

Protection of inviolability of property

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Abstract. The presented issue is relevant because it calls for a thorough analysis of both the theoretical and practical aspects of guaranteeing land's inviolability in order to identify the critical elements that must be taken into account when putting legislative measures into place to guarantee the inviolability of private property in the context of contemporary economic conditions. The aim of the research is to consider practical and theoretical aspects of ensuring the inviolability of land as an integral component of land ownership relations. The combination of systematic analysis of the features of legislative acts constructed in various countries, which determine various aspects of solving issues of protecting the inviolability of property, with an analytical investigation of the practical implementations of these provisions, forms the basis of the methodological approach to this study. The findings of the study indicate the importance of clear regulation of the protection of the inviolability of property by current legislative provisions and the need to implement these provisions in everyday practice when resolving disputes on determining the principles of inviolability of property and its protection in individual cases. The authors suggest supplementing the current legislation of Ukraine with a number of provisions for better regulation of land ownership relations. The results obtained in the study and the conclusions formulated on their basis are essential for establishing the key principles that determine the inviolability of property and can be used in planning changes to the current legislation on the specific features of ensuring the inviolability of property as well as determining the degree of punishment for its violation

Keywords: the inviolability of property; invasion of land; violation of borders; self-defence of land property; trespass on land

Introduction

One of the fundamental tenets of civil law in many contemporary states that supplement the existing provisions of their own legislative acts is the inviolability of property. The international legal aspect of this principle is particularly

important, especially in the form, as reflected in the Convention on the Protection of Human Rights and Fundamental Freedoms (1950), Art. 1 of the First Protocol, and the practice of inviolability of property based on it, since the priority

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norms of international law concerning national legislation in the event of a conflict was established. As indicated in the literature, one of the main subjective components of property relations is the relation of a person to property as their own and their elimination of all other participants in public life from it. In the land relations, this is manifested in the desire of the owner or land user to separate their land plot and restrict access to it to other persons, which is practically implemented by arranging various kinds of fences (ditches, hedges, and palisades, etc.), which do not allow these other persons to enter the corresponding plot.

Accordingly, a number of foreign laws directly assign the owner (land user) of a land plot the right to “install a fence”. Thus, according to the Civil Code of France (Dovgert, 2006), each owner can enclose their property, except in cases established by law. Similar provisions are contained in the Italian Civil Code (1942) and Civil Code of Quebec (1994), etc. As for Ukraine, the lists of rights of land owners and land users established in the Land Code of Ukraine (2001) do not explicitly provide a special right to install a fence on their property. Therefore, the question arises whether the owner or land user has the right to restrict access to their land plot for other persons (including by fencing it) and how inviolable is their ownership. The current development of the issue is that the content of the rights of land owners and land users, including their guarantee and protection, has been repeatedly covered in the papers of researchers (Fedchishin, 2018). However, in general, the theoretical and practical aspects of ensuring the inviolability of land in the literature have not been sufficiently investigated.

Each owner or land user seeks to allocate their land plot and restrict access to it for unauthorised persons by arranging various kinds of fences. However, the question arises as to whether the restriction on access to their land plot established by the owner or land user is mandatory for other persons and the legal consequences of its violation. Based on the investigation of international experience of legal regulation, proposals are formulated to introduce a mechanism for protecting the inviolability of land from unauthorised intruders. This study’s methodology entails using contemporary instruments to analyse the actual situation regarding the preservation of the inviolability of legal procedures in many nations throughout the world.

The aim of this study is to consider the theoretical and practical aspects of ensuring the inviolability of land as an integral component of land ownership relations.

Materials and methods

The combination of systematic analysis of the features of legislative acts constructed in various countries, which determine various aspects of solving issues of protecting the inviolability of property, with an analytical investigation of the practical implementations of these provisions, forms the basis of the methodological approach to this study. The main part of the research is preceded by the establishment of a theoretical foundation, which consists of the findings of other authors who consider the protection of the inviolability of property, for which the features of legislative acts of several countries that define the key aspects of the stated issue were investigated.

