

ANALYSIS OF LEGAL FORMS OF LAND USE UNDER THE LEGISLATION OF UKRAINE AND POLAND

Iryna Tsvigun

Candidate of Law Sciences, Senior Lecturer at the Department of Civil Law and Procedure,
West Ukrainian National University, Ukraine
e-mail: Cvigunirina247@gmail.com, orcid.org/0000-0002-1284-4193

Summary

In the article, a professional comparative legal analysis of the forms of land use under the legislation of Ukraine and Poland was carried out. For the completeness and comprehensive presentation of the research, attention is primarily focused on the legal forms of land use, the legislation that regulates the issue of registration of rights to land plots is analyzed.

The article outlines the presence of a set approach to the introduction of a plot of land into circulation in Ukraine and Poland. A plot of land becomes an object of legal relations under the condition of its formation, i.e. transformation from an object – a natural resource to a separate object of space with defined boundaries and mode of use.

It has been investigated that land plots in Ukraine can be under the conditions of ownership (state, communal, collective and private) and use (permanent use, lease or sublease, land easement, use of someone else's land plot for agricultural needs (emphyteusis) and use of someone else's land plot for buildings (surfaces)).

The article discloses the conditions for the use of land plots in Ukraine and Poland and it is clarified that, in general, the forms of use are identical, but with certain differences, namely the presence in Ukrainian legislation of the right of permanent use as a tool for acquiring rights to land plots, as opposed to usufruct in Polish legislation. It has been established that the right of permanent use is an ineffective legal instrument for acquiring rights to land plots in Ukraine, as evidenced by numerous court practices.

It is proposed, based on the results of the research, and taking into account successful foreign experience, the introduction of the usufruct institution into Ukrainian legislation as a legal structure for the use of land plots/real estate, which will allow to resolve a number of problems that arise in practice and are related to the right of permanent use, which is acquired whether it is acquired according to the provisions of Ukrainian legislation.

Key words: property, use, land easement, emphyteusis, superficies, usufruct.

DOI <https://doi.org/10.23856/5419>

1. Introduction

Despite the complexity of the situation in Ukraine, which is related to the martial law, the adaptation of Ukrainian legislation to the provisions of the European Union continues. Among the spheres of social relations, one of the most relevant topics of modern discourse remains legal land relations, in particular, the study of optimal forms of land use. This is facilitated by the existing trend of civil turnover growth and the transition to new economic conditions, which necessitates the search for the most effective legal structures for the use of land plots/real estate.

The most successful in the development of future legislative initiatives is the conduct of comparative legal studies and the analysis of judicial practice, on the example of Ukraine and Poland.

The purpose of the article The purpose of the article is to study the legal forms of land use under the modern legislation of Ukraine and Poland and to provide proposals for solving problematic issues in this area.

2. Discussion

Analyzing the legislation of Ukraine and Poland in the field of regulation of land legal relations, we will first of all note the presence of a set approach to the introduction of a land plot into circulation. A plot of land becomes an object of legal relations under the condition of its formation, i.e. transformation from an object – a natural resource to a separate object of space with defined boundaries and mode of use. In this context, we are primarily interested in the land plot itself, but already in relation to the legal forms of its use.

Preferably, a land plot, which by its natural properties is a single real estate object, can be under different conditions of use, which primarily depends on the category of the land plot according to the main type of purpose (agricultural, forestry, nature reserve, residential or other purpose).

In general, analyzing the provisions of the Civil and Land Codes of Ukraine, we note that a plot of land in Ukraine can be under the terms of ownership or use, while there is variability in their types.

Thus, with the entry into force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding the Demarcation of State and Communal Property Lands", which entered into force on January 1, 2013, the lands of Ukraine were demarcated into communal and state property, while the form of private ownership introduced in 1992 with the adoption of the Decree of the Cabinet of Ministers of Ukraine of December 26, 1992 No. 15-92 "On Privatization of Land Plots".

Simultaneously with the adoption of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Solving the Issue of Collective Land Ownership, Improving the Rules of Land Use in Massifs of Agricultural Land, Preventing Raiding and Stimulating Irrigation in Ukraine" the term collective form of land ownership was re-introduced in the legislative space.

