in traditional forms – hired labour, creative, collective labour, labour in cooperative formations or entrepreneurial activity, etc.) is the defining and influential category in this sense. In general, the symbiosis of economics and law can be traced through the economic analysis of law, which is becoming increasingly relevant for the study of property relations and turnover.

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To understand the phenomenon of ownership, it is necessary to take into account this “genetic code” in the context of a particular historical stage in the existence of society. Thanks to such aspect of property analysis, it is possible to see the significant changes that have occurred in economic and public life, and thus to make a conclusion about how necessary the reforms in civil law regulation of property are, and how they should be implemented.

Legal analysis of ownership was provided by Ukrainian researchers in various aspects – both in the broad (Shevchenko *et al.* 2002; Dzera, 1996; Maydanyk, 2019; Kharchenko, 2016; Kharkiv civil school: property rights, 2012, etc.), and in particular ones (Spasibo, 2009; Rozgon, 2006). However, there is a lack of research in the context of doctrinal changes of the vision of property rights. Only some research by the author of this article can be mentioned in this respect (Spasibo-Fateeva, 2006, p. 91–99; Spasibo-Fateeva, 2007, p. 8–11; Spasibo-Fateeva, 2013, p. 138–140; Spasibo-Fateeva, 2011, p. 29–36, etc.).

Historical Review of Property Rights Doctrines

One of the ancient doctrinal social principles is the philosophy laid down in the way of life in Sodom (The Book of Ezekiel 16:49). It was based on an extreme degree of individualization, when no one helped anyone with anything. The life of each person was formed the way it should have been. This not only made up routine life rules, but also served as a basis for punishing those who violated these rules. This could be perceived as savagery, but the aim of philosophy is to testify to the deep layers of the worldview, which only manifests itself externally in the economic structure and legal norms. We cannot but mention the recent story of a poor Chinese man who got rich and built a new housing equipped with everything necessary for his fellow villagers in 2016. However, no one lives in the housing, since the residents cannot agree on who will get several villas and who will get only one.

At the dawn of Christianity, the dogma demonstrated by the words of the Apostle Paul “Those who want to get rich fall into temptation and a trap and into many foolish and harmful desires that plunge people into ruin and destruction.” changed (Paul 1 Timothy 6:9. For the development of The Gospels of Mark 4:19, Luke 12:15).

Instead, in secular life, everything was different. Slave states were called to protect and strengthen the property of slave owners, acting as an instrument of their total domination over all important resources of those times, including human ones. A similar doctrine was laid in the basis of the feudal structure, although the main resource that determined all other areas of influence was land.

The paradigm shift took place during the transition to fundamentally new economic principles, in which capitalist private ownership of the means of production took precedence. This became the basis for the relevant legal regulators, which are still preserved mainly in the legislation of European countries, the United States and other states. This is accompanied by the emphasis on the equality of all citizens before the law while maintaining their economic inequality. So, this simple conclusion contains a contradiction that inevitably results in revolutions, coups, various kinds of reforms, etc.

One of them was the revolution of 1917 in Russia, which led to a fundamentally new doctrine – the formation of socialist property and law, which rejected all the principles of private property, including contractual ones. There were changes in the subject composition of the owners, the legal regime of their property. With the total domination of state property, market mechanisms of civil turnover and equality of protection of the rights of all owners disappeared. There appeared many other legal categories unknown in the world, designed to serve the doctrine of the priority position of state property – such an ersatz of property as operational management.

With the collapse of the Soviet Union, the doctrine, the defining feature of which is putting private property on a pedestal, was restored in Ukraine. This was accompanied by an appropriate reform of the legislation. The rapid processes of denationalization, privatization, initial accumulation of capital in the late 80s of the last century accompanied by a weak legislative framework and undeveloped doctrine led to negative results. It could not go other way, since this was the result of an accelerated formation of private property, which in other states took place over the centuries. Therefore, the economy and law in Ukraine have turned 180 degrees twice during 70 years.

For thirty years after the proclamation of Ukraine's independence, Ukrainian legislation has been in a hurry for economic processes, which indicates the absence of a doctrine in its basis that should be followed. There is not only Brownian movement in lawmaking, but also obvious miscalculations, one of the examples of which was the adoption of the Commercial Code, which demonstrated a completely false doctrine, leaving quasi-ownership rights of economic management and operational management, which had doctrinal origin from Soviet law.