A systematic analysis of certain features of the structure of legislative acts that determine all possible aspects of ensuring the protection of the inviolability of property allows

determining the competence of owners and users of property to ensure the protection of its inviolability at the level of the current legislation of the state. Therewith, a crucial point is the ability of legislative acts to determine the full range of aspects that are important in the context of solving this issue, especially when it comes to ensuring the inviolability of land plots and housing of citizens. At this stage, it is quite appropriate to refer to specific legislative documents that strictly regulate all these aspects. The definition of the competence of owners and land users to protect their land plots, which is indicated in some legislative acts of Ukraine, references to which are given, is also of critical importance. This is necessary to establish a comprehensive understanding of the current state of the inviolability of private property in Ukraine, and real measures to ensure the rights of citizens to immovable land ownership objects.

The analytical investigation of the prospects for implementing the provisions of the current legislation regulating the sequence of ensuring the rights of citizens to the inviolability of their property involves analysing examples of the application of legislative restrictions in the legal practice of the United States of America (USA), Great Britain, Australia, and a number of other countries. In addition, the feature analysis was performed on the construction of the American legal doctrine of protecting the borders of private property from outside encroachments, and the norms of English law, in which invasion of someone else’s territory is considered one of the most serious violations of legislation in the field of protection of private and land property and a separate type of private violations – trespass to land – is determined. The analysis of similar individual types of violations and the procedure for protection in each variant is also conducted, which is stipulated by the provisions of the current legislation of the state. The analytical investigation also provides an assessment of several scientific findings of Ukrainian authors who conducted their study on the issue of ensuring legal protection of citizens from trespass to land and the features of qualifying crimes of this type. In particular, similar analytical calculations are provided in the scientific findings of M.M. Konstantinovsky (2012), and some other authors. Proper comprehension and the development of final results that summarise the study are facilitated by an analytical comparison of the results obtained in this investigation with the conclusions of some other researchers on this topic.

Results

In practice, the right of owners and land users to protect their land plots is generally recognised, since this follows from the provisions of Part 2 of the Civil Code of Ukraine (2003) Art. 319 (the owner has the right to perform any actions in relation to their property that do not contradict the law), and a number of other acts regulating the installation of fences, such as Law of Ukraine No. 2807-IV “On the Improvement of Settlements” (2005), State Building Norms of Ukraine B.2.2-12:2019 “On Planning and Development of Territories” (2019), State Building Norms of Ukraine B.2.2-5:2011 “On Planning and Development of Cities, Settlements and Functional Territories” (2012). However, it should be understood that the fence itself is only a means to:

- ▶ mark the boundaries of the land plot (however, the fence cannot replace the official procedure for establishing (restoring) the boundaries of the land plot, and the fence is not equal to the boundary signs of the set template);

- ▀ technically restrict entry to the land plot;
- ▀ indicate to other persons the prohibition of unauthorised access to the land plot.

The main question is whether a land plot as a person's property can be considered inviolable and whether its owner (land user) has the right to prohibit access to it for other persons, including fencing it. In this regard, it can be noted that in post-Soviet countries, including Ukraine, for some time the situation when the legislation guaranteed the inviolability of a person's home, but did not provide for liability for invasion (entry) of a land plot as a person's property was typical. Positive changes in this matter are related to the recognition of the object of criminal law protection of the inviolability of not only housing but also other property. Thus, today the inviolability of a person's home and other property is considered one of the principles of criminal law (criminal proceedings) (Nazarenko, 2016). As indicated in Resolution of the Supreme Court of Ukraine No. 5-299kz15 (2016), inviolability of a person's home and other property, which also includes inviolability of private and family life, presupposes broader human rights and conditions a broader concept of "housing and other property of a person" in the criminal procedural aspect than is defined in civil and housing law. Therefore, in this case, the "other property of a person" also includes land plots that are legally or illegally stay in the factual long-term and continuous possession of an individual and are intended, adapted, or specially equipped to accommodate or store their property, grow or produce products, provide for the household and other needs of the person, and equipped with any devices (fences, locks, alarms, security, etc.) that make it impossible or difficult to enter them.

