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The expert opinion on the dissertation written by the Tatyana Sergeyevna Krasnova, Coercion and autonomy of will in servitude law

1. The subject matter of the dissertation

The law on servitudes belongs to the re-discovered matters of the private law. The concept of the servitude challenges the traditional classification of the property law. It is due to the complex and heterogenous nature of the servitudes, which constitutes a border line between the law of obligations and property law. The tension between the components of property law and of the obligations rises the questions on the freedom of the determining of the content of the servitudes by the parties. The dissertation concerns also another essential problem of systematisation of the various encumbrances of the property, imposed on the owner. The Author faces the matter of the diversity of the legal sources for the various encumbrances charging the property, analysing them from the perspective of their constitutionality. Mrs. Krasnova analyses also whether such encumbrances or limitations on the property may be qualified as the proprietary rights and the servitudes or easements.

The fundamental question of the dissertation arising from the hybrid structure of the servitudes is the tension between the mandatory elements of the servitudes and the scope of the potential freedom in determining their content.

2. The structure

The dissertation consists of three chapters, first dealing with the general issues of servitude law. In this chapter, the Author discusses the different sources of the servitudes and the historical backgrounds, with the focus on the historical

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development in the Russian law. The Author draws the line between the limits imposed on the immovable property on the one hand and the encumbrances of immovable ownership. In the second chapter Mrs. Krasnova analyses different categories of encumbrances of ownership of immovable ownership in contemporary Russian law and formulates proposals for the most convenient development of the concept of servitudes in the Russian law. The central role for this work plays the chapter 3 of the dissertation, devoted to the relation of the autonomy of the parties and the mandatory law. The dissertation has a logical structure, leading the reader from the illustration of the outline picture of the servitudes, through their various forms (or the legal constructions serving to this same purpose) and finally analysing the crucial question for the whole work, concerning the limits of freedom and the interplay between the proprietary structure and the scheme of the obligation.

I have however some doubts concerning the construction of the book. The main problem of the book according to its title concerns the matter discussed mostly in the third chapter. It would be advisable to distribute the main topic of the book more equally through its structure. The most innovative part is to be find in the § 1 of the third chapter. The remaining two chapters play a role of the introduction, so it would be desirable to extend it through the whole work. By the way the Author deals with the private autonomy in the law on servitudes, but vast part of the dissertation is devoted to these encumbrances or easements which are established by the operation of law. It cannot be denied however, that it is also a negative aspect of the private autonomy, if different limitations of ownership are imposed by the operation of law or by the acts of the public authorities.

3. The method

Mrs. Krasnova enriches her analysis of the dogmatic law with the historical and comparative perspective. It is not a comparative work, but the widely used comparative and historical remarks serve the deeper understanding of the explained institutions. The Author omits often committed mistake with the fragmented presentation of the legal system, deprived of the context. The comparative remarks serve here more to highlight different possible way of understanding the content of the servitudes and consequences which may be derived from the foreign legal systems.

Similarly, Mrs. Krasnova uses also the legal - historical method. This method is also used carefully with sufficient diligence. The historical arguments serve also to the explanation of the current content of the institutions and they do not imitate the historical research, which has not been done. They help to understand the current development and the paths of the juridical argumentation.

Mrs. Krasnova has proofed the ability of using the doctrinal and jurisprudential sources in the methodologically correct way. The footnotes fulfil the academic requirements.

4. **The main findings and conclusions of the dissertation**

The most important and innovative remarks can be find in the Chapter 3 of the dissertation. Mrs. Krasnova enters a discourse concerning the position of the law of servitudes in the scheme of the private law. In many legal systems, the servitudes are qualified as the "real" rights, sharply distinguished from the obligations. For the Author the constitutive features of the proprietary rights are the right to follow and the absolute protection. She supports further the principle of the numerus clausus. By these means Mrs. Krasnova declares herself to be rather on the dominant and conservative side of the doctrine. The great value of Krasnova's work is however the identification of the problem. The servitudes are presented as the rights of the genuine "complex" structure, combining the proprietary elements with the obligation. It has a consequence that a right of servitude may cover very differentiated spectrum of entitlements. The servitude itself remains only as a frame without determinable content. One may ask then, whether the distinction between the proprietary rights and the rights arising from the obligation is rational. Does the "numerus clausus" principle remain its relevance in the time of the growing complexity of the legal relationships, where also a principle of the "relative effect" of the obligation remains more and more only a theoretical figure? For Mrs. Krasnova concept speaks however the general reluctance of the Russian law-maker towards the "negative" servitudes. The Author points out, that such negative servitudes may be replaced by other institutions and their introduction is not necessarily. It is then consequent. If the law-maker tries to allow only servitudes with the restricted content and additionally takes a negative position towards the voluntary servitudes, it is coherent to regard the servitudes as "real rights" and the sharp distinction between the realm of obligation can be successfully maintain. The lack of the broader concept of the servitude may be completed by the contractual effect with the relative effect, what in practice does not produce difficulties. The differences in the approach of different legal systems to this problem are correctly pointed out by the Author. This is exactly a proper application of the comparative argumentation allowing the better understanding of the peculiarities of the Russian law. Mrs. Krasnova makes also a pleading for allowing the voluntary easements in the Russian law.

It is the most interesting parts of the work, which is not only interesting from the perspective of the Russian law, but may serve to develop more general conclusion concerning the structure of the modern continental civil codes. Such system (like e.g. the Polish law or German law) which accepts the broad concept of servitudes, leaving to the parties of the servitude agreement vast freedom in creating the easements with very different content, have difficulty in maintaining the coherence or rationality of the structure. In these systems, despite the external structure of the codes, the closer examination discovers the disappearing rationality of the division between the obligations and real

rights. Under Russian law more rigid approach to the possible content of the servitudes and the way of their establishment allow keeping this borderline of categorization of the private-law rights in the more convincing manner.

For the Author the qualification of the servitudes (easements) as the "real rights" serves to the very practical conclusion. Mrs. Krasnova points out, that in the current Russian law does provide the specific protection of the servitudes. This protection has been derived by her from the classification of the servitude as a "real right" which must result with the absolute protection of the entitlements arising from the servitude. These considerations are accompanied by the well-argued conclusions concerning the question of the subject matter of possession in case of the servitudes. I am also sharing the view, that it is the possession of the "right" and not directly of the real estate. Of course, this conclusion depends very much on the terminology of the examined legal system and the legal consequences of such qualification under legal system in question.

5. Conclusion

The dissertation of **Tatyana Sergeyevna Krasnova, Coercion and autonomy of will in servitude law** proves the ability of the Author to provide self-standing academic research of high quality. It proves the methodological maturity, originality of conclusion and the quality of the conducted legal research. The Author has solved a scientific problem, enriching the science of law with new considerations and perspectives. The dissertation fulfils the legal requirements to grant the academic title of the "candidate of sciences" Ph.D. in the Civil Law, Business Law, Family Law and Private International Law.

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