

# THE ROLE OF THE NOTARY IN THE EFFICIENT PROTECTION OF PROPERTY RIGHTS

*Maria Bondarieva*

**PhD in Law, assoc. prof., Law Faculty  
of Taras Shevchenko National University of Kyiv (Ukraine)**

*doi.org/10.33327/AJEE-18-2.4-a000023*

Summary: 1. Introduction. – 2. The Modern Concept of the Registration of Rights to Real Estate and Their Encumbrances in the Light of Their Implementation. – 2.1 General Regulations. – 2.2. Agencies Authorized to Conduct State Registration. – 2.3 Arguments in Favor of Acknowledging State Registration of Real Rights and Their Encumbrances as Interior State Functions and the Introduction of Responsibility of the State for Mistakes and Intentional Violations Made by State Registrars. – 3. Forms of Participation and Functions of Notaries in the Process of Actualizing State Politics Pertaining to the Registration of Rights to Real Estate and Their Encumbrances. – 3.1. Historical Development of the Notaries Public on the Territory of Ukraine. – 3.2 Subjects of the Implementation of Notarial Activities. Arguments for Creation of Open Corporations. – 4. Conclusions.

*The relevance of the research is substantiated by the chain of factors, two of them being of particular importance. Firstly, it is connected with the process of creating the stable model of property institute operation and its protection: at the level of conceptual decisions on land market introduction, and in practical context – through determination and elimination of legislative gaps, which facilitated numerous abuses in the process of acquisition and/or conveyance of title to immovable property. Secondly, announcement and prolongation of the realization of the legal reform also stipulates the reformation of notarial system – not only in the context of its internal organization, methodological support of its operation, authorities and functions, but also considering the interaction with the other authorities, which are competent in title registration.*

*The author analyses the role and functions of notarial authorities in the common system of title protection in Ukraine; defines the sufficiency, effectiveness and performance of the legal regulation level in the process of succession; considers the purpose and the tasks of notarial performance in the area of title protection and analyses the offered legislative novelties at the conceptual level.*

*The author of this article comes to the conclusion that an extensive scholarly discussion shall be held on the grounds of which the contents and functions of notarial system in the system of property rights protection should be settled.*

*Keywords: Notary Public, Rights to Real Estate, Encumbrance of Ownership Rights, System of State Registration Agencies, State Registrars, Protections of Rights, Subjective Jurisdiction of Judicial Cases to State Registrars*

## 1. INTRODUCTION

Just like the Russian Empire, whose lands included Ukrainian lands, did a hundred years ago, modern Ukraine resolves the issues of land market introduction. Then this process was known as providing liquidity of private land ownership, or 'real estate mobilization'.<sup>1</sup> However, the contemporary Ukrainian situation differs from that of the Russian Empire one hundred years ago. First of all, the events of 1917 and later development of the country erased not only the concept of 'mobilization', but also the very concept of village and farm land as private property. This was due to the practice of collectivism and the creation of state and cooperative collective farms, the difference of which was not very significant. Secondly, because of a whole array of factors, among which the social awareness of larcenous actions conducted in the 1990's in connection with certified privatizations of real estate, 73% of Ukrainians do not support opening the real estate market, under such conditions as are announced by the mass media.<sup>2</sup>

On 13 November 2019, the Verkhovna Rada of Ukraine voted in the first reading for and approved as a basis the draft law 'On Amendments to Some Legislative Acts of Ukraine on the Circulation of Agricultural Land' recommended by the Verkhovna Rada of Ukraine Committee on Agrarian and Land Policy and submitted by deputies M.T. Solsky, M.V. Nikitina, A.S. Nagaevsky and others (Reg. No. 2178-10 of 10 October 2019).<sup>3</sup>

The socio-economic situation in the country was reflected in the usual discussions during the implementation of any reform, polarizing points of view. Generally, they can be represented by the following pattern: one opinion is to resolve the issue of introduction of the agricultural land market within a national referendum; another opinion is that the very fact of the election of a majority to the parliament has already given its representatives a mandate of trust.

According to the Prime Minister of Ukraine Oleksiy Goncharuk, the land market will be in operation from 1 October 2020,<sup>4</sup> and according to Radio Svoboda, 'Western

---

1 V Sviatlovskiy, *Mobilizatsiia zemelnoi sobstvennosti v Rossii (Mobilization of land property in Russia)* (Luch 1909) 6.

2 Attitude of Ukrainians towards the introduction of land market <[http://ratinggroup.ua/research/ukraine/otnoshenie\\_ukraincev\\_k\\_vnedreniyu\\_prodzazhi\\_zemli.html?fbclid=IwAR2b-W80wQ47POdWgBhF91tkQVdRNbYyXSqz8DgN1032D\\_Deht9MZ0l0LZg](http://ratinggroup.ua/research/ukraine/otnoshenie_ukraincev_k_vnedreniyu_prodzazhi_zemli.html?fbclid=IwAR2b-W80wQ47POdWgBhF91tkQVdRNbYyXSqz8DgN1032D_Deht9MZ0l0LZg)> accessed 11 December 2019.

3 The draft law 'On Amendments to Some Legislative Acts of Ukraine on the Circulation of Agricultural Land' <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=66948](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66948)> accessed 14 December 2019.