Accordingly, today there is a judicial practice regarding the qualification as a crime of illegal actions to enter the fenced territory (yard) of a household (estate), even if the violator did not manage to get into the housing itself. Thus, the above-mentioned Resolution of the Supreme Court of Ukraine No. 5-299kz15 (2016) states that entering the fenced territory of a household at a late time without the permission of the owner and without legal grounds, including overcoming an obstacle (fence), is a violation of the inviolability of "other property of a person", which entails liability for the Criminal Code of Ukraine (2001) Art. 162 "On the violation of the inviolability of the habitation". From the standpoint of civil terminology, in this case, the object of legal protection is the territory (space) for the personal life of an individual, that is, a manor that includes a land plot together with a residential building located on it, household buildings, ground and underground utilities, perennial plantings as indicated in the Civil Code of Ukraine (2003) Art. 381 "On the features of separation of household plots". The boundaries of such a territory (space) are determined in each specific case, considering the whole set of factual circumstances, but in general, this refers to the right of an individual for territorial (spatial) autonomy, its supreme power of a person in a certain territory (in a certain space), including the right to demand from other persons and the state not to violate the regime of its inviolability (Demianenko, 2014). However, the above-mentioned provisions on criminal law protection of the inviolability of a person's home and other property do not provide a solution to the issue of ensuring the inviolability of land, since:

- ▀ the object of criminal law protection is the inviolability of a relatively limited number of land plots used as a place

for an individual to live. Accordingly, land plots belonging to legal entities, and those land plots that are not used as a place of residence, are outside such protection;

- ▀ the issue of the authority of the owner (land user) of a land plot to restrict access to their property and eliminate its violations remains unresolved. To date, the private law aspects of these land ownership relations in Ukraine have not been regulated, nor have these issues been investigated in the doctrine of civil and land law.

The opposite is the approach inherent in the legislation of the countries of the Anglo-Saxon law family (Great Britain, USA, Australia, etc.), which consider the inviolability of ownership as an integral component of property relations, and the invasion of someone else's property (land plot) is defined as a separate type of private offence – trespass to land. Thus, in English law, trespass to land is one of the most ancient types of torts, which currently qualifies as independent deliberate actions of a person that are associated with an illegal invasion of someone else's property. Therewith, the list of actions that can be considered a violation of property of real estate is quite wide: for example, in one of the cases, the court qualified as trespass hunting near a protected area using hunting dogs that systematically ran into the protected area (Konstantinovskiy, 2012)

In American legal doctrine, the protection of the boundaries of property from unlawful encroachments is also given special importance, since it is considered the primary basis of property relations. Accordingly, the USA legislator and courts seek to guarantee the unhindered exercise by owners of rights freely right to property and the right to exclude any violators. Trespass to land is considered an unauthorised physical invasion of the borders of someone else's property, conducted both by the person or arising as a result of their actions (invasion of a third person or thing). The following actions can be qualified as trespass to land: passing or driving through someone else's site, shooting at the site or throwing stones at it, or erecting a building or part of a building on someone else's site. In this case, the violator can be either an intruder who has entered someone else's property or a guest who refuses to leave. Since one of the characteristic features of trespass to land is the unauthorised (illegal) invasion, the following cases are considered privileged trespass:

- ▀ entry with the consent of owner or license;
- ▀ entry based on easements;
- ▀ violation of the boundaries of property as a result of necessity or an emergency to prevent more serious damage to the life, health, or property of citizens;
- ▀ invasion of private territory caused by the public interest (including prevention of crime, detention of the offender, provision of medical or other assistance);
- ▀ withdrawal (restriction) of property conditioned upon public necessity, etc. (Konstantinovskiy, 2012).

Therewith, as for the first case of the legality of staying on someone else's territory, it is quite common in the studies of American lawyers to avoid disputes about border violations, the owner of a land plot should take care in advance to install special signs that inform unauthorised persons about the prohibition of an invasion. In practice, this is reflected in the fact that in the United States of America, the No Trespassing warning sign can often be found on private plots. Thus, all issues of protecting the inviolability of the owner's property should be resolved by including relevant legal provisions in the current legislation, which will

help to clarify and regulate the rights and obligations of the owner and the measure of responsibility for their violation.

