

**THEORETICAL APPROACHES TO THE DEFINITION OF “LAND
TRANSFER” AND “LAND PLOT TRANSFERABILITY” IN THE RUSSIAN
LAND AND CIVIL LAW**

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Abstract: the relevance of the problem under study is due to the fact that scientific concepts do not offer a shared vision of the essence of transferability and types of agricultural land plot transfer. Analysis of the problems arising in this sphere provided herein is of major importance to land and civil law. The article is aimed at formulating a theoretical definition of land transfer, which may apply to land plots of any categories not withdrawn from transfer, including transfer of agricultural land plots. The leading approach to the study of the problem at hand is the logical method of system analysis, which allows to educe peculiarities of agricultural land transfer conditioned by specific features of a transferable item. The research article yields the following main results: it uses the data of comprehensive study of the law and specialist scholarly literature to identify the peculiarities of both public and private agricultural land plot transfer and offers the author's

definition of transfer. The article provides arguments for the recognition of public (administrative) transfer as a variety of land transfer. The article justifies the need to specify general principles of determining transferability of land plots of any category, including land plots from agricultural land, in the Russian Land Code. Article materials may be of use when developing the land law theory, expanding the theory of agricultural land transfer regulation, in the elaboration of some fundamental definitions and scientific classifications and in the theoretical justification of lines of improvement of the land transfer law. The theoretical suggestions provided may be used when teaching land law, individual sections in the civil law course and when preparing textbooks, teaching aids and study guides.

Keywords: land transfer, agricultural land plot transferability, grounds for the

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creation of land plot titles, acts of public authorities and local government bodies, consummation of civil transactions, civil and public turnover.

1. 1. Introduction

At various phases of history, land plots were transferred on different legal grounds.

The term “land transfer” (“land plot transfer”) was widely accepted in the law and legal literature during the period of economic reforms in Russia when the matters of transition to market relations became relevant. Land market development (inclusion of land plots into turnover) after 70 years of predominance of exclusively state land ownership became one of the lines of the agrarian and land reform.

Different authors discuss market and extra-market, public and private, civil and administrative turnover and use different definitions of land transfer.

For example, I.A. Ikonitskaya defined land transfer as change of land owners, including transfer of state and public land plots to individuals and legal entities and mentioned its two varieties – market and extra-market. She mentioned that “prohibition of private (extra-

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market) land transfer did not imply the absence of land transfer in principle. Extra-market turnover that existed in the context of state land monopoly was conducted by way of land allocation and reallocation among land users based on executive acts of public authorities”. This view was shared by N.I. Krasnov. Later on, this view was expanded: extra-market turnover also included change of land plot owners under uncompensated civil transactions. Nevertheless, extra-market turnover is mostly understood to mean administrative (public) turnover.

In line with this “pattern”, in Soviet times, land was recognized as an item withdrawn from civil turnover. However, there is no denying that land plots still changed owners, i.e. they were transferred, but it was public (administrative), not civil (private) turnover. Civilists also recognized the existence of land plot transfer in Soviet times.

If acts of public authorities and local government bodies are viewed as the grounds for the creation of civil rights and duties (subclause 2 clause 1 article 8 of the Russian Civil Code) in the contemporary context, why is it common to disclaim an administrative-executive

act of land plot assignment for temporary use as a title-creating ground for land transfer as change of right holders in Soviet times? What is a fundamental difference between a resolution to grant the land plot in state or public ownership, for instance, to a farm (peasant) household free of charge under applicable laws and a regulatory and executive act for the provision of the same state-owned land plot for use to a farm unit, which is the same in its essence? The only difference is that there was no change of a land plot owner in the latter instance. However, it's a lame argument for the negation of turnover since, in the context of present-day lease relations, no land plot owner is changed either, although it is not a hindrance to considering land lease as a form of land transfer.

