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Issue Article

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DISPOSAL OF PROPERTY RIGHTS AND MORTGAGES

Abstract: *The subject and research topic of the article is to study the dispositive nature of the right of ownership and mortgage. Since mortgage is an accessory right and is related to the main right, that is, the right to demand performance arising from the main obligation. In addition, it is related to the dispositive nature of the right of ownership, since based on the dispositive nature of the right of ownership, the subject has the right to mortgage the property. Accordingly, any interference with the right of mortgage is reflected in the right of ownership. The purpose of the article is precisely this, to discuss the right of ownership in connection with the right of mortgage.*

A vicious practice in modern Georgia is the conclusion of a purchase agreement with the right to repurchase instead of a mortgage agreement. On July 21, 2018, an amendment was made to the Civil Code of Georgia , which imposed a restriction on the use of collateral for a loan issued to an individual, except for exceptions established by law. As a result of this restriction, we have a practice where, instead of a mortgage agreement , the parties conclude a purchase agreement with the right to repurchase. This type of agreement is more risky for the property owner, since there is a greater risk of losing the property.

The imposition of a restriction on the right to mortgage a loan by an individual under the legislation also constitutes a restriction on the right to property, and this article will address this issue.

The article also discusses the essence and main characteristics of mortgage as a legal institution. It will also discuss the decision of the First Collegium of the Constitutional Court of Georgia of December 18, 2020 No. 1/4/1380; in the case "Fatman Kvaratskhelia and Kakha Ekhvaia vs. the Parliament of Georgia", where the Constitutional Court discussed the constitutionality of the aforementioned norm.

As a result of the article, the shortcomings of the legislation will be revealed and mechanisms for improving the legislation will be proposed.

Scope of application of the results: The above results will be useful for both theorists and practicing lawyers. For theorists, in the sense that the connection of the dispositive nature of property rights with the right of ownership will be obvious, and for practicing lawyers, for example, for lawyers, in the process of dispute resolution, to justify that when interfering with the right of mortgage, there is also interference with the right of ownership.

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Introduction

The relevance of the topic and the problematic nature of the research topic. The main research topic of the article - the dispositive nature of property rights and mortgages - is relevant, since the issue was raised by the amendment to the Civil Code of Georgia in 2018, as a result of which a restriction was imposed on the mortgage of property to secure a loan by an individual. The topic is relevant, since this type of restriction has had an impact on the legal and social situation of citizens. In addition, the topic is also relevant from a scientific point of view, since it examines two legal rights - property and mortgage. It contains scientific research and findings on the interrelationship of these two rights.

The subject of the study is to discuss the latest legislative changes surrounding the institution of mortgage and, at the same time, to analyze the impact of these changes on property rights. It also discusses the decision of the Constitutional Court, which concerns the relationship of the legislative changes introduced in the section on mortgage and pledge in the Civil Code of Georgia to **the equality** and **property rights guaranteed by the Constitution of Georgia** .

Goal and Objectives The goal of the study is to study and improve the current legislation relating to the institution of mortgage. The paper will also analyze existing judicial practice surrounding loan relationships.

The theoretical and practical significance of the article is that scientists and researchers interested in the issue will have an idea of the latest changes surrounding the mortgage institution and what kind of impact it has on property rights. In addition, from a practical point of view, the article will be useful for judges and lawyers when discussing the invalidity of a transaction and its connection with property rights.