Discussion

The need to ensure the inviolability of the boundaries of the property as one of the foundations of land ownership relations has not been ignored by legal scholars and legislators of the countries of the Romano-Germanic law family. However, there, in contrast to the legislation of the countries of the Anglo-Saxon family, such provisions belong to the sphere of real, not tort law. Thus, according to the Civil Code of Netherlands (1992), Book 5, Art. 22, if a land plot is not fenced, everyone can move inside it, unless it harms or causes inconvenience to the owner, or it was explicitly stated that it is forbidden to stay within the plot without permission. By the content of the Italian Civil Code (1942), Art. 842, it is not allowed to hunt on someone else's fenced land plot. Such provisions are considered by researchers and legislators of post-Soviet countries. Thus, according to the Model Civil Code of CIS (1994), Art. 273-2, if the land plot is not fenced or its owner has not otherwise clearly indicated that entry to the plot without their permission is not allowed, anyone can pass through this plot, as long as this does not cause damage or inconvenience to the owner (part 2) (Stefanchuk and Stefanchuk, 2009).

Practically in this form, these recommendation provisions received their legislative consolidation in the Civil Code of the Republic of Belarus (1998), Art. 263, and the provisions of Civil Code of the Republic of Armenia (1998), Art. 203, the Land Code of the Republic of Kazakhstan (2003), Art. 68 etc. Considering the above, a proposal to fix in the current legislation the provisions according to which the owner or land user has the right to fence or otherwise restrict access to the land plot, which excludes the presence of other persons on it without the permission of such owner or land user, unless otherwise provided by law, has already been put forward (Myronenko, 2019).

Therewith, the legal power of the owner of a land plot or a land user to restrict or prohibit access (entry) to their property for other persons and any subjective right is of practical importance if legal means provide for the possibility of its exercise. Therefore, the question arises about ways to protect the inviolability of a land plot as a person's property. According to the Land Code of Ukraine (2001) Art. 152, the owner of a land plot or a land user may request the elimination of any violations of their rights to land. Considering this issue in more detail, it is customary to distinguish between jurisdictional (protection of rights is conducted by authorised competent authorities) and non-jurisdictional (protection of rights is conducted by the participants in legal relations themselves) forms of protection of land rights. In practice, systematic serious violations of land property rights can be effectively eliminated in court as a jurisdictional form of protection of rights, especially if they are related to causing damage to its owner or land user. However, short-term violations of property right that are not related to causing harm are quite ineffective to eliminate in court, and in some cases, it is simply impossible (in particular, if the identity of the violator is unknown). Therefore, in some cases, protection of property rights conducted out of court (not the least because of its operational nature) is more effective.

The out-of-court procedure for protecting land rights within the jurisdictional form of protection is mainly associated with an appeal to law enforcement agencies. Thus, calling police representatives to the place of violation, admittedly, can reduce the degree of conflict between the owner (land user) of a land plot and the violator, and force the latter to leave the boundaries of the property. However, in the Criminal Code of Ukraine (2001), Art. 162 "On the violation of the inviolability of the habitation" does not have a special rule on criminal or administrative liability for invading someone else's land plot, therefore considerably reducing the effectiveness of this method of protecting the inviolability of property. As for the appeal to other competent bodies, in particular authorized bodies of executive power and local self-government bodies, with their help within the framework of legal regulation of land neighbourliness and neighbourly relations (Art. 158-161, of the Land Code of Ukraine (2001)), trespasses committed by owners or occupiers of adjacent land can be more or less effectively remedied.