The fact that land was not recognized as property in Soviet times cannot serve as a ground for the negation of turnover either as today, the items that may not be classified as property (information, exclusive rights, etc.) may still be the items of turnover. The same applies to the free-of-charge basis of provision of land plots for use since, in civil law, devolution of estate under

uncompensated transactions belongs to turnover.

Besides, it should be noted that, even in the Soviet land law, there was a heated discussion as to whether land relations could be recognized as property relations. For example, V.K. Grigoriev wrote that “land legal relations in the USSR differ from regular civil law relations because they are not property equivalent relations as, following nationalization of land, the latter lost its pecuniary valuation and was withdrawn from civil turnover”. The same opinions were voiced by many other Soviet agrarian lawyers (A.M. Turubiner, N.D. Kazantsev, G.A. Aksenok, A. Nikitin, A.A. Ruskol) who blankly denied any possibility to recognize the property nature of land use relations even in part under the conditions of state land ownership and gratis land use.

Civilists had a different view. According to S.N. Bratyus, “land removal from contract relations and establishment of the principle of gratis land use may not give rise to the negation of the property nature of land relations and identification of Soviet civil turnover with private turnover”. He mentioned that “land relations are double

relations: relations that result from administration management activities of executive-administrative bodies and property relations”. Later on, the property nature of land relations, even in the context of exclusive state land property, came to be recognized by land law scholars, which are right to say that in Soviet land law, property relations were deeply intertwined with management relations and that “even if the state acts as a title holder, these are property relations”. We share this approach and we believe that it affords ground to conclude that land transfer also existed in Soviet times.

Methodological framework of the study. The article was prepared using the general scientific dialectical cognition method; logical methods of system analysis, synthesis, comparison, analogy and special legal research methods (historical, system interpretation, prediction).

Some authors define land plot transfer as “implemented possibility to dispose of a land plot in private or public ownership (by way of a transaction or in another legal manner), which changes the scope of rights and obligations of subjects of particular legal relations, but

does not alter the land plot legal status”.

It follows from this definition that scientists do not negate extra-market (administrative) turnover (it is evidenced by a reference to the public owner’s possibility to dispose of the land plot not only by way of a transaction, but also in another legal manner, for example, by way of adoption of an administrative act). However, it says further that “land transfer is a special case of a wider civil law construction – civil turnover, in which it holds a unique position since land plots belong to natural sites, a part of the environment”. As we see, public (administrative) turnover is no longer mentioned here. However, in our opinion, there is no controversy here as, on the one hand, land transfer may be private (civil) and public (administrative), in which case land transfer is a wider notion. However, if one considers only civil turnover as such (as a whole), land transfer is its variety since there is civil turnover of other objects of civil rights (securities, precious metals, weapon, information, etc.).

S.I. Gerasin, on the contrary, underlines the civil component of land transfer in every possible way and

describes it as “transfer of title, other rights to land plots and share of ownership rights to land plots by way of civil transactions and using other civil methods provided for in land laws that occurs according to civil law and in line with the peculiarities set out in land laws and registered by competent public bodies”.

It cannot but be mentioned that while I.A. Ikonitskaya discussed transfer of land plots from some persons to others, S.I. Gerasin writes about “transfer of rights”. Of course, in certain instances, rights to land plots are the subject of civil transactions (for example, when tenancy is sold by tender); however, in most cases, it is more proper to talk about land plot transfer. The reason for this is that a particular land plot is the subject matter of a purchase and sale, gift, annuity and other agreements under land transactions rather than corresponding rights, even though transfer of rights obviously occurs.