4 Radio Svoboda, 'Honcharyk: The Land Market Will Be In Operation from 1 October 2020' (19 September 2019) <<https://www.radiosvoboda.org/a/news-honcharuk/30172740.html>> accessed 14 December 2019.

organizations, such as the International Monetary Fund and the European Court of Human Rights, support the opening of the land market.<sup>5</sup>

By the second reading, the draft law will be finalized; perhaps the remarks of the Main Scientific and Expert Directorate of the Verkhovna Rada of Ukraine will be taken into consideration. Consensus may emerge not only in the parliament but also in society. That is, it is important to understand that the introduction of the land market will inevitably happen. That is why it is important to anticipate what challenges this process will bear and have a sound and logical answer to them.

The establishment of the agricultural land market is not only the goal of routine reforms, but at the same time, an occasion to conduct analysis of the functioning of the land market in general, regarding its availability, stability and security, since all existing problems, without doubt, will take hold on a new foundation, if we do not bring them to light and substantiate their resolution today.

## **2. THE MODERN CONCEPT OF THE REGISTRATION OF RIGHTS TO REAL ESTATE AND THEIR ENCUMBRANCES IN THE LIGHT OF THEIR IMPLEMENTATION**

### *2.1 General Regulations*

The current Civil Code of Ukraine (part 3, article 334)<sup>6</sup> directly associates the moment of obtaining rights to real estate with the fact of exercising the right of state registration on the basis of the agreement by which the property was obtained. Termination of property rights occurs as the result of the property's destruction (point 4, part 1, article 346 of the Civil Code of Ukraine),<sup>7</sup> or its alienation, while the destruction of the property until recently was to be corroborated by an expunction of that property from the State Register of Rights to Objects of Real Estate and Their Encumbrances, based on part 2 of article 349 of the Civil Code of Ukraine. The legislation has excluded this standard from the Civil Code on the basis of the codified law No.2597-VIII of 18 October 2018 - the Code of Ukraine on Bankruptcy Procedures, which makes unclear not only the grounds for excluding the legal standard, but also any of its connection with the subject of regulating bankruptcy procedures. The only possible explanation of such connection is a conspiratorial version, that the Code itself contains a statutory loophole for hiding properties from creditors by way of their fictive destruction. At least, until recently the named legal standard protected owners' and/or co-owners' properties through the opportunity of implementing procedures of vindication in cases of partial damage in the process of their illegal reconstruction.<sup>8</sup> Now such means of protection is under question, which speaks of the quality of legislation and its validity in the process of implementation.

---

5 Radio Svoboda, 'The Verkhovna Rada Supported the Draft Law on the Land Market' (13 November 2019) <<https://www.radiosvoboda.org/a/news-rada-rynok-zemli/30269447.html>> accessed 15 December 2019.

6 The Civil Code of Ukraine <<https://zakon.rada.gov.ua/laws/show/435-15>> accessed 11 December 2019.

7 The Civil Code of Ukraine (n 168).

8 See The Ruling of the Supreme Court of 10 October 2019 in the case No 761/32301/16-ц <<http://reyestr.court.gov.ua/Review/85075415>> accessed 11 December 2019.

According to paragraph 1, part 1, Article 1 of the Law of Ukraine ‘On State Registration of Rights to Real Property and Their Encumbrances,’<sup>9</sup> a state registration is understood as ‘an official acknowledgment and confirmation by the state of the facts of obtainment, change or termination of the rights to real estate, as well as encumbrances of such rights, by way of recording corresponding data in the state register’.

In this way, it could be said, that the occurrence, change and termination of ownership rights to objects of real estate is associated with the official acknowledgment by the state of certain judicial facts, which the law defines as the basis for the occurrence of rights and obligations, according to part 2, Article 11 of the Civil Code of Ukraine.<sup>10</sup> In the definition of state registration as a right supportive rather than right establishing fact, is the following unconditional logic: the right does not occur as a result of state registration (as from the court decision itself), but it occurs as a consequence of the acknowledgment by the state of the completed legal action on the part of the one receiving the right, such as the erection of a new construction, the manufacturing of a new things, the completion of deals and other such things.

In accordance with the legal position of the Supreme Court of Ukraine set forth in the ruling of 25 August 2009, in Case No. 2/394, reviewed in the first instance by the Economic Court of Kyiv,<sup>11</sup> the agency authorized to implement state registration completes only the corresponding actions within the guidelines of the active legislature, and of itself is not the entity that could dispute or acknowledge ownership rights.

## *2.2. Agencies Authorized to Implement State Registration*

The Law of Ukraine ‘On State Registration of Rights to Real Property and Their Encumbrances’ envisages the following procedure of registration:

- 1) In the preamble to the Law it is stipulated that the law is directed towards ‘the provision of acknowledgment and protection by the state’ of property rights and their encumbrances;<sup>12</sup>
- 2) Paragraph 2, part 1, Article 2 of the Law denotes the State Register as a singular state informational system, which ‘provides for the handling, preservation and presentation of data about registered rights to real estate and their encumbrances, as well as about objects and subjects of such rights’;<sup>13</sup>
- 3) Paragraph 7, part 1, article 2 of the Law defines the technical administrator of the register as a unitary enterprise defined by the Ministry of Justice of Ukraine and assigned to the sphere of its administration;<sup>14</sup>

9 The Law of Ukraine ‘On State Registration of Rights to Real Property and Their Encumbrances’ <<https://zakon.rada.gov.ua/laws/show/1952-15>> accessed 11 December 2019.