Main text

Disposal of property rights and mortgages

1.1 Right to dispose of property and mortgage

This chapter of the article will discuss the right to dispose of property and mortgage. Mortgage is a legal institution, the main essence of which is established by the Civil Code of Georgia. In particular, the main essence of the mortgage institution is that it is a means of securing a claim. [1]Mortgage of property is related to the dispositive nature of the right to property, since the property owner himself decides whether to mortgage the property to secure a loan and thus dispose of it. The content of the right to property defined by Part 1 of Article 170 of the Civil Code of Georgia also includes the right to dispose of it [2]. Accordingly, the owner, based on the essence of the right to property, can decide for himself whether to mortgage the property or not. The disposal of property is related to the conclusion of a transaction on an item, and the owner has the authority to mortgage it precisely due to the dispositive nature of the property right. An exception to this rule is Part 4 of Article 286 of the Civil Code of Georgia, which imposes restrictions on the use of immovable property as a means of securing a loan for an individual (with the exception of exceptions) [3]. The aforementioned legislative amendment to the Civil Code of Georgia was implemented on July 21, 2018. [4]The legislator's approach is interesting, why it imposed an exception specifically for securing a loan issued only to an individual. Given the dispositive nature of property, an individual should be free to use immovable property as a means of securing any person's loan, including his own, and mortgage it, although the legislator has not restricted his ability to do so. The legislator's explanation when introducing the current legislative amendment is particularly interesting. As noted, the Civil Code was amended on July 21, 2018. As we read in the explanatory note to the draft law, the main goal of the draft law is to protect the rights of consumers in loan/credit relations, as well as reduce the risk of over-indebtedness [5]. Naturally, we are dealing with not only the protection of consumer rights, but on the contrary, their infringement, since by introducing restrictions on loans issued to individuals by the legislator, consumers were left only with banks and microfinance organizations. A subject who wants to take a mortgage loan from an individual has limited authority, except for the exceptional cases established by law. The exception is established only for cases when the purpose of transferring the subject of the mortgage is to use it as a dwelling. This shows that the legislator did not choose an overly rigid approach and in this specific case allowed the mortgage of property only in favor of an individual. The explanatory note states that in the case of a mortgage, there is no defined mechanism for the debtor's legal protection in the event of abuse of power by the creditor [6]. It is unclear by what logic the legislator considered that the aforementioned legal protection interest applies only to loans issued to individuals, and not to loans issued by banks and microfinance organizations. The legislator should have more fully assessed the legal and material, including social, consequences that would result from the aforementioned legislative change. The explanatory note itself states that the adoption of the draft law may have a certain impact on those persons whose field of activity is the issuance of secured loans [7]..., it is also indicated that at the stage of adopting the law it is impossible to assess the

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[1]Law of Georgia "Civil Code of Georgia", date of adoption: 26/06/1997, source: www.matsne.gov.ge ; Article 286, Part 1;
[2]Law of Georgia "Civil Code of Georgia", date of adoption: 26/06/1997, source: www.matsne.gov.ge;
[3]Law of Georgia "Civil Code of Georgia", date of adoption: 26/06/1997, source: www.matsne.gov.ge.
[4]Law of Georgia "On Amendments to the Civil Code of Georgia", date of adoption: 21/07/2018, document number: 3315-RS;
[5]Explanatory note on the draft law of Georgia "On Amendments to the Civil Code of Georgia"; Source: Official website of the Parliament of Georgia; p. 3;
[6]Explanatory note on the draft law of Georgia "On Amendments to the Civil Code of Georgia"; Source: Official website of the Parliament of Georgia; p. 2;
[7]Explanatory note on the draft law of Georgia "On Amendments to the Civil Code of Georgia"; Source: Official website of the Parliament of Georgia; p.6.

expected impact on the financial situation of those persons to whom it will apply [8], naturally the legislator should have taken into account the possible risks and consequences when introducing the legislative amendment, however, if this was impossible at the stage of approving the amendment, the mentioned article and a number of recommendations proposed in legal science demonstrate that the existing regulation on mortgage agreements concluded in favor of an individual is flawed and requires legislative intervention. Naturally, the mentioned legislative amendment had an economic basis, in addition to the legal and social basis. The banking sector in Georgia is quite well developed, naturally the mentioned legislative amendment strengthened it even more. I will not touch on the economic discussion of the issue within the scope of this article, although I can say that the economic effect of the law is enormous. Production is not developed in Georgia, the leading economic actor in the country is the banking sector, and the introduction of the aforementioned legislative change further strengthens the banking institution, which naturally has a corresponding economic and social effect on the rights of citizens. Naturally, the aforementioned legislative change covers political, social and economic aspects, although I believe that the goal was not achieved, which the legislator had at the level of permission, as evidenced by local judicial practice, when a purchase with the right of redemption is considered an invalid transaction. It is obvious that the introduction of a legislative restriction contributed to this vicious practice of concluding a purchase agreement with the right of redemption. Naturally, the legislator had a specific goal, however, as a conclusion to this chapter of the article, it should be said as a recommendation that it should have regulated the mortgage institution differently and not imposed such a strict restriction on the regulation of the mortgage institution. In addition, as a conclusion to this chapter, it can also be said that the restriction imposed by the legislator in the mortgage norm on a mortgage agreement concluded in favor of an individual is a completely unjustified interference in the right to property.