Regarding the collective form of ownership, it is appropriate to note here that this form of land ownership in Ukraine arose with the adoption of the Land Code of Ukraine No. 561-XII in 1990 and was defined as a separate form of ownership of "collective agricultural enterprises, agricultural cooperatives, agricultural joint-stock companies in among horticultural societies created on the basis of state farms and other state agricultural enterprises" (*Land Code of Ukraine; 1990*). The legislator provided that "the area of land transferred to collective ownership is the difference between the total area of land owned by the respective Council and the area of land that remains in state ownership (reserve land, forest fund, water fund, reserve fund, etc.) and owned by citizens... lands are transferred into collective ownership free of charge" (*Article 5 of the Land Code of Ukraine; 1990*). The peculiarity of this form of land ownership is the possibility of a member of the enterprise to obtain the right of private (individual) ownership of a land share (share) with subsequent formation into a land plot by unsoldering collectively owned lands.

However, with the adoption of the new Land Code of Ukraine in 2002, the collective form of ownership was forgotten by the legislator for a long time (until 2019), as were issues related to the unfinished procedures for unsoldering collectively owned lands. Currently, these are lands that, after the adoption in 2020 of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding the Conditions of Transfer of Agricultural Lands", were put into civil circulation.

As for other forms of ownership, it should be noted here that according to Art. 80 of the Land Code of Ukraine, the subjects of the right of ownership are "citizens and legal entities – on privately owned land, territorial communities that exercise this right directly or through local self-government bodies – on communally owned land; the state, which implements this right through the relevant state authorities, – on state-owned land". Also, the legislator allows the right of joint ownership of a land plot – partial or joint, and trust ownership "as a way of ensuring the fulfillment of an obligation under a credit agreement" (*Art. 597⁻¹ of the Civil Code of Ukraine; 2003*).

According to the types of use, according to the provisions of the legislation of Ukraine, land plots can be acquired under the conditions of permanent use (*Article 92 of the Land Code of Ukraine; 2001*), lease or sublease (*Article 93 of the Land Code of Ukraine; 2001*), the Law of Ukraine "On Land Lease"), on the terms of land easements (*Article 98 of the Land Code of Ukraine; 2001*), on the right to use someone else's land for agricultural purposes (emphyteusis) and the right to use someone else's land for development (surfaces) (*Article 102-1 of the Land Code of Ukraine; 2001*).

A feature of all forms of use, with the exception of the right of permanent use, is the need to conclude a deed, the content of which is subject to consideration and detailing of the provisions of Art. 96 of the Land Code of Ukraine regarding the need to "ensure the use of land for its intended purpose and, at one's own expense, bring it back to its previous state in case of illegal changes to its topography...obey the requirements of environmental protection legislation...pay land tax or rent in a timely manner...do not violate the rights of owners of adjacent land plots and land users... to increase soil fertility and preserve other useful properties of the land... to observe the rules of good neighborliness and restrictions related to the establishment of land easements and protection zones... to preserve geodetic signs, anti-erosion structures, networks of irrigation and drainage systems... to prevent burning of dry vegetation or its remains in violation of the procedure established by the central executive body, which ensures the formation of state policy in the field of environmental protection..." (*Land Code of Ukraine; 2001*).

Variability of forms of land use in Ukraine is due to the legal status of legal subjects as possible participants in legal relations or managers of land under the right of title ownership. At the same time, the right to permanent use of a land plot has now entered the field of discourse-analysis of land legal relations. Attention to this type of land use is due to a significant number of legal disputes regarding land purchased by individuals for the creation of farms before 2002 in accordance with the provisions of the land legislation at that time, as well as regarding the conditions of use of land purchased under the conditions of permanent use by state or communal organizations, etc. For example, the question regarding the transfer of the right of permanent use from the founder to the peasant (farm) farm (Decision of the Supreme Court of Ukraine, 23.06.20, case No. 179/1043/16-ts (proceedings No. 14-63ts20)) was referred to the court for consideration. The court concluded that "from the moment of state registration of the peasant (farm) economy as a legal entity under the Law "On Peasant (Farm) Economy" dated 12.20.1991, the right to permanent use of the land plot, which was obtained by its founder for running such an economy, passed to of this farm, and therefore

did not cease due to the death of the founder and cannot be inherited by the heirs of the latter (clause 16 of the resolution).

At the same time, the answer to the raised issue regarding the use of a land plot with the right of permanent use can be found in the legislation and judicial practice of Poland.