10 The Civil Code of Ukraine (n 168).

11 *LLC ‘Hotel complex “Rus” vs Communal Enterprise ‘Kyiv Municipal Bureau of Technical Inventory and Registration of Rights’* <<http://reyestr.court.gov.ua/Review/2456599>> accessed 11 December 2019.

12 The Law of Ukraine ‘On State Registration of Rights to Real Property and Their Encumbrances’ <<https://zakon.rada.gov.ua/laws/show/1952-15>> accessed 11 December 2019.

13 The Law of Ukraine (n 174).

14 The Law of Ukraine (n 174).

4) According to Article 6 of the Law, the authority to conduct registration have the executive bodies of village, town and city councils, Kyiv and Sevastopol city, district and district in the cities of Kyiv and Sevastopol state administrations, accredited subjects and state registrars.<sup>15</sup> The jurisdiction of the system of state registration bodies includes the Ministry of Justice of Ukraine and its territorial agencies, which are endowed with functions of regulatory, organizational and methodical provision and regulation.

Until 1 January 2013, the functions of state registration of rights to real estate and their encumbrances were implemented by the Bureaus of Technical Inventory – state enterprises, which combined the functions of registration, technical inventory control and passportization of properties,<sup>16</sup> and which are legal successors of technical inventory and passportization state offices, established in 1927 in the USSR.

Therefore, according to the new order, it is state registrars who directly implement the function of acknowledging in the name of the state the basis for the occurrence of real rights of an entity to real estate. State registrars organizationally may belong to the executive bodies of local councils, Kyiv and Sevastopol city and state administrations, or to the so called accredited subjects, accreditation and monitoring of accreditation requirements of which implements the Ministry of Justice of Ukraine., It is worth noting that originally the function of state registration was performed by separate registration services, which were a part of the system of State Registration Service of Ukraine (Ukrderzhreistr), being a part of the system of central agencies of executive authority, whose activity was directed and coordinated by the Cabinet of Ministers of Ukraine through the Ministry of Justice of Ukraine.<sup>17</sup> These, in turn, aimed at actualizing the state politics in the sphere of implementation of registration activities. New authorities, coming in on the wake of the Revolution of Dignity, abolished the State Registration Service of Ukraine by the Decree No. 17 'Questions of Optimizing the Activities of Central Bodies of Executive Authorities of Justice Systems'<sup>18</sup> of 21 January 2015 temporarily transferring state registrars directly into the structure of territorial agencies of the Ministry of Justice of Ukraine, before such functions were conveyed to the executive bodies of local councils.

Simultaneously the functions of state registrars have been delegated to notaries public who fulfil these functions only in cases where such registration is conditioned by the necessity of completing notarial actions.

### *2.3 Arguments in Favour of Acknowledging State Registration of Real Rights and Their Encumbrances as Interior State Functions and the Introduction of Responsibility of the State for Mistakes and Intentional Violations Made by State Registrars*

It would be logical to provide for the responsibility of a state in cases of person's rights violation when such violation is a result of violations of state registration procedure

15 The Law of Ukraine (n 174).

16 *Yurydychna Entsyklopedia (Legal Encyclopedia)* (MP Bazhan Ukrainska Encyclopedia Publishing House 1998) vol 1 p 295.

17 Para 1 of The Resolution on the State Registration Service of Ukraine, approved by the Decree of the Cabinet of Ministers of Ukraine of 2 July 2014 No219 <<https://zakon.rada.gov.ua/laws/show/1952-15>> accessed 11 December 2019.

18 The Decree No. 17 'Questions of Optimizing the Activities of Central Bodies of Executive Authorities of Justice Systems' <<https://zakon.rada.gov.ua/laws/show/17-2015-%D0%BF>> accessed 11 December 2019.

or violations of the existing (i.e. acknowledged and registered by the state) right by conducting subsequent illegal registration considering the following: 1) the aim of the Law of Ukraine 'On the State Registration of Rights to Real Estate and Their Encumbrances' is not only acknowledgment, but also protection of real rights; 2) the occurrence of a real right and/or its encumbrance is a fact only after its state registration; 3) enduing the Ministry of Justice with functions of implementing accreditation. However, the practical situation appears differently.

A period of deep changes in economic models, deep social sphere and models of business activity is characterized by a larger amount of abuse and open violations than a stably functioning society. There may be many reasons, but the reaction of the state must be the standard practice, which would prevent such abuses and violations, or exclude them, instead of a random struggle with consequences. Unfortunately, Ukrainian authorities didn't demonstrate such virtues in the past, and judging from practical actions rather than formal declarations, do not intend to do this in the future.

Lately the problem of using counterfeit court decisions as the basis for implementing state registration has become quite large-scaled. State register of court decisions of almost every court of first instance abounds with such matters. Only on 9 November 2016, after numerous scandals, some of which surfaced publicly, the Ministry of Justice of Ukraine was able to pass through the Cabinet of Ministers amendments to 'The Order of Registration of Real Rights to Real Estate and Their Encumbrances', ratified by Decree of the Cabinet of Ministers No. 1127 of 25 December 2015, in part of the usage of the data of all informational systems, 'the access to which is provided for in accordance with legislation', when implementing the inspection of documents presented for state registration.<sup>19</sup>

Considering the wide authority of the Ministry pertaining to monitoring and regulation, provided by Article 37-1 of the Law 'On State Registration of Real Rights to Real Estate and Their Encumbrances', such a reaction seems very late, while the formulation relative to 'informational systems' without a clear indication of a Universal State Registry of Court Decisions is extremely vague.