Ukrainian law has not changed during the so-called postmodern period, since our legislation is more in line with the era of industrial society. Instead, economic processes indicate a transition to the era of corporate society (Spasibo-Fateeva, 2019, p. 60–65) and is moving quickly further towards a digital society that requires appropriate reorientation of law and, above all, property rights.

Therefore, these trends must be taken into account by proposing an appropriate model of legal regulation of property relations based on modern doctrine. This is forced by changes that have taken place in the subject matter of property rights, model of economic relations between owners, social principles of the owners' activities, etc.

Reasons for Revising the Doctrine of Ownership

The first and obvious reason for the revision of the doctrine of ownership is that it is based on Roman law, which operated with completely different subject matter. Property law, the understanding of which is provided by the ancient Romans, is associated with the thing as a certain material substance; so-called incorporeal things were an exception. The rules of law were also set up for this. In particular, only such a thing could be owned, only such a thing could be demanded.

However, over time, the *objects of ownership* have changed – property rights, securities, noncash and electronic money, virtual assets, digital things are becoming increasingly important.

The analysis of national legislation and doctrine gives grounds to note the inconsistency of the concepts of “possessions”, “property”, “ownership”, “property rights”, “ownership rights”. Additional misunderstanding occurs due to the use of the European Court of Human Rights practice regarding the application of the relevant provisions of Art. 1 of Protocol-1 to the Convention by Ukrainian courts. It extends the Convention's effect to a much wider range of relations that are traditionally not considered civil by Ukrainian law. For example, the ECtHR recognizes as *possession* both “claims” and legitimate expectation (Spasibo-Fateeva, 2020, p. 137–146).

When the court resolves a certain dispute (that is, at the micro level), the shift of emphasis from the conventional for the Ukrainian law understanding of ownership to the one applied by the ECtHR is barely noticeable. However, at the macro level, the processes that radically change society become apparent. Given the scope of the article, we will note only three areas that provide an opportunity to show it.

First, services are becoming more and more important than things (for example, a 3D printer is able to print food, medicine, housing and even human organs, and these printers need to be operated and maintained).

Secondly, IT companies with their currencies are demonstrating intensification of activity. This leads to the displacement of such an object as money in the so far ordinary sense for us, and thereby to the gradual break of the banking system. With a decrease in banking rates (not only on credit resources, but also on deposits, the rates on which can already be negative) the path to bankruptcy, or the merger of banks with IT companies, or the transition to the provision of services similar to those provided by IT companies, becomes possible.

Thirdly, the problems with vital resources for humanity and their distribution are exacerbated. And these are not only energy resources, although they are a rather peculiar object of property rights, which no one can take possession of within the meaning of possession, no one *owns or used* them but *they* are distributed and *exploited*.

Changes in Property Rights Objects

The importance of taking into account the mentioned above can be demonstrated by credit legal relationships, in which money *traditionally stands as the object*. Recently, the vision has been spreading that from a legal point of view, the provision of a loan is not the transfer of money by the bank to the borrower, but the purchase of the client's debt obligation. The bank, without cash as such, undertakes to make appropriate calculations for the borrower (*Irving Fisher*). Given that the vast majority of transactions is undertaken "from account to account" rather than "hand to hand", there occurs a manipulation of numbers recorded in computers memory. So, money is created as someone's debt. As long as there is no request for a debt, there is no money. That is, money is more of a liability of individuals, and not their assets (Paata Leishvili, 2017, p. 24, 27). The situation can cause a lot of problems when moving into the plane of cryptocurrency.

As for *resources*, the legal regulation of the supply of energy and other resources through the connected network as a type of a contract of sale is contained in § 5 of Chapter 54 of the Civil Code of Ukraine. However, the essence of the sales and purchase is the acquisition of ownership of the object of the contract. In this connection, it is worth considering whether the system of property rights is acceptable in the allocation of resources, whether it is worth relying on the fact that the right of private ownership of electromagnetic waves is too difficult to determine and protect due to the invisibility of the resource, and a weak understanding of the circumstances in which one type of broadcasting activity will come into conflict with another (Hazlett, 1990, p. 133, 135–139). There was also a proposal that the "taking possession" of this resource took place not by determining the rights to the share of "ether" or to some frequencies, but through the allocation of certain rights of use to broadcasting equipment (Coase R.H.). Moreover, according to *Coase*, this will avoid conflict over access to such resources, because the introduction of origins of private property, thanks to which it is possible to freely sell and buy all resources, will make the distribution of radio frequencies more effective than the activities of commissions that carry out this distribution on a completely different basis.