In the decision of the Voivodeship Administrative Court in Kraków dated July 23, 2014, file no. No. II SA / Kr 735/14 states "The Commune may demand a claim from the legal successor who received rights to immovable property. The provisions of the contract of perpetual use are binding not only for the original perpetual use, but also for subjects who will acquire this right from him. In particular, this concerns the purpose and term of development of the land plot".

The provisions of the Civil Code of April 23, 1964 (Poland) provide that "within the limits defined by the laws and rules of coexistence ... the contract on the transfer by the State Treasury of a plot of land or lands belonging to local self-government bodies or their associations for indefinite use, the user may use land to the exclusion of other people. Within the same limits, a permanent usufructuary can dispose of his right (Article 233)..the grant of land to the State Treasury or land belonging to a local government unit or their association in perpetual usufruct is ninety-nine years. In exceptional cases, when the economic purpose of perpetual usufruct does not require the donation of land for ninety-nine years, it is allowed to donate land for a shorter period, but not less than forty years (Article 236)".

Thus, it can be argued that the right of perpetual use in Poland is essentially the counterpart of the right of permanent use in Ukraine, while there are differences in the design of this right. In contrast to Poland, in Ukraine, the right of permanent use is acquired according to the decision of the administrator of state or communal forms of ownership without concluding a deed, which causes a number of discussions on the practical level and a significant number of legal disputes. For example, regarding the conditions for the transfer of the right of permanent use to a successor or heir, the possibility of land use by other land users, etc.

Looking at successful foreign experience, taking into account that "usufruct has become an integral part of many legal systems of the continental legal family (in particular, Belgium, Spain, Italy, Quebec, the Netherlands, Germany, France, Switzerland, Turkey), including post-socialist (Bulgaria, Poland, Romania, Hungary, Czech Republic) and some post-Soviet (Estonia, Moldova) countries...researchers call usufruct "the second most important property right after ownership" (*Smitiukh A.V., 2020; p. 75*), we agree with the opinion of scientists that the institution of usufruct is a successful legal construction.

Moreover, in our opinion, the right of permanent use, which currently exists in land legal relations in Ukraine, is a rudiment of the Soviet legal system, accordingly, the introduction of the usufruct institution into Ukrainian legislation as a legal construction of the use of land plots/ real estate will allow to resolve a number of problems arising in practice and related to the right of permanent use acquired under the provisions of Ukrainian legislation.

At the same time, researching the legislation of Ukraine and Poland, we note that unlike Ukrainian legislation, where the terms land plot, right to a land plot are usually used, the Polish legislator uses the term real estate "parts of land that constitute a separate object of ownership (land plot), as well as buildings permanently attached to the land plot of related or parts of such buildings, if this is provided for by special provisions, constitute an object of ownership separate from the land (*Article 46 of the Civil Code of April 23, 1964*) and " agricultural real estate (agricultural land) is immovable property that is used or can be used to carry out production activities in agriculture in the field of crop production and animal husbandry" (*Art. 46-1 Civil Code of April 23, 1964*).

According to the provisions of the Civil Code of April 23, 1964, the acquisition of rights to real estate can be carried out "by means of an auction or competition" (Article 70-1), at the same time, when acquiring ownership of a real estate object, "the ownership of land extends to space above and below its surface" (Article 143), during the transfer of ownership, contracts of purchase and sale, exchange, donation, transfer of real estate, etc. are applied (Article 155).

The existence of the right of individual, joint or partial ownership in Polish law is the same as in Ukrainian law. According to the decision of the Higher Administrative Court II FSK 2096/11, it is provided that "in the case of joint ownership of real estate... specified in Art. 3 sec. 4 of the Law of January 12, 1991 "On Local Taxes and Fees" (Legal Gazette, consolidated text for 2006 No. 121, Article 844 with amendments) the decision on real estate tax is issued to all co-owners as joint... in situations where one of the co-owners meets the subjective and objective conditions for exemption from payment of real estate tax in accordance with ... the cited law, the amount of tax payable must correspond to the value of the tax liability for the entire property, minus a proportional of the specified amount of tax due to the taxpayer to whom the exemption applies, provided that he has not used such an exemption" (*Decision of the Higher Administrative Court, 2013*). Moreover, the Polish legislator established that "walls, fences, bays, ditches and other similar devices, located on the border of a neighboring land plot, are in common use by neighbors. The same applies to trees and bushes on the border. Users of the aforementioned devices are obliged to jointly pay the costs of their maintenance" (*Art. 154 Civil Code, 1964*).