The so-called Anti-Raider's Commission (Commission Pertaining to Questions of Reviewing Complaints in the Sphere of State Registration), set forth by Article 37 of the Law on Registration, also has not proven effective. First of all, according to para. 3, part 8 of Article 37 of the Law on Registration, the Ministry of Justice refuses to satisfy complaints, if "by the time of the approval of a decision regarding the results of the reviewing of a claim, a state registration of that right by another entity than that indicated in the plaintiff's decision has been made."<sup>20</sup> This means that, according to the intention of the legislator, this quasi-judicial agency a priori is powerless, if by a fraudulent scheme ownership was taken from the rights-holder and successfully re-sold to a third entity. Filing another complaint will not save the situation, since on the basis of para. 8, part 8 of Article 37 of the Law on Registration, the Ministry of Justice refuses to satisfy complaints, if 'the deadline established by the law for filing complaints has

---

19 Changes to the resolutions of the Cabinet of Ministers of Ukraine pertaining state registration approved by the Decree of the Cabinet of Ministers of Ukraine No 806 of 9 November 2016 <<https://zakon.rada.gov.ua/laws/show/806-2016-%D0%BF/ed20170727#n90>> accessed 11 December 2019.

20 The Law of Ukraine (n 171).

expired.<sup>21</sup> The deadline for filing complaints is 60 days from the moment of committing the disputed registration action, or from the moment when the person found out, or should have found out, about the fact of the violation of his right. The filing of the original complaint is the certifiable fact of awareness of violations having taken place. In such cases, when in the register a new owner is recorded, establishing the fact of the violation of the plaintiff's rights by contesting the new action of registration will be impossible.

Secondly, as the analysis of judicial practice shows, the work of the Commission cannot be positively evaluated. Thus, as it appears from the decision of the Circuit Administrative Court of Kyiv of 14 May 2018 in case No. 826/4727/17,<sup>22</sup> the court proclaimed illegal and cancelled the order of the Ministry of Justice about the rejection of an action on the grounds of missing deadline for its filing. At the same time the illegality of the Commission's inaction, which was expressed by not reviewing the complaint objectively, was acknowledged and the litigants were obligated to implement the review of complaints, according to the facts of their demands and arguments.

Theoretically, part 1, article 6 of the 'Convention for the Protection of Human Rights and Basic Freedoms' extends its power to the activity of the Commission as a quasi-judicial agency. Such an affirmation is inferred from the following. In accordance with para. 88 of the decision of the European Court of Human Rights in the case of '*Volkov v. Ukraine*', 'in the context of the first condition, nothing interferes with legal experts naming as 'the court' a specific national body, which is not a part of the judicial system, for the purpose of establishing its correspondence to criteria set forth in the case of '*Vilkho Eskelainen et al. v. Finland*'. An administrative or a parliamentary body may be regarded as 'a court' in the substantive meaning of that term, which leads to the possibility of applying Article 6 of the Convention to disputes of state services (see the decision of the ECHR pertaining to the cases of '*Argyrou et al. v. Greece*', statement No. 10468/04, p. 24, 15 January 2009, and '*Savino et al. v. Italy*', statements No. 17214/05, No.20329/05 and No. 42113/04, pp. 72-75, 28 April 2009). However, a conclusion about the applicability of Article 6 of the Convention does not hinder reviewing the question of observing the procedural guarantees in such procedure (see the aforementioned decision of the ECHR pertaining to the case of '*Savino et al. v. Italy*', p. 72). Therefore, in points 46 and 47 of the decision of the ECHR of 21 October 2010, in the case of '*Action 97 v. Ukraine*' (statement No. 19164/04) '...the Court repeats that the right to a fair trial, guaranteed by para. 1, Article 6 of the Convention, should be understood with regard to the preambles of the Convention, in the corresponding part of which the supremacy of the right is declared to be a part of the common inheritance of the Sides to the Agreement..'

At the same time, it is presumed that the Commission as an independent state body should act impartially and conscientiously. The relevance and justification of the aforementioned statement should be grounded on the following. As indicated in para. 70 of the decision of the ECHR of 20 October 2011, in the case of '*Risovskiyi v. Ukraine*' (statement No. 29979/04), "...the Court emphasizes the special importance of the principle of 'Conscientious Authorities'. It provides that, regarding the questions

21 The Law of Ukraine (n 171).

22 The decision of the Circuit Administrative Court of Kyiv of 14 May 2018 in case No. 826/4727/17 <<http://reyestr.court.gov.ua/Review/73924750>> accessed 11 December 2019.

of common interest, in particular, if the case influences such foundational human rights as property rights, the state bodies shall act timely and appropriately in the most efficient manner as possible. In particular, the obligation has been laid on state bodies to conduct interior procedures, which enhance the transparency and clarity of their actions, minimize the risk of mistakes... and will facilitate judicial accuracy in civil rights relations, where property interests are concerned... According to paragraph 71, of the abovementioned decision, 'The Principle of Conscientious Authority', as a rule, should not hinder the state bodies from correcting occasional mistakes, even those that result from their own negligence (see the decision of the ECHR in the case '*Moskal v. Poland*', p. 73.) Any other position would be the equivalent of, inter alia, the sanctioned misallocation of limited state resources, which of itself would contradict common interests (see above). ... In other words, state bodies that do not introduce or do not adhere to their own procedures should not have opportunity to receive profit from their illegal actions or to escape fulfilling their obligations (see the decision of the ECHR in the case of '*Lelas v. Croatia*', p. 74). The risks of any mistakes of a state agency should be carried by the same state, while the mistakes may not be corrected at the expense of the person, whom they concern...'