The non-jurisdictional form of land rights protection is implemented by independent actions of an authorised person without applying to state or other authorised bodies. Primarily, it is related to self-defence, which is conducted by the owners and land users of land plots themselves. In The Civil Code of Ukraine (2003) Art. 19, it is stipulated that a person has the right to self-defence their civil right from violations and illegal encroachments. In some cases, this non-jurisdictional form of ownership protection is more effective, since it provides an opportunity to eliminate violations more quickly and take the necessary preventive measures. In this regard, it is possible to mention the Civil Code of the Czech Republic (1964), Art. 14, according to which self-defence of civil rights is allowed provided that the relevant right is under threat and it is evident that the intervention of public authorities will not be timely. However, looking ahead a little, it can be noted that, based on the provisions of the current legislation on the regulation of the relations under study, the use of self-defence to eliminate existing violations of land property is complicated. This is conditioned upon such circumstances as:

1. Relatively abstract provisions of the Civil Code of Ukraine (2003), Art. 19, allowing for disputes as to their interpretation. Therewith, the legislation of Ukraine does not provide for self-defence of property (and self-defence of real rights in general), and provisions on the application of self-defence in the field of land relations. Although the latter, as rightly indicated in the literature, does not exclude the exercise of self-defence of land rights based on the Constitution of Ukraine (1996) Art. 55 and the Civil Code of Ukraine (2003) Art. 19 (Fedchishin, 2018).

2. The absence in the current legislation of provisions that would directly define the invasion of someone else's land plot contrary to the prohibition of its owner or land user as a violation or illegal encroachment, and its inviolability – as an object of legal protection. There are also no special provisions that would provide for the right of the owner (land user) of a land plot to perform independent actions to remove the violator from the property (so-called actual "forceful" methods of self-defence) (Filonova, 2020).

Thus, it is wise to once more consult the global experience of legal regulation when discussing this matter. The procedure for protecting against trespass on land in the

legislation of the countries of the Anglo-Saxon law family is also usually divided into judicial and out-of-court. In court cases of trespass on land, the plaintiff can first of all claim compensation for damages. Therewith, the very fact of invasion of someone else's property is the basis for compensation by the defendant for nominal damage, and if there is actual damage, the court collects compensation from the violator in full; the plaintiff may also be awarded compensatory damages related to other violations of their rights. In addition, the court, at the request of the plaintiff, may issue a court order (ban) to the violator, obliging them to terminate the injunction (Konstantinovskiy, 2012). Self-help is mainly considered as an out-of-court order of protection against trespass on land.

As already mentioned, the Anglo-American legal doctrine provides for a right to exclude any violators from their property. Therefore, self-help possession involves a reasonable use of force against the violator to both stop the attempted invasion and expel the violator from the property. Therewith, the use of physical force must have reasonable limits to prevent excessive impact on the violator; otherwise, excessive use of force may lead to a counterclaim of the violator. In general, as noted in the literature, in Anglo-American law there is an institution of the forcible injunction of the violator from the land plot, which grants the right, after warning the violator to stop the invasion and making a demand to "peacefully leave someone else's land", to use force against them with the possibility of causing property and minor physical damage (Fedchishin, 2018). If the owner is unable to remove the violator from the property on their own, then, as already mentioned, they can apply to the court for an order (prohibition) obliging the defendant to immediately stop the injunction.

Self-defence against trespass on land can also be passive in the form of installing fences, surveillance equipment, etc. Nevertheless, some types of self-defence are subject to special regulation. Thus, a separate law, the Guard Dogs Act (1975), stipulates that their use is not allowed unless they are chained or under the permanent control of the owner (Konstantinovskiy, 2012). In the laws of the countries of the Romano-Germanic family, invasions of someone else's land plot can also be eliminated in court and out of court. As for the judicial procedure, unlike Anglo-American law, a separate type of claim for the elimination of this type of violation is not provided, but such conventional general constructions as vindication and negator claims are used. Elimination of invasion of a land plot out of court within the framework of private law regulation is conducted by the owner themselves in self-defence. Consequently, it should be highlighted that several states' laws include specific provisions for the self-defence of property in addition to general ones regarding the defence of civil rights. Thus, according to the Civil Code of Germany (2002), Art. 859 "On the owners' self-help", the owner can resist prohibited arbitrariness by using force; if the owner of a land plot is deprived of property by means of prohibited arbitrariness, they can immediately restore their property after a violation by removing the violator.