S.I. Gerasin also believes that land plot transfer as part of an administrative procedure is not turnover. His arguments are as follows. Firstly, today, land plots are withdrawn from civil turnover, but

they can change owners administratively. But what does it prove? In our opinion, it only proves that land plot transfer, as was mentioned above, is a wider notion compared to civil turnover. Secondly, S.I. Gerasin underlines that the so-called “extra-market turnover” also existed in Soviet times; however, different terms were used back then (“land grant and withdrawal”, etc.). Again, this does not prove anything, since in Soviet times it was not customary to talk about turnover for “ideological” reasons. Speaking modern language, land plot transfer also occurs in these cases (to be more exact, rights to land are transferred, which fits well the definition given by S.I. Gerasin, if one ignores his references to civil law). This is indirectly evidenced by present-day land laws, including the Law of Agricultural Land Transfer that regulates the matters of land grant and withdrawal.

It is evident that, in the modern period, researchers focus on civil plot land transfer, which is easy to explain as it is a new legal phenomenon, while the problems of land grant and withdrawal under Soviet laws are discussed in literature in detail.

Yu.N. Andreev defines land plot

(land allotment) transfer as “property turnover with a possibility to dispose of corresponding land right objects (land plots, land allotments) through various civil transactions (purchase and sale, exchange, donation, pledge, etc.) subject to land laws and transfer of land plots, land allotments, proprietary and liability rights by way of inheritance, legal succession, acquisitive prescription, privatization, contribution of objects and rights to the charter (reserve) capital, unit fund of an company, etc.”. As we see, the author doesn’t call this turnover “civil”, although he actually means it and ignores the existence of administrative (extra-market) turnover.

In our opinion, another drawback of this definition is inconsistency of terms – on the one hand, it only mentions a possibility to dispose of land plots by way of transactions; on the other hand, it mentions land plot transfer by way of inheritance, etc. Besides, some actions that mediate land transfer that the author actually sets against transactions, in fact, are transactions (land plot contribution to the charter capital, privatization, etc.). Some other authors also reduce land plot transfer to transactions and state explicitly that they mean the conveyance

transactions that result in the grant of rights of ownership and use to acquirers (i.e. not only the transactions with title transfer).

By contrast, other researchers try to define civil turnover of land plots (agricultural), but they actually run far beyond it and define a general notion of land transfer. In particular, T.A. Pasikova defines civil turnover of agricultural land plots as statutory transfer of property rights to these land plots from one subject to another as a result of transactions, by way of universal succession and regulatory and executive powers of public authorities and local government bodies. In our opinion, the fact that acts of public authorities and local government bodies are classified in article 8 of the Russian Civil Code as grounds for the creation of civil rights is not the reason to consider the very grant of land plots under these acts as civil turnover since it must be based on equality and autonomy of will of parties to civil legal relations, which is not the case when the state exercises public administration functions. With a different approach, it turns out that the administrative turnover that appeared in the Soviet law and that many deny can

also be treated as civil turnover, which is, of course, wrong.

It should be noted that land transfer as related to grant of land plots (especially by tender) and its withdrawal has “mixed” nature, in a manner of speaking: it combines the elements of public (administrative) and private (market, civil) turnover since these relations are based on a complex set of facts: act of a public authority on tender holding or land plot withdrawal and corresponding purchase and sale (lease) agreement with the preferred bidder or land plot repurchase agreement.

One must admit that land transfer goes beyond title transfer relations and includes transfer of other rights that may arise both from transactions and other legal facts. In addition to transactions, some authors recognize as turnover relations the relations of enforced seizure (including withdrawal) of a land plot on the grounds and according to the procedure provided for in the civil law and land plot recovery when a land plot “moves” along the civil terrain from a title-free holder to a title holder. This point of view looks interesting, but it was not evolved in literature.

1. 2. Results

Based on the analysis of the views on the notion under study, one can offer the following classifications of land transfer:

The following categories may be singled out by a legal regulation method:

- public turnover based on acts of public authorities and local government bodies, including reissue of qualified proprietary rights by individuals;

- private turnover on a contractual basis as well as based on other legal facts that give rise to civil relations between equal subjects (for example, in case of legal succession);

- “mixed” turnover that combines the elements of both public and private turnover.