Obviously, such an algorithm of work is not intrinsic to the Commission on reviewing complaints in the sphere of state registration: as it is seen from information on the official site of the judicial authorities, the circuit administrative court of Kyiv is currently reviewing the case No. 640/11369/19 with the participation of the plaintiff, who has been repeatedly rejected on the other grounds. However, in the original review of the complaint the expiration of the deadline was acknowledged as the only reason for the rejection.

To the defence of the rights' owners stood the administrative courts, which have well established, precise and standardized practices that may be illustrated by one example. According to the ruling of the Supreme Court of Ukraine of 22 June 2017 in case No. 6-1047, section 17, the designated grounds for cancelling a decision about completing state registration on the basis of a counterfeit judicial decision are the following: 'the judicial decision is the basic act of public justice, the act of the implementation of constitutional authorities of a state judicial body, by which legal disputes are resolved in the name of the Ukrainian state. Therefore, for the state and society of indisputable interests are respect to the judicial decision, acknowledgment of the obligation of its fulfilment, and trust to ratified judicial decisions.' That is why '...social interests in the requirements of the prosecutor, relative to interference in property rights of the litigant, consist in securing the observing of one of the basic principles of the judicial process, which is the binding nature of the judicial decision, in the consolidation of principles of respect and trust to judicial decisions, in the formation of law enforcement practices, which make using counterfeit judicial decisions for the illegal possession of property and its future transfer impossible.'<sup>23</sup>

It should be noted that the reviewing of cases pertaining to state registration by the administrative courts had one essential advantage for plaintiffs, which lied in the

---

23 The ruling of the Supreme Court of Ukraine on of 22 June 22, 2017 in case No. #6-1047, section 17 <[http://www.scourt.gov.ua/clients/vsu/nsf/\(documents\)/F77709B8ADEF709AC22581550028341F](http://www.scourt.gov.ua/clients/vsu/nsf/(documents)/F77709B8ADEF709AC22581550028341F)> accessed 11 December 2019.

following. According to part 2, Article 7 of the Code of Administrative Procedure of Ukraine, when reviewing cases of illegal decisions and the actions of state authorities, in cases when they disagree with the stated claims, the burden of proof rests on them. This is important, since the plaintiff doesn't always have access even to registration documents of the case, especially, if another person had acted as the plaintiff, appropriating for himself the property of the plaintiff, using counterfeit documents or employing other tactics.

Howbeit, since the spring of 2018 the Supreme Court, which was restructured in 2017 after a routine judicial reform, has changed the practice, acknowledging such a category of cases as disputes about rights, and referring them to the review of general (or commercial) courts. It should be added that judicial motivation was changed to the opposite direction in less than a year, because of which suffered many plaintiffs, whose cases were not timely reviewed due to a large load of courts and judges, as well as because of the process of their restructuring and/or protraction with the designation of judges to the office, arising from the political ambitions of former authorities.

The change of the legal position of the Supreme Court can be illustrated by data of judicial practices, which can be found (without uncovering personal data) in open access on the site of the Universal State Registry of Judicial Decisions of Ukraine. Hence, in the ruling of the Supreme Court of 26 June 2018 in case No. 826/7921/13-a it was noted that '...the subject of inspection by the administrative courts in this category of cases (questions of state registration – author's note) is the observation of law established order for ratification by a subject of executive authority of a decision about state registration of rights and their encumbrances, as well as carrying the corresponding record into the state registry of real rights to real estate property. The question of private persons or legal entities lawfully or unlawfully obtaining ownership rights to real estate property was the subject of consideration in another case. Administrative courts shall examine the observance and scrupulous execution of state registration procedures exclusively on the grounds of lawful requirements, since the nonfulfillment of the requirements of legislation by a subject of authority leads to the illegality of all procedures of state registration.'<sup>24</sup> At the same time the Grand Chamber of the Supreme Court in the ruling of 16 May 2018, noted that the relationship occurring in the process of state registration with the participation of the state registrar belongs to public law, while the conclusion of the court on public law disputes in the sphere of state registration is unsound (ruling of the Grand Chamber of the Supreme Court of 16 May 2018 in case No. 826/4460/17).<sup>25</sup>

As has already been noted, since the second half of 2018, the practice has changed cardinally, and in the changed form has finally become unified.<sup>26</sup> Obviously, some judges did not agree with the new practice, but expressed their dissent in the correct, procedural form especially established for this – in the form of a separate opinion.<sup>27</sup>

---

24 The ruling of the Supreme Court of 26 June 2018 in case No 826/7921/13-a <<http://reyestr.court.gov.ua/Review/74988686>> accessed 11 December 2019.