Restricted property rights to real estate in Polish law, which is similar to Ukrainian law, include easement, pledge, mortgage. (*Art. 244 Civil Code, 1964*). According to Art. 285 of the Civil Code of April 23, 1964 "property can be transferred to the owner of other immovable property (immovable property) with the right, the content of which is... that the owner of the dominant property can use it in the specified amount from the encumbered property, or the owner of the encumbered property is limited in the possibilities of making actions specified in relation to him, or that the owner of the property does not have the right ... to exercise certain powers that he has in relation to the real estate (land easement). Also, in Polish legislation, as in Ukrainian, lease is used as a type of land use, in particular, but not only, in relation to agricultural land.

In contrast to Ukrainian law, Polish law uses custom as a form of acquisition of rights, in particular, in Articles 266-267 of the Civil Code of April 23, 1964, it is determined that "a custom established in favor of a person shall cease no later than upon his death. The user is obliged to preserve the essence of the thing and its current purpose. However, a land user may construct and operate new mining devices in accordance with the law... Before commencing work, the user must... notify the owner of his intention within a prescribed period. If the intended devices would change the purpose of the land or violate the requirements of proper economy, the owner may demand their omission or provide a claim for damages".

Also, Polish legislation, unlike Ukrainian legislation, provides for the use of a real estate transfer agreement. According to Article 902-1 of the Civil Code of April 23, 1964, "under the contract of transfer of immovable property, its owner undertakes to transfer the property to the municipality or the State Treasury free of charge. The State Treasury may enter into a contract for the transfer of immovable property when the commune at the location of all or part of the immovable property has not accepted the invitation to conclude it within three months from the date of submission of the invitation to the property owner".

It should be emphasized that the right of the title holder in the person of the state or municipality is also applied in the legal system of Poland.

According to Article 12.1 of the Law of October 19, 1991 on the management of agricultural property of the State Treasury, "property of the State Treasury... adopted under the terms of this Law creates a fund of agricultural property of the State Treasury. Paying attention to judicial practice, the decision of the Supreme Court dated September 21, 2011 is decisive here. sign. No. I CSK 719/10 (Poland), which states that "if the plot was designated for a road, it was and remains excluded from the market as such (*res extra commercium*), and no one except the State Treasury (national roads) or a local authority authorities (voivodeship, county and commune roads), cannot own it and may not stay on it. Since January 1, 1999 a plot of land under a public road can be owned only by the State Treasury or local self-government (*Article 2a of the Law on Public Roads dated March 21, 1985*)".

Regarding the form of land use by agricultural production cooperatives, we note that according to Article 271 of the Civil Code of April 23, 1964, "the use of land owned by the State Treasury may be established in favor of an agricultural production cooperative as a temporary law or as a perpetual right. In any case, such use ends immediately upon liquidation of the cooperative".

3. Conclusions

Summarizing the above, we note that the developed legal framework regarding the conditions for the use of land plots in Ukraine and Poland is distinguished by its systematicity. The terms of use are generally the same, but with some differences. At the same time, the use of different forms of ownership of a land plot, from ownership to perpetual use, creates a favorable position for legal entities and individuals regarding the acquisition of rights to land plots and preserves the interests of the state or local self-government regarding the country's natural resources. Despite this, we note that the state of war in Ukraine did not make drastic changes in the forms of land use, but it caused restrictions on the procedure for acquiring rights to them (Clause 27 of Chapter X of the Land Code of Ukraine).

As for the differences, we should note that when investigating the issue of using land plots according to formalized rights, we come to the conviction that the right of permanent use is an ineffective legal tool for acquiring rights to land plots in Ukraine, as evidenced by numerous court practices. The disadvantage of the form of use of land plots with the right of permanent use in Ukraine is the uncertainty and impossibility of registering the transfer of rights to a legal successor or heir, use of land by other land users, etc. Thus, taking into account the successful foreign experience, in particular of Poland, we consider it expedient to introduce the institution of usufruct into Ukrainian legislation as a legal construction of the use of land plots/real estate, which will allow to resolve a number of problems that arise in practice and are related to the right of permanent use, which are acquired according to the provisions of Ukrainian legislation.