Land transfer may have the following categories based on

onerousness of acquisition of titles to land plots:

- market – if turnover is based on onerous civil transactions. This may also include land plot repurchase from owners, since although a land plot is withdrawn forcibly, it is repurchased at market prices;

- extra-market – based on the acts of public authorities and local

government bodies on the gratuitous grant of land plots under uncompensated transactions, by way of universal succession, privatization of agricultural land into the common property of individuals;

- “mixed”. For example, repurchase of the land plots earlier granted subject to limited proprietary rights at statutory reduced prices may not be classified as either market or extra-market turnover. This category also includes withdrawal of the land plots from the persons who own them subject to the right of permanent (indefinite) use or lifetime inheritable possession, as these persons are compensated for the losses caused by the termination of their rights to the land plots withdrawn.

Presence of the so-called “mixed” turnover in each group is the evidence of diversity and complexity of the land relations under study that do not always fit into “classical” schemes. Besides, land transfer may be divided into “typical”, i.e. the one that uses the same legal measures as turnover of other objects of civil rights (transactions, universal succession, enforcement, etc.) and “non-typical” that does not apply to other objects of civil rights (reissue of the

proprietary rights that have arisen earlier).

Based on the above, one can formulate the following notion of land transfer, common to all land categories, which means that it can apply to agricultural land plot transfer:

Land transfer is the transfer of land plots (shares of the land ownership right) and devolution (including reissue) of rights to land according to applicable laws as a result of civil transactions, universal succession, other legal facts that give rise to the occurrence of civil rights, including acts of public authorities and local government bodies targeted at regulatory and executive (administrative) reallocation (grant or withdrawal) of land plots.

1. 3. Discussion

In the course of market land transformation, the notion of “land transfer” has come to be often used as a synonym for “land market”. N.A. Syrodov states that identification of these notions is erroneous. One has to agree with the scientists who believe that the notion of “land market” is broader than the notion of “land transfer” since, apart from the system of land

transactions, the land market also comprises the mechanism and structure to support these transactions.

E.N. Krylatykh claimed the opposite when considering the correlation between the land transfer and land market notions. In her opinion, land market is a part of land transfer and the very notion of transfer comprises the establishment, alteration and termination of rights to a land plot legally stipulated in a contract and mediated by money and in kind payment. E.N. Krylatykh only includes onerous civil transactions such as purchase and sale, lease, land mortgage loan and compensation for the land withdrawn for state and public needs in the land market notion.

N.A. Syrodoev criticizes these assertions as the “confusion of economic and legal notions” and mentions that the land market may only exist if there is permitted land transfer. In this regard, there is a connection between the market and transfer, which is not direct, but mediated by economic components. N.A. Syrodoev is right to say that, apart from transactions, transfer also includes other devolution of estate to another person. Besides, he says that recognizing compensations for the land withdrawn

for state needs as a transaction is an apparent legal error and he explains that compensation is in fact an obligation that originates from the causing of harm by lawful actions.

Land plot transfer only occurs to the extent permitted by laws on land and other natural resources (clause 3 article 129 of the Russian Civil Code). It is correctly stated in the literature that there is an opinion affected by this norm of the Russian Civil Code, according to which civil transactions may only apply to land transfer when this possibility is expressly provided for in land laws. However, no such conclusion may be drawn from law analysis.

In our opinion, it follows from clause 3 article 129 of the Russian Civil Code that land laws have to define the “degree” of land plot transferability as the Civil Code does not classify land plots as objects in free turnover, limited or withdrawn from turnover.

Thus, the difference between the notions of land plot transfer and transferability lies in the fact that, “in the first instance, the focus is on an action (making transactions, adopting administrative acts, etc.), whereas in the second instance, the focus is on a

possibility to make such actions. Land plot transferability as a legal category implies a statutory possibility for the land plot owner to legally dispose of the land estate by making a transaction or otherwise as prescribed by the law (for example, a local government body may grant a land plot into individual's private ownership and administratively).