25 The ruling of the Supreme Court of 16 May 2018 in case No 826/4460/17 <<http://reyestr.court.gov.ua/Review/74309887>> accessed 11 December 2019.

26 See The Resolution of the Grand Chamber of the Supreme Court of 7 August 2019 in case No 826/15145/16 <<http://reyestr.court.gov.ua/Review/83846715>> accessed 11 December 2019.

27 Separate opinion of a judge of the Grand Chamber of the Supreme Court OB Prokopenko on the Resolution of 7 August in the case No 826/15145/16 <<http://reyestr.court.gov.ua/Review/84305392>> accessed 11 December 2019.

Consequently, we have several tentative conclusions.

The state plays a special role in the question of state registration of the rights to real estate and their encumbrances. It establishes the rules of binding acknowledgment by it of judicial facts for the sake of the very occurrence of such rights. Simultaneously it creates and delegates the competencies to 1) the bodies, which implement such a registration; 2) the bodies which are obligated to implement standardization of the process on the one hand, and implement monitoring and control of its actualization on the other hand.

In this regard, as the Universal State Registry of Judicial Decisions shows, courts are overloaded with lawsuits against the state registrars, as well as against the Ukrainian Ministry of Justice. Lawsuits against the former are because of multiple violations, while those against the latter are because of its inefficiency.

The problem is catalysed by the absence on the part of the state of guarantees pertaining to the securing of fundamental rights i.e. ownership rights. In many cases people are afraid to enter information about their own real estate in the State Registry, due to apprehensions of losing it and being caught in the net of many years of court proceedings. One of the examples of this is the case from judicial practice No. 826/15145/16. The administrative lawsuit was filed on 27 October 2016, and during its review three different presided officials were changed. In the first instance the case was finally reviewed in July 2018, when judicial practice began to lean toward transferring this category of cases to general courts. The review of the case was finished on 7 August 2019. Almost three years after filing suit the Grand Chamber of the Supreme Court affirmed the ruling of the Circuit Administrative Court of Kyiv about the closing of proceedings on the grounds of violations of subject-matter jurisdiction rules when filing an administrative suit, although at the time of its filing the old wording of the Administrative Procedure Code of Ukraine was in force, according to which the case belonged to the jurisdiction of administrative court. Such pattern of provision by the state of the effective means of judicial protection is in open access. However, the most important thing is not that all know about this, but more glaring is the fact of the massiveness of such a statement.

Things are not easier with the new wording. According to part 3, Article 19 of the Administrative Procedure Code of Ukraine, administrative courts do not review the claims, which are derived from the claims of the private law and are filed together with them, provided that such a claim is subject to review in an order other than administrative, and is under the review of the corresponding court.

According to part 2, article 2 of the Administrative Procedure Code of Ukraine, the task of the administrative procedure is the just, impartial and timely resolution of disputes by the court in the sphere of public law relationships with the aim of effectively protecting rights, freedoms and interests of private persons, and the rights and interests of legal entities from violations on the part of subjects of executive authority.

According to para. 2, part 1, Article 5 of the Administrative Procedure Code of Ukraine, a public law dispute is a dispute, where at least one side provides administrative services on the basis of legislature, which empowers or obligates exclusively the subject of executive authority to provide such services, and the dispute occurs in connection with the provision or non-provision by that side of indicated services.

Thus, the object competency of administrative courts clearly arises from the aforementioned and almost verbatim referenced standards of the Codex of Administrative Judicial Procedures of Ukraine. It is not subject to expanded or constricted interpretation due to the introducing additional, non-specific legal criteria, as the Supreme Court had done in aforementioned examples. Such a position is not a theoretical rationale. It is grounded on the standard of Article 17 of the Law of Ukraine 'On the Execution of Decisions and the Application of Practices of the European Court of Human Rights',<sup>28</sup> in accordance with which the courts shall apply the Convention and the practice of the European Court of Human Rights as a legal source.

The practice, however, is the following. Paragraph 98 of the Decision of the ECHR in the case of *Coëme et al. v. Belgium* states that '...in countries where the law is codified, the organisation of the judicial system cannot be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.' The abovementioned absolutely fits into general theoretical terms and conditions relative to negation of the role of judiciary in countries of the continental legal system in law establishment, failure to recognize the status of legal sources behind judicial decisions and recognizing the right of judicial bodies to interpret legal standards.

Arbitrary interpretation of standards of procedural rights in part of the provision for legal procedures of case review organization, and determining the competency of the court by the interior legal court itself is recognized by the European court as a violation of para. 1, article 6 of the Convention. This point is supported by the legal position of paragraph 101 of the decision of the ECHR in the case of *Coëme et al. v. Belgium*, which, in view of the universal character of the interpretation of the Convention standard by the European court irrelevantly to the subject and to the procedure, cannot be applied exclusively to procedures (administrative or criminal) of a repressive character. Hence the following legal position: 'As a result, the parties could not ascertain in advance all the details of the procedure which would be followed. They could not foresee in what way the Court of Cassation would amend or modify the provisions governing the normal conduct of a criminal trial, as established by the Belgian parliament. In so doing, the Court of Cassation introduced an element of uncertainty by not specifying which rules were contemplated in the restriction adopted. Even if the Court of Cassation had not made use of the possibility it had reserved for itself of making certain changes to the rules governing procedure in the ordinary criminal courts, the task of the defence was made particularly difficult because it was not known in advance whether or not a given rule would be applied in the course of the trial.' is universal and applicable in any event. Para. 25 of the decision of the ECHR in the case *Sokurenko and Strigun v. Ukraine* (statement No. 29458/04 and statement No. 29465/04) points to this as follows: 'in pp. 107-109 of the decision in the case of *Coëme et al. v. Belgium*' (as noted above) the Court came to the conclusion that the national court did not have jurisdiction to try some of the applicants, relying on practices that were not established by law, and accordingly, could not be considered a court "established by law". The position of the