1.2 The accessory nature of mortgage and property rights

When discussing the institution of mortgage, it is natural to consider the principles operating in commercial law, since mortgage is a commercial legal institution. Commercial law is characterized by the rule of imperative regulation, and a number of principles operate in it, such as: the principle of numerus clausus, the principle of specificity (specificity), the principle of absolutism, the principle of priority of commercial claims, the principle of the pursuit of commercial rights, the principle of publicity, the principle of causality and unity, and the presumption of completeness and infallibility (the principle of public trust) . I will not attempt to discuss each of them in detail, since this has already been done in legal science. Among these principles, I would single out[9] **the numerus clausus** generally recognized in commercial law. The principle according to which, in the field of property law, there are as many property rights as are established by law [10]. Property rights include: ownership (Article 170 of the Civil Code) and mortgage (Article 286 of the Civil Code) [11]. Naturally, the correlation between these two property rights is also established by the above, since both rights belong to property legal rights. When mortgaged property, the owner disposes of his property and decides its fate. Accordingly, the connection between the right to property and the right to mortgage should be considered in the property legal aspect. It is obvious that the possibility of mortgaged property is established on the basis of the numerus clausus principle, accordingly, imposing any restrictions on it constitutes an interference with both the right to mortgage and the right to property. The accessory nature of the mortgage is expressed in the fact that it exists as an additional (non-secure) relationship along with the principal-obligor relationship [12]. The mortgage is tied to the right of ownership. If there is no right of ownership, the encumbrance of property with a mortgage is excluded, in other words, if there is no property, a mortgage does not arise. The connection between these two interrelated rights - the right of ownership and the right of mortgage is obvious, although the main right of them is the right of ownership, accordingly, any legislative intervention in the right of mortgage is reflected in the right of ownership as well, therefore, based on the legal nature of the mortgage, the legitimacy of the intervention in the right of ownership should be assessed.

1.2.1 Distinguishing between contractual and contractual relationships

The law of contract has its own specifics of regulation and is reflected in the legal relationship of obligation. In the Civil Code of Georgia, Book Two is devoted to the law of contract, and Book Three is devoted to the law of obligation. It is necessary to establish the difference between a mortgage and a purchase agreement with the right of redemption. It is

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[8] Ibid.;
[9] Tamar Shotadze, "Conventional Law", Textbook for Law Schools, "Meridiani" Publishing House, Tbilisi 2014, p. 29.
[10] Tamar Shotadze, "Constitutional Law" Textbook for Law Schools, "Meridiani" Publishing House, Tbilisi 2014, p. 29;
[11] Tamar Shotadze, "Constitutional Law" Textbook for Law Schools, "Meridiani" Publishing House, Tbilisi 2014, p. 30;
[12] Tamar Shotadze, "Contract Law", Textbook for Law Schools, "Meridiani" Publishing House, Tbilisi 2014, p. 430.

obvious that these are two different agreements, but the main research problem is precisely that two different agreements are used for the same purpose. On July 21, 2018, an amendment was introduced to the Civil Code of Georgia, which imposed a restriction on the use of collateral for a loan issued to an individual, except for exceptions established by law. As a result of this restriction, we have received a practice when, instead of a mortgage agreement, the parties conclude a purchase agreement with the right of redemption. As a result of this change, there is a complete confusion between the legal institutions of property and obligation, since mortgage by its legal nature is a legal institution of property, while purchase with the right of redemption is a contractual law institution, and therefore belongs to the legal institution of obligation. In legal science, important explanations have been made about the legal institutions of property and obligation, according to one of which the right to property arises through purchase, but the purchase itself is an obligatory transaction [13]. This also clarifies the difference between a mortgage and a purchase agreement. Although the right to property is the main right in the case of both agreements, the main difference between them lies in the will of the parties when concluding the agreement. When concluding a mortgage agreement, the party's intention is to receive a benefit in the form of money, while in a purchase agreement with the right to redeem, the transfer of ownership rights is two completely different legal interests. In addition, as mentioned above, a purchase agreement concluded with the right to redeem is an institution of contractual law, accordingly, the norms of the law of obligations apply to it, and the institution of mortgage belongs to the law of contract, accordingly, the amendments made by the legislator to the Civil Code of Georgia have confused these two legal institutions - obligations and contract. In legal science, quite a lot of research has been conducted on the issue of securing real estate. The main research issue of the article is the study of the dispositive nature of the right of ownership and the institution of mortgage. Naturally, since the legislator has imposed restrictions on the encumbrance of real estate as collateral for loans issued to individuals, all this is reflected in the right to property, as well as in the regularity of civil turnover, social status, and economy. However, the research issue is analyzed within the framework of this article only from the perspective of the development of legal science. As noted, there are principles in commercial law that must be observed when concluding commercial legal transactions. I will not dwell on the discussion of each principle, although I have already spoken about the most important of them, the numerus clausus principle, although in addition to these principles, the principle of abstraction is especially important, which separates commercial and obligation-legal relations from each other[14]. The main principle that operates in commercial law, as mentioned above, is the numerus clausus principle, which prohibits the development of commercial legal institutions not provided for by law. Based on this principle, it is inadmissible to "violate the order" strictly established in commercial law and to introduce a law that would facilitate the conclusion of transactions of a hypocritical and non-commercial legal nature. The purchase agreement with the right of redemption is placed in the Civil Code of Georgia in the Book of Obligations, in the Private Part, in the Second Part of the First Chapter of Contract Law, in Subchapter III. It is not an institution of commercial law. Accordingly, subjects who wish to take a loan from an individual with the security of real estate resort to the method of concluding a purchase agreement with the right of redemption, which contradicts the nature of commercial law, does not comply with the numerus clausus principle and Violates both the strict regulation rule characteristic of the property law, as well as the regularity of civil turnover. Accordingly, the mentioned norm should be removed from the Civil Code and another regulation mechanism should be proposed , the law should be changed and, in particular, the conclusion of a mortgage agreement in favor of an individual should be allowed. Another difference between property rights and obligations lies in their nature, namely, as explained in legal science, property rights are absolute rights, while obligations-legal rights are relative. It is precisely because of this nature that it is inadmissible to interfere with the right to property illegally. The extent to which the legislator interfered with the right to property when introducing legislative regulation and imposing restrictions on the right to mortgage was assessed by the Constitutional Court of Georgia, which will be discussed in one of the following chapters of the work.