While the notion of land plot transfer is common to all land plot categories, as was mentioned above, the degree of land plot transferability is different for different land plot categories. Many scientists criticize article 27 of the Russian Land Code that sets out land plot lists; they say that these lists are apparently incomplete, not specific enough and are not in agreement with other normative legal acts that address these matters in a number of aspects. Besides, legislators use different categories to classify land plots as limited or withdrawn from turnover (entity composition, land functional purpose, category, size, etc.).

Analysis of common principles of defining land plot transferability is beyond the scope of our study; however, it should be noted that we can hardly subscribe to an opinion that land plots do

not belong to a group of the objects of civil rights withdrawn from turnover or to a group of the objects of civil rights limited in turnover. Considering peculiarities of land as a natural resource and peculiarities of a land plot as property, some authors conclude that they belong to a different category of objects of civil rights, which is proposed to be conventionally titled “special objects of civil rights that are only allowed to be in civil turnover in the cases and to the extent provided for in special (natural resources) laws”. This is not true as land plots may be in free turnover, limited and withdrawn from turnover.

1. 4. Recommendations

Let us now consider land plots comprised in agricultural land. It is known that article 27 does not expressly define their degree of transferability and it refers to the special Law of Agricultural Land Transfer. There is a special provision saying that this law does not apply to the land plots allocated from agricultural land for individual residential, garage building, part-time farming, gardening, cattle breeding and market gardening and to the land plots

occupied with buildings and structures.

It follows from this provision that the listed plots are in free turnover, so the procedure of dealing with these plots is not further on discussed in detail herein. As to other land plots from agricultural land (farm land in its essence), neither the Russian Land Code nor the specified Law expressly refer to them as land plots of limited turnover; nevertheless, they should be perhaps qualified as such – according to the criterion set out in article 129 of the Russian Civil Code – their belonging to certain persons (given that these land plots may not belong to foreign persons on the basis of the right of ownership).

At the same time, one cannot ignore the conventional nature of this approach that does not fully fit in civil or land laws. For example, according to clause 5 article 27 of the Russian Land Code, land plots of limited turnover are only the ones in state or municipal ownership and no land plots owned by individuals and legal entities on the basis of the right of private ownership may be sold to foreign persons. Besides, according to article 129, turnover limitation lies in the fact that certain objects may only belong to individual

parties to turnover, but no underlying right is specified. From this perspective, it does not fully apply to foreign persons either as they cannot own land plots on the basis of the right of ownership only and rental rights of foreign persons are not limited.

As to the second criterion set out in the Civil Code (object turnover under a special permit), it does not apply to land plots in Russia, although authorization-based procedure of land transactions is used in some foreign countries. This is another proof of the fact that the general principles of defining land plot transferability in the Land Code need to be specified. We believe that, among other things, the Code itself needs to define the position of agricultural land (including farm land) plots in the general system of classifying land plots with one or another group of objects in terms of their transferability.

The Land Code of the Russian Federation specifies the land plots not subject to any limitations as to their participation in turnover (summer gardening, horticultural, etc.), subject to limitations to a certain extent (farm land) and completely withdrawn from turnover (outstanding productive farm land). Still,

it is not clear, on the one hand, what is implied when it is said that limitations as to participation in turnover apply to farm land “to a certain extent”? Secondly, what does the assertion of withdrawal of valuable farm land is based on? Clause 4 article 79 of the Russian Land Code says that this land may be included in the list of the land plots not allowed to be used for any other purposes according to the laws of constituents of the Russian Federation. However, this does not mean that an agricultural organization or a farmer are not allowed to lease out these land plots or sell them to another agricultural goods producer. So, there is no reason to classify valuable farm land as the objects withdrawn from turnover.

1. 5. Conclusion

Thus, we note finally that there are different approaches not only to the definition of the subject of turnover, but also its consent, which is directly related to the correlation between civil and land regulation of property relations with regard to land plots.

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