These provisions of German law are reflected in the civil laws of a number of other states, including post-Soviet ones, such as the Civil Code of the Republic of Moldova (2002), Art. 492, the Civil Code of the Republic of Azerbaijan (1999), Art. 164. Thus, according to the content of the Civil Code of the Republic of Moldova (2002), Art. 492,

the owner or a third party may resort to self-defence against a person who unlawfully deprives one of the property, otherwise unlawfully infringes property, or whose actions pose an imminent threat of unlawful deprivation or violation of property; self-defence measures are limited to the immediate and proportionate ones necessary to return the thing or to terminate or prevent deprivation or violation of property, and to remove the violator from the immovable property. Inviolability of property is the main principles of civil law in the modern state. Compliance with this principle is mandatory from the standpoint of the need to preserve the existence and development of modern civil society, and preserve free trade turnover and public relations in general. Roman law historically combines three main types of civil property: peregrine, bonitarian, and, the most ancient, *quiritium* property. Inviolability of property consists in the existence of guarantees of non-interference of unauthorised persons in relation to the property, without the permission of the owner himself. Such guarantees are the availability of legal and several other means by which the owner can objectively reflect the influence of unauthorised persons on them.

Conclusions

The right to restrict access to a land plot for other persons should be considered an integral part of the powers of land owners and land users. In turn, ensuring the inviolability of land property by prohibiting unauthorised intrusion on it by the owner or legislation and introducing effective mechanisms to prevent and eliminate such intrusion is one of the important tasks of legal regulation of land ownership relations. It is suggested to add provisions to Ukraine's current legislation to better regulate this aspect of land ownership relations, that: recognise illegal unauthorised invasion of someone else's land, which is properly fenced by the owner or land user and/or access to which is prohibited in another way; provide for the obligation of the violator, after receiving a warning from the owner or user of the land, to immediately stop the violation and move outside the plot; provide for the right of the owner (user) of the land to self-defence of the inviolability of property, including the possibility of limited use of force to eliminate unauthorised access; establish administrative liability for unauthorised intrusion on someone else's land plot, access to which is prohibited by its owner or land user.

There are various approaches to resolving the question of property's inviolability in the contemporary context of state legal systems. In particular, such as a feature of the right to property, which excludes any influence on the object of ownership with disregard for the will of the true owner, and as a feature of the right to property, which does not allow any persons to resist the owner of the property in matters of using the specified property, regardless of the purpose of the use. In any case, the protection of the inviolability of property purely in the legal field is an integral feature of the developed legislation of a modern state, which should be determined using the existing organisational and legal foundations.

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Conflict of interest

None.

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Охорона недоторканності власності

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Анотація. Питання актуальне, оскільки потребує ретельного аналізу як теоретичних, так і практичних аспектів гарантування недоторканності землі з метою виявлення критичних елементів, які необхідно враховувати у впровадженні законодавчих заходів щодо гарантування недоторканності приватної власності в Україні в контексті сучасних економічних умов. Мета дослідження – розглянути практичні та теоретичні аспекти забезпечення недоторканності землі як невід’ємного складника відносин власності на землю. Поєднання системного аналізу особливостей законодавчих актів різних країн, що визначають різні аспекти вирішення питань охорони недоторканності власності, з аналітичним дослідженням практичної реалізації цих положень становить основу методологічного підходу до цього дослідження. Результати роботи свідчать про важливість чіткого врегулювання охорони недоторканності власності чинними законодавчими нормами та необхідність реалізації цих положень у повсякденній практиці під час вирішення спорів щодо визначення принципів недоторканності власності та її охорони в окремих випадках. Запропоновано доповнити чинне законодавство України низкою положень для кращого врегулювання відносин власності на землю. Отримані результати дослідження та сформульовані на їхній основі висновки суттєві для встановлення ключових принципів, що визначають недоторканність власності та можуть бути використані в плануванні змін до чинного законодавства щодо особливостей забезпечення недоторканності власності, а також визначення міри покарання за його порушення

Ключові слова: недоторканність власності; вторгнення на землю; порушення кордонів; самооборона земельної власності; посягання на землю