---

28 The Law of Ukraine 'On the Execution of Decisions and the Application of Practices of the European Court of Human Rights' <<https://zakon.rada.gov.ua/laws/show/3477-15>> accessed 11 December 2019.

Supreme Court is appropriately grounded, but at the same time does not correspond to the motivation of the European Court of Human Rights, the jurisdiction of which Ukraine has accepted as binding. Besides this, it 1) did not allow resolution of judicial cases the consideration of which had started by the moment of its introduction, and which were filed when another understanding of subjective jurisdiction was in force; 2) exacerbated the plight of the plaintiff, transferring to him the burden of proof of the circumstances of the suit.

A couple of words are worth stating about the so-called subjects accredited by the Ministry of Justice of Ukraine. This legal novelty has brought to life a set-up, wherein in the setting of some local village or small town council somewhere in a far off province a community enterprise is created, which, we may expect, must have its representatives in the centres of focused business life, before all else, in Kyiv. The Ministry of Justice accredits such a communal enterprise (hereinafter - CE), endorsing it as corresponding to all requirements of qualifications. The Ministry simultaneously monitors its activity, but as practice shows, for some reason quite randomly.

It is worth illustrating by an example. Under the Golovanivska town council in Odessa oblast a communal enterprise was created, while some of its representatives resided in the capital. Lawsuits against not only violations, but abuses made by state registrars of this were filed to courts regularly, whereas in monitoring, the Ministry of Justice of Ukraine obviously passed over it. Only after a significant scandal pertaining to the illegal redrafting of the network of servicing stations, the Ministry accepted responsibility and revoked the CE's accreditation. Incidentally the explanation came forth that the state registrars (and from the very title it appears that they even being the members of the CE, were acting in the name of the state) were using keys of access to the Registry that were not their own, which is a significant violation. Also, it was discovered that there were in fact more users of keys than there were actual registrars. Those prosecuting the CE in court couldn't fail to appreciate that 'timely' movement of the regulator to bring about order. The victory, however, turned out to be hollow, since from the moment of the revocation of accreditation the registration files quickly disappeared along with the registrars, whereas, without copies of those affairs the court cannot substantively review the case.

Hence, it would seem correct to speak namely about the responsibility of the state for violations in the sphere of state registration of rights to real estate. Also such a responsibility cannot be considered as a transferral of accountability from a person guilty for concrete violations, entailing the violation of the rights of a certain deponent (rights holder). As is evident, the state systematically tolerates violations at a general level, involving the approval of ineffective and unworkable legislation, inefficient execution of monitoring functions, inspections and regulations, ineffective judicial protection of violated rights and so forth.

This is why it is necessary to speak about the responsibility of the state itself, as well as about the fact that, having recognized the necessity of state registration, it simultaneously has recognized its own accountability, and also the fact that the whole composite of events pertaining to the provision of the process of state registration and especially the protection of registered rights is the actualization of its interior functions.

Insuring risks when implementing state registration, by Canada's example, might be seen as another way out, but this way may be hindered by constricted deadlines for introduction (violations already exist today and are characterized by their massiveness), inadequate development of the insurance market and the low living level of the population, wherein Ukraine is recognized as the poorest country of Europe. It is functional to transfer the cost of the insurance package to the final consumer cost, but this will not facilitate a rebound even without a 'boosted' real estate market.

### **3. FORMS OF PARTICIPATION AND FUNCTIONS OF NOTARIES PUBLIC IN THE PROCESS OF ACTUALIZING STATE POLITICS PERTAINING TO THE REGISTRATION OF RIGHTS TO REAL ESTATE PROPERTY AND THEIR ENCUMBRANCES**

#### *3.1 Historical Development of the Notaries Public on the Territory of Ukraine*

Historically the notarial system was considered to be the agency 'which affixed the property rights to the person',<sup>29</sup> an agency of indisputable public justice, and the appearance of such agencies was recognized as life itself, the fulfilment of the social and judicial lifestyle, the freedom of a person from the power of old, domestic and relative, unionized forms.<sup>30</sup>

In the Russian empire, which encompassed a large portion of Ukrainian lands, the Notarial Regulation of 1866 was active, pertaining to which 'obligations of patrimonial establishments' were laid upon senior notaries public, which could be found in county courts and kept books of title deeds and conducted notarial archives.<sup>31</sup>

Through the events of October 1917 the old notarial system, based on the Regulation of 1866, was destroyed, and a new, state notarial system was created, which, however, in full measure satisfied the existing demands, inasmuch as 'civil transactions were extremely insignificant'.<sup>32</sup>

#### *3.2 Subjects of the Implementation of Notarial Activities. Arguments for Creating Open Corporations*

Today notarial activity is standardized by the Law of Ukraine 'On the Notarial System' in the 1993 wording with significant amendments and appendixes.