1.2.2 The role of a notary in the execution of a mortgage agreement

When discussing the issue of mortgage of property, we naturally cannot ignore the institution of the notary, which has an important function in the execution of the aforementioned transaction. However, it should also be noted that the notary had a much more important function before the amendments to the Civil Code of Georgia. In particular, the certification of a mortgage agreement to secure a loan from an individual by a notary became mandatory as a result of the amendments made to the Civil Code of

[13] Zoidze B. "Georgian Civil Law", second revised and complete edition, Publishing House "Science", Tbilisi, 2003, p.28.

[14] Chanturia L., "Basic Principles of Civil Law in the Future Civil Code of Georgia", p.16.

Georgia in 2013.[15] Thus, it was mandatory for a notary to certify a loan agreement concluded with an individual secured by real estate. Naturally, from the point of view of risk analysis, we can say that the involvement of a notary in the execution of such transactions is positive for citizens who may lack sufficient legal awareness when concluding such transactions. We can no longer discuss this exclusive authority of notaries as a result of the amendments made to the Civil Code of Georgia on July 21, 2018, since not only the rule for certifying real estate from an individual, but also this type of contract itself was restricted by the legislator as a result of the addition of paragraph 4 to Article 286 of the Civil Code of Georgia . Here too, a flaw is evident; the legislator should not have restricted this institution; the existence of the notary as a kind of controlling entity in this institution indicates that the control mechanism was already in the law to protect the rights of citizens and consumers. Accordingly, the legislator should not have chosen such a rigid approach. Of particular interest is the exception to the rule, namely, the legislator did not extend the restriction imposed by the Civil Code on mortgage of property for the benefit of a loan of an individual only to the case of mortgage of property for the purpose of using the mortgagee as a residential property for the natural person [16]. Naturally, in this case, the notary has a great responsibility. He or she must clearly and precisely determine the purpose of the transaction. If a property is mortgaged for the benefit of a natural person's loan, this is permitted by law only if the property is transferred to the mortgagor as a residential property. In other cases, Article 286, Paragraph 4 of the Civil Code of Georgia applies.