References

1. *Dekret Kabinetu Ministriv Ukrainy (1992) "Pro pryvatyzatsiiu zemelnykh dilianok"* [Decree of the Cabinet of Ministers of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/15-92#Text> [in Ukrainian].
2. *Zakon Ukrainy "Pro vnesennia zmin do deiakyykh zakonodavchykh aktiv Ukrainy shchodo rozmezhuvannia zemel derzhavnoi ta komunalnoi vlasnosti"* (2012) [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Demarcation of State

- and Communal Property Lands"] URL: <https://zakon.rada.gov.ua/laws/show/5245-17#> [in Ukrainian].
3. Zakon Ukrainy "Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vyrishennia pytannia kolektyvnoi vlasnosti na zemliu, udoskonalennia pravyl zemlekorystuvannia u masyvakh zemel silskohospodarskoho pryznachennia, zapobihannia reiderstvu ta stymuliuivannia zroshennia v Ukraini" (2018) [The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Solving the Issue of Collective Land Ownership, Improving the Rules of Land Use in Massifs of Agricultural Land, Preventing Raiding and Stimulating Irrigation in Ukraine"] URL: <https://zakon.rada.gov.ua/laws/show/2498-19/sp:max50:nav7:font2#n121> [in Ukrainian].
 4. Zakon Ukrainy "Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo umov obihu zemel silskohospodarskoho pryznachennia" (2020) [The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding the Conditions of Transfer of Agricultural Land"] URL: <https://zakon.rada.gov.ua/laws/show/552-20#Text> [in Ukrainian]
 5. Zakon Ukrainy "Pro orendu zemli" (1998) [Law of Ukraine "On Land Lease"] URL: <https://zakon.rada.gov.ua/laws/show/161-14#Text> [in Ukrainian].
 6. Zakon z pytan upravlinnia silskohospodarskym mainom Derzhkaznacheistva (1991) [Law on the management of agricultural property of the State Treasury] URL: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19911070464/U/D19910464Lj.pdf> [in Poland].
 7. Zemelnyi kodeks Ukrainy (1990) [Land Code of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/561-12#Text> [in Ukrainian].
 8. Zemelnyi kodeks Ukrainy (2001) [Land Code of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/2768-14#Text> [in Ukrainian].
 9. Kodeks tsyvilnyi (1964) [Civil Code] URL: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf> [in Poland].
 10. Postanova Velykoi Palaty Verkhovnoho Sudu (2020) [Resolution of the Supreme Court], case No. 179/1043/16-ts URL: https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/02_07_2021_Gudyma_D_A_practicum.pdf [in Ukrainian].
 11. Rishennia Voievodskoho administratyvnoho sudu v Krakovi (2014) [Decision of the Voivodeship Administrative Court in Kraków], file no. No. II SA / Kr 735/14 URL: <https://bip.rzeszow.uw.gov.pl/pozostale-informacje/informacje-prawne/wyrok-wojewodzkiego-sadu-administracyjnego-w-krakowie-z-23-lipca-2014-r-sygn-akt-ii-sakr-73514/> [in Poland].
 12. Rishennia Vyschchoho administratyvnoho sudu (2013) [Decision of the Higher Administrative Court] URL: <https://bip.rzeszow.uw.gov.pl/pozostale-informacje/informacje-prawne/wyrok-nsa-ii-fsk-209611/> [in Poland].
 13. Smitiukh A.V. Shchodo uzufрукtu korporatyvnykh paiv (chastok, aksii) (2020) [Regarding the usufruct of corporate shares (shares, shares)]. *Pravo i suspilstvo* 3/2020, p. 74–79. DOI <https://doi.org/10.32842/2078-3736/2020.3.11> [in Ukrainian].
 14. Tsyvilnyi kodeks Ukrainy (2003) [Civil Code of Ukraine] URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text> [in Ukrainian].
 15. Ukhvala Verkhovnoho Sudu (2011) [By the decision of the Supreme Court] URL: <https://bip.rzeszow.uw.gov.pl/pozostale-informacje/informacje-prawne/wyrok-sn-z-21-09-2011r-sygn-akt-i-csk-71910/> [in Poland].