According to Article 1 of the designated Law, 'the notary system in Ukraine is a system of bodies and official persons, upon which is laid the obligation to certify rights, as well

---

29 AM Femelidi, *Russkii notariat. Istoriia notariata I deistvuiuschee notarialnoe polozheniie 14 Aprelia 1866 (Russian Notarial system. History of development and current Notarial Resolution 14 April 1866)* (AYa Kantotovykh Publishing House 1902)2.

30 Femelidi (n 191) 2.

31 YeV Vaskovskiy, *Uchebnik grazhdanskogo prava (Civil Law Textbook)* (Statut 2003) 273.

32 VV Komarov, VV Barankova, *Notariat v Ukraini (Notarial System in Ukraine)* (Pravo Publishing House 2011) 25.

as facts having judicial significance, and to fulfil other notarial actions provided by this Law with the aim of providing them judicial veracity.<sup>33</sup>

The system of notarial agencies includes state notarial offices, rudiments of the Soviet past, a subject of endless disputes, but from which none can be rid of, as well as private notaries public.

In order to receive a license to conduct notarial activity it is required to meet qualification demands pertaining to education, pass practical training and qualification exams. When conducting notarial activity one will face monitoring on the part of the territorial agencies of justice and strict regulation.

Pertaining to professional association, the notaries public have created a voluntary union at the Notarial Chamber of Ukraine. Hence, by all signs the notary system presents itself as an open, professional corporation.

From this a tentative conclusion may be made.

First of all, the system of registration bodies exists, functions and its activity is legally controlled.

Secondly, the state notary system as a rudiment of the Soviet past and an expense article in the budget, being a complete duplicate of the functions of the state and private notaries public, and shall eventually be discontinued.

Thirdly, notaries public fulfil functions of state registrars, as they complete notarial actions. Together with state registrars among local authorities they are able to satisfy the existing demands of state registration.

Fourthly, attempts to draw into the notarial world of the persons who are not subjected to strict selection in accordance with the requirements of the Law of Ukraine 'On the notary system', as it happened with draft law No. 9311 of 21 November 2018, contains corruption elements to which the Notarial Chamber of Ukraine<sup>34</sup> justly gave attention. Having such a lively judicial practice pertaining to 'accredited subjects' and their numerous violations, to create a new simulacrum is the path of searching for institutional infrastructures on the threshold of the opening of the agricultural land market, but it is in no way the standard provision of the process of opening a market.

#### 4. CONCLUSIONS

The process of state recognition of judicial facts as the condition of the occurrence of personal rights is constant; such a model has proven its vitality and optimality.

Hence, considering this standpoint, it should be said that 1) questions of state registration of rights to real estate (from the standardization of the process of regulation to the creation of effective defence mechanisms of rights) should be recognized as interior

---

33 The Law of Ukraine 'On the Notarial System' <<https://zakon.rada.gov.ua/laws/show/3425-12>> accessed 11 December 2019.

34 The Notarial Chamber of Ukraine. Official website <<https://npu.org.ua/news/mizhnarodnij-soyuz-notariatu-visloviv-zasterezheniya-shhodo-zakonoproektu-9311/>> accessed 11 December 2019.

functions of the state; 2) consequently, the state has a positive obligation to create a system of effective and valid legislature, as well as to develop effective management in this area. Such posing of a question should be closer to the modern government of young reformers, who departing from the classical understanding of the state, define it as the 'creation of civil service, the main task of which is to resolve existing problems and to prevent potential threats against citizens by providing a balance of interests of various parts of society.'<sup>35</sup> The understanding is not indisputable, but it correlates in the part of threats and effective management with the vision of the author, in the sense, that the existing status of the state registration of rights is on the threshold of opening the land market, actually contains and will directly model threats in the future. Therefore it should not be forgotten that the threat of losing property is a hindrance for foreign investment in Ukraine, and consequently, the threat of unfulfilled governmental programs with a record prognosis of indicators of that investment. Therefore, purely theoretically, there is the basis to consider that the approval of appropriate measures is simply a question of time.

Taking into account the ability of the notary system to self-organize, considering its standard and functional provision, the best completion of its reforms will become the cancellation of the provision on state notarial office, as well as the implementation of desktop audit of notaries public, not necessarily periodically, but incidentally and exclusively pertaining to complaints.

Opening the market of agricultural land suggests not only investment and the opportunity to earn, but also the possibility to receive work and income by those functions, which it will service. Obviously, from the moment of ceasing massive mortgage crediting, such an incident might become the renaissance of the Ukrainian notary system.

The state is only required to create equal conditions of access to professions with no setups and simulacrum directed toward the achievement of goals of personal wealth.

Ideally, notaries public could become the only candidates to the execution of functions of state registrars, since they, differing from other state registrars, answer for violations at the expense of all their property, and this could be the worthy alternative to insuring registration activities. At least, we are at the first phase. However, fees for completing registration actions are a weighty addition to the means of budgets, wherefore notaries public will have to work in their habitual paradigm of self-employed persons, as well as persons who create a work place for their workers.

---

35 Draft program of the government of 29 September 2019 <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=66959](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66959)> accessed 11 December 2019.