1.2 Restriction of property rights as a result of legislative changes

Of particular interest in relation to the restriction of property rights is the decision No. 1/4/1380 of the First Collegium of the Constitutional Court of Georgia of December 18, 2020; In the case **"Fatman Kvaratskhelia and Kakha Ekhvaia vs. Parliament of Georgia" [17],** where the Constitutional Court discussed the constitutionality of the aforementioned norm. In the case, the plaintiffs challenged the legislative amendment to the Civil Code of Georgia in the section on mortgages and pledges in relation to **the equality** and **property rights guaranteed by the Constitution of Georgia** . The plaintiff points to the practice of concluding a purchase agreement with the right to redemption instead of a mortgage agreement in the form of fictitious transactions. The defendant in its position mainly focused on the protection of consumer rights and maintaining financial stability, which was served by introducing the existing amendment to the law. The Constitutional Court based its decision on these motives and found the norm unconstitutional in part, only in the section on pledges, namely, the pledge The Constitutional Court recognized the constitutional amendment to the norm regulating the right as unconstitutional only in relation to the first and second paragraphs of Article 19 of the Constitution of Georgia, and did not find the unconstitutionality of the aforementioned norm in relation to the first paragraph of Article 11 of the Constitution of Georgia. As for the mortgage, it did not find the unconstitutionality of the disputed norm in relation to either the first and second paragraphs of Article 19 of the Constitution of Georgia or the first paragraph of Article 11 of the Constitution of Georgia. When discussing mortgages, the Constitutional Court draws attention to the high burden that may be imposed on a person. It should be noted that this does not apply only to loans taken from individuals; mortgage loans are also issued by banks and microfinance organizations, therefore, the same risks apply to them. This reasoning cannot be shared, since if we follow this logic A restriction should be imposed on all types of mortgage loans. The court justifies interference with the principle of contractual freedom based on public interest. The above-mentioned explanation of the Constitutional Court is completely inadmissible and unacceptable, since the risk to which the court points and with which it justifies such a blatant interference with the right of ownership is evaluative. It is necessary to determine whether the introduction of the existing legislative regulation actually improves or worsens the situation of borrowers, since the judicial practice of common courts also shows that transactions concluded in the form of a purchase with the right to redeem are invalid transactions [18]. Practice shows that citizens still have a need to borrow from an individual with the security of real estate, therefore, the legislator should have taken this interest into account when introducing a legislative restriction, and the Constitutional Court should have considered the issue of the right of ownership more fundamentally. On the restriction. I agree with the court's reasoning that the legislation requires, to a certain extent, the necessity of general regulation. However, not in the form in which it was proposed by the legislator. For example, the introduction of supervision over loans issued to individuals and others may be a good mechanism for avoiding the problem. Based on the positive obligation of the state, it is obliged to create such a legislative space where the protection of human rights will be effectively ensured. Accordingly, when

[15] Kharitonashvili N. , "Notary Law", Publishing House "Bona Kausa", Tbilisi, 2021, p. 136;
[16] Law of Georgia "Civil Code of Georgia"; Date of adoption: 26/06/1997, source: www.matsne.gov.ge; Article 286, paragraph 6;
[17] Decision No. 1/4/1380 of the Constitutional Court of Georgia of December 18, 2020.
[18] See the decision of the Civil Cases Chamber of the Supreme Court of May 18, 2022, No. 1090-2021 .

discussing this issue, the legislator should have assessed the appropriate consequences that would result from the introduction of a restriction in the law, in addition, the interests of the debtor should have taken into account and introduced the correct regulation. It is justified to introduce such a regulation under which it would be fully permissible to conclude a mortgage loan in favor of an individual. As for the costs and resources, which the court indicates, the state must have sufficient capacity to properly ensure the protection of the interests of its citizens. The very fact that court disputes The fact that the existing regulation of the law is flawed [19]indicates that the current legislation is flawed. The reasoning developed in the court's decision cannot be shared, since by introducing the disputed norm, the legislator directly interfered with the right to property, since the ability of an individual to mortgage property was limited (with the exception established by law), which of course contradicts the dispositive nature of the right to property and should be assessed as interference with the right to property. In addition, the court has proposed a double standard, since the Constitutional Court satisfied the constitutional claim only in the part of the pledge and did not take into account the same risks and circumstances in the part of the mortgage. In addition, when considering the mortgage, it did not establish the existing legislative provisions as interference with the right to property. Provision.

Conclusion

In conclusion, it should be said that the decision of the Constitutional Court in the mortgage part contains an important consideration of the legitimate interest that could have justified the introduction of a legislative restriction provision by the legislator. It should also be said that it is obvious that the dispositive nature of the right to property is limited when imposing a restriction on the conclusion of a mortgage agreement in favor of a loan by an individual . The legislator allowed the conclusion of a mortgage agreement in favor of a loan by an individual only for the purpose of using the premises as a residence.

Naturally, the legislator's goal was to regulate the institution, however, the result is clear that citizens still have a need to borrow from individuals, and this may not be done solely for the purpose of using the mortgaged property as a residential property.

I think it would be right to completely remove Article 286, Paragraph 4 of the Civil Code of Georgia, which would result in the removal of other subparagraphs of the same norm, namely Paragraphs 5 and 6, and the mentioned norm should be rewritten from scratch.

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