

American University of Central Asia

International and Business Law

THESIS WORK

Theme:

Ownership Rights of Foreign Persons

Over the Land Parcels in the Kyrgyz Republic:

Law and Practice

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Introduction

Land is a strategically important object for sovereignty of each country and cost-effective facility in civil turnover. Therefore, each state pays special attention to the legal regulation of this issue. When it is not just about the land, but also about the possibility of transfer ownership rights over the land to foreign persons, this issue becomes even more resonant. On the one hand, every state wants to preserve its territorial integrity by prohibiting foreign participation in land transactions, but on the other hand it wants to attract more foreign investment by creating for them an attractive list of certain rights and responsibilities concerning land issues. The ambiguity of states' position in this matter leads to legal problems that are difficult or even impossible to solve in practice. This work is dedicated to the analysis of the legal regulation of foreign persons' ownership rights over the land parcels in the Kyrgyz Republic and its problematic aspects. Analysis of these issues through comparison of different states' legislative experiences aims to find out necessary solutions.

In the course of writing this paper it was found that there are few similar works on analysis and evaluation of legal regulation of foreign persons' property rights over the land parcels in the Kyrgyz Republic. Those works are investigated by Alenkina N., Kolesnichenko S., and International Business Council. In this regard, this research paper represents a continuation of the mentioned works and an attempt to develop new approaches for this issue.

Present work is researched based on constitutions, land and civil legislations of the Kyrgyz Republic, the Russian Federation, the Republic of Uzbekistan and the United States of America. Little part of the research is covered also by family law of our country. Theoretical base consists of scholarly works mostly of Russian scientists, researches on the issue of private ownership rights over the land in Kyrgyzstan, periodicals, and other sources.

Different methods of knowledge were used for carrying out the present research qualitatively. Historical and analytical techniques such as legal and structural analysis, comparison, deduction, induction, helped to investigate this work on all hands. In addition, method of interview and statistics take place in the present work.

This work has theoretical importance for the improvement of the land legislation of the Kyrgyz Republic, because it analyzes problematic aspects of the regulation itself and tries to give appropriate solutions. Its findings and provisions may be used in researches, legal analysis, and in teaching processes of land and civil laws.

The main points and suggestions to solve problematic aspects of the foreign persons' ownership rights over the land in the Kyrgyz Republic were approved and described by the author in the practical conferences "Problems of ownership rights over immovable property and ways of solution" held in Kyrgyz State Juridical Academy on February 12, 2010 and "Improvement of the Kyrgyz Republic legislation" held in Kyrgyz Russian Slavic University on April 26, 2010.

This work consists of an introduction, three chapters, including two sections, conclusion, and bibliography.

In *introduction* the author substantiated the actuality of the present research and its purpose. Also author states that the present work has theoretical and practical importance, because it analyzes problems of foreign persons' land ownership rights over land parcels and it can be used in teaching and scientific purposes.

Methodological base of the present work is described by author in all hands. Scientific novelty of the present research paper was revealed, and author approved findings of the present work in practice by participating in several conferences.

The first chapter "Origin and historical development of ownership rights over the land in Kyrgyzstan" is devoted to historical and legal analysis of land ownership right institute in the sovereign republic of Kyrgyzstan after the collapse of the Union of Soviet Socialist Republics in 90s of XX century.

In the second chapter "Comparative legal analysis of legal regulation of foreign persons' ownership rights over the land according to the legislation of other countries" author investigates legislations of the Russian Federation, the Republic of Uzbekistan, and the United States of America concerning foreign persons' land ownership rights and tries to evaluate its legal regulation in order to use positive practices in our legislation.

The third chapter "Legal regulation of foreign persons' ownership rights over the land in Kyrgyzstan" reveals our republic's approach to the foreign persons' ownership rights over the land. In this part author analyzes civil, land and other related laws.

In the first section "Cases providing foreigners with ownership rights over the land in Kyrgyzstan" author describes exceptional cases from the general prohibition for foreign persons to own the land in Kyrgyzstan. The first one is mortgage lending of house building, and the second - universal succession. Mentioned cases lead to problems, which are revealed by author in the next section.

The second section “Problematic aspects of legal regulation of foreign persons’ ownership rights over the land and suggestions for its improvement” is devoted to problems which foreign persons and legislator face in land transactions. Legislation of the Kyrgyz Republic when it set restrictions concerning foreign persons’ ownership rights over the land parcels in our country, it failed to analyze consequences of its limitations and foresee probable gaps, which in practice leads to the unsolved situations.

Conclusion part of the present work is devoted to the resuming whole work with focusing on the main issues and to its results.

Used sources are listed in *bibliography*.

CHAPTER 1: ORIGIN AND HISTORICAL DEVELOPMENT OF OWNERSHIP RIGHTS OVER THE LAND IN KYRGYZSTAN

Issue on the ownership rights over the land as one of the basic issues on the state level is reflected in the constitutions of every state. Constitution is a fundamental law, which regulates society and state's functioning through the legal means¹. One of the objects of society's functioning is private ownership. The issue of private ownership in the current constitutions has two versions of the constitutional provisions:

- ❖ private ownership as a fundamental principle of economic organization of society; and
- ❖ private ownership serves as one of the