It is surprising that this proposal, expressed at the beginning of the 20th century, has not yet been accepted. And after a hundred years, the personal nonproperty rights of members of society fully depend on such distribution – both their acquisition of information through the sources that they choose themselves, and the permission of the free expression of their opinion on one occasion or another. By these examples, it becomes quite clear that the principles of private property go far beyond the material understanding of this right.

Speaking of more traditional objects of civil law, in particular *real estate*, one may notice that recently they also have undergone modifications, but not so much in their economic or natural essence

(after all, the land plots and buildings on it remained the same) as in the legal one. It has already become common to “invest money” in the construction of an apartment building, as a result of which a person receives ownership of an apartment.

From an economic point of view, this is understandable, since it provides opportunities for people who do not have the means to purchase housing to do so during a certain time with funds from different sources of origin. From the point of view of law, there are significant changes in the essence of legal relations on the purchase of housing and in the objects of these legal relations. Traditionally the acquisition of housing took place by concluding a contract of sale or by construction of a self-built housing, however, in our time investing in construction is becoming increasingly important. The analysis of these relationships by and large proves that we are talking about the same contract of sale. The only difference lies in the fact that the object of the contract at the time of its conclusion does not exist – the apartment that the buyer intends to take possession of is not yet available, since the construction is just beginning. Nevertheless, the law does not contain a prohibition on the conclusion of a contract of sale of property, in its absence from the seller. Therefore, there can be no obstacles to the conclusion of the contract of sale of the apartment. That is why those schemes of legal relations that began to regulate the simple content relationship of purchasing apartments in this way (namely, agreement on share participation in construction, a property management agreement) appeared not at all because it was impossible to do this by buying and selling. Therefore, it is worth looking for other reasons for this. Probably, this reason is the need to spread, accelerate and strengthen the turnover of real estate, which is associated with an interest in generating the constant need of markets for money resources and the revival of banking services.

There are similar reasons for the appearance of such a “forced” or “situational” object as *unfinished construction* – such an object does not arise while construction continues, or a housing is being built, since there is no need for it. But when the construction stops and it makes sense to alienate what was not built, a new object of law appears. It is neither a house / building, nor building materials, but an “object of unfinished construction” (Part 3 of Art. 331 of the Civil Code of Ukraine). So, in both of these cases, the object of ownership is in demand for civil turnover.

It is impossible not to touch upon the *legitimate expectation*, which is considered in different ways, but often enough – as a property right to a future object. And in this case, the question arises not only about whether it will be part of the property, but whether it will become tradable (Legitimate Expectations, 2020, p. 137–146).

Changing the Model of Economic Ties, the Scope of the Owner’s Legal Capabilities and Their Motivation

At present, there is a gradual change in the model of economic ties, in particular, the transition from private property in its classical sense to corporate property (Spasibo-Fateeva, 2012, p. 291–315).

There are monopolistic tendencies in accumulating share package in order to influence corporate governance. As a result, the state regulation of such property relations is increasing, which demonstrates another paradox: what in Soviet times was criticized as a negative, at the present stage of history of economics and law is perceived as the only possible.

The above cannot but affect the change in the scope of the legal capabilities of the owner – there are more and more restrictions and obligations, including in the public interest. The legislative regulation is becoming stronger and stronger, which allows much less autonomy of the will than the law of obligation. Probably, this is caused by the model of real right, according to which the owner, being

in the midst of legal relations, does not coordinate his/her actions with other persons, and therefore the norms governing his/her right are primarily imperative. And this fundamentally distinguishes property rights as a type of a real right from the law of obligation with its freedom of contract and the dispositivity of norms.

The analysis of changes in property relations in general and in the objects of property rights in particular would not be complete, if we do not touch upon the reason for alienation of a person from his/her property, its greater turnover as an object not related to the arrangement of human life.

Recently, the *model of motivation for acquiring property rights* has been changing. The value of the housing as “a family nest”, the desire for a settled lifestyle, the achievement of better living conditions, which required efforts to acquire and maintain objects, became inferior to slightly different values of the “generation of consumption”, such as mobility in work, training, which once again fundamentally changed the objects to which the rights of individuals are directed. The stage of pushing consumers to buy various and often unnecessary for them goods by market operators is coming to an end. This stage is replaced by a fundamentally different model that will work in the near future – meeting the needs of everyday consumption with the help of modern technologies, due to which the place of residence of a person and the conditions of his/her work do not matter. Goods will be replaced by services that will be provided to a person for the use of technology; there is a tendency to the lack of need to take care of housing and ensure its functioning – all these functions will be transferred to the state or certain corporate or social entities, and therefore the ownership of housing will not be relevant, etc. This is stated at various authoritative platforms – from the World Economic Forum to reports at the Club of Rome.

All this is reasonably explained by a change in the format of public life, which is subject to economic analysis, which, in turn, proves the foolishness of carrying unnecessary costs for acquisition, maintenance in proper condition, costs and protection of certain objects of property rights, especially costly ones. And this applies not only to real estate, but also to appliances, equipment, and even cars. Thus, the owner of real estate or a car spends a lot of money on security (security means to prevent theft, insurance, parking, repair, formation of joint funds of co-owners, etc.). Taxes paid by the owners can be added to this. The cost of housing is significantly increased by the inclusion of costs aimed at the proper fulfilling of duties by participants in legal relations on construction.

The law (at least civil) bypasses these aspects, however, it shouldn't do so since they all affect not only the value of the object itself, property rights, but also the movement of these objects. And as a result, they influence the very understanding of these objects.

Continuing the topic of property costs, it is important to touch upon the property that the owner does not use, for example, the unfinished and / or suspended construction, destruction of the house, etc. Thus, the termination of the construction of the subway will lead to the fact that the cost of maintaining it in proper condition will exceed the cost of continuing construction. However, in the second case, the obvious is the result, and in the first – a waste of money. In case of destruction of the house, when the owner does not take actions either to repair or restore it, the costs will be assigned to other persons who will be forced to remove the destroyed segments. It becomes clear that in these cases the value of the property is still decreasing, since it not only does not exist in proper condition, but it should be finally destroyed, which requires additional costs. In case of an unfinished construction, which has not been completed for a long time, at some stage it makes no sense anymore to complete it, or completion becomes technically impossible.

In all these cases, it is necessary to take into account the social costs associated with the property and who they fall on. Among other things, the problem of termination of rights to such property is also important. According to Art. 135 of the Central Committee of the USSR of 1963, the owner of the

property, which is mismanaged, could be deprived of the right. Since 1993, this has become impossible. However, to what extent is this approach socially balanced?¹ Thus, the owner is obliged to take care of his/her property (“property obliges”). If he/she does not do this, then no one can deprive him/her of his/her right, except if this property is of cultural value (Art. 352 of the Civil Code of Ukraine). As a result, we have buildings and houses that are not only not repaired, but pose a threat to other persons (in particular, due to the danger of movement on the sidewalk near these buildings, the use of these houses by antisocial persons, which creates a dangerous sanitary and epidemiological situation).

Finally, the regulation of virtual assets has recently been actively discussed in Ukraine (Law of Ukraine “On Virtual Assets” of February 17, 2022. No. 2074-IX), which is extremely controversial. It is also noteworthy that economic terminology, in particular “assets”, has leaked into the laws, that is, into legal norms. For the development of this project, a draft law No. 6447 “On Amendments to the Civil Code of Ukraine Aimed at Expanding the Range of Civil Rights Objects” was registered in the Verkhovna Rada. The essence of the definition of an object should probably be not the substance (corporeality or incorporeality – a digital or electronic form), but its place in the relevant legal relations, because the law regulates the relationship itself. Therefore, *it is necessary to rethink what is an object* and therefore – subject to appropriate regulation as an object, *what is its form, and what is a technical means*. Thus, the web page is not an object, nor are the registers. Therefore, their regulation is of a technical, not legal nature. A status of a website and an account also need clarification. However, by the Law of Ukraine “On Copyright and Related Rights”, it is stipulated, that the *owner of the website is* “a person who is the owner of the account and establishes the procedure and terms of use of the website”. This makes it necessary to recognize that the website is an object of the right and that it belongs to the property rights, and therefore the relationship is covered by book 3 of the Civil Code of Ukraine.

Another key position is the turnover, which can have a form not only of a transfer of things (which, in fact, is now the main way of turnover) but also of an entry in the corresponding register. And this applies not only to things, but also to intellectual property rights. Concerning digital or electronic things, it can have a form of opening of access, or copying, although perhaps it is a consequence of access, or not, if the object is publicly available.

Thus, the concept of ownership is significantly changing due to significant changes in the worldview, economy and paradigm, and their perception. Earlier ownership was a right inseparable from things (*Girke*), which caused the formalities associated with the transfer of this right, but in the 20th century it becomes incorporeal and impersonal (Kantorovych, 1927, p. 19). This leads to the need to find the core of this right, which will be defining or right-forming for its understanding. At one time, scientists were looking for a certain „clot“ in it (as they once sought to find the elixir of youth, the philosopher’s stone). Such searches do not lose relevance in our time, but they are almost not carried out.

In addition to this, in the field of property rights, it is worth touching upon some other issues – trust property, which rather controversially fits into the Civil Code of Ukraine; public property, which as such is not covered in Ukrainian law, but only some of its aspects are regulated in the Law of Ukraine „On Management of State Property Objects“; beneficial ownership is a term used not by the civil, but by the tax legislation of Ukraine (Tax Code of Ukraine), together with the concept of „ownership structure“, which is used to identify assets for taxation. All this requires special attention, which is impossible within the volume of this article. However, there is an obvious inconsistency between the norms of civil and other areas of legislation in these matters.

¹ This applies not to the fact that the property, by Art. 135 of the Central Committee of the Ukrainian SSR, was withdrawn without compensation by the decision of the local self-government body, but in general, to the grounds for termination of property rights.

Conclusions

To sum up, changes in objects and content of property rights, which consist in the limiting possibilities of the owner, are becoming increasingly obvious. There are more and more differences in understanding of private property which was common in the 18th–20th centuries. The scope of corporate ownership is gradually expanding. State regulation of property (registration of rights to real estate, maintenance of property, sale of products, maintenance of assets, etc.) is becoming increasingly important.

All this testifies to the need to rethink property rights and reform them, which requires *at the doctrinal level*: to determine the essence of property rights; to consider the triad of the owner's powers (possession, use and disposal) in a fundamentally different way, so that they do not narrow down neither the content of the property right, nor the procedure for its implementation, or ways of protection; to proceed from a balanced position on priorities when applying certain legal mechanisms, their borrowing, connecting with all legal institutions of Ukrainian law; establish legislative and doctrinal approaches on the economic analysis of law. Overcoming inconsistencies between the norms of civil and other areas of legislation in these matters is possible by raising legal mechanisms to the constitutional level.

The essence of the definition of an object should probably not be substance (corporeality or incorporeality (digital or electronic form)), but its place in the relevant legal relations, because the law regulates the relationship itself.

Therefore, it is necessary for us not only to work out the doctrine in these relations, because the legislation is already somewhat outdated, but also to determine whether we will move forward together with the trend proclaimed in the EU, or we will overcome only urgent difficulties, realizing that it is still unacceptable for us.

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Some Views on the Grounds for Rethinking the Doctrine of Ownership

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S u m m a r y

Ownership is a defining category for the economy, social sciences, law, therefore, its legal regulation must take into account the changes taking place in these areas of human activity. At the same time, legal regulation is associated not only with the economy of a particular country in a certain period of time, but also with the global economy and legal relations that are developing in the world. From time to time, the legislation requires reforms, which should be based on a clear and elaborate doctrine. The doctrine should take into account all the significant changes that have occurred in the right of ownership in recent times and relating to property rights, the content of this right, strengthening of the role of state regulators, the motivation of a person who becomes the owner of certain property, on which many changes in the legal relations of civil turnover also depend, services, etc.

Pastabos dėl nuosavybės doktrinos peržiūros pagrindų

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S a n t r a u k a

Nuosavybė yra ekonomiką, socialinius mokslus ir teisę apibrėžianti kategorija, todėl jos teisinis reguliavimas turi atsižvelgti į šiose žmogaus veiklos srityse vykstančius pokyčius. Teisinis reguliavimas siejamas ne tik su konkrečios šalies

ekonomika tam tikru laikotarpiu, bet ir su pasauline ekonomika bei pasaulyje besiklostančiais teisiniais santykiais. Teisės aktams, praėjus tam tikram laikui, reikia reformų, kurios turėtų būti pagrįstos aiškia ir išsamia doktrina. Doktrinoje turėtų būti atsižvelgta į visus reikšmingus pastarojo meto nuosavybės teisės pokyčius, susijusius su nuosavybės teise, šios teisės turiniu, valstybinio reguliavimo institucijų vaidmens stiprinimu, asmens, kuris tampa tam tikro turto savininku, motyvacija, nuo kurios priklauso ir daugelis civilinės apyvartos teisinių santykių pokyčių, paslaugų ir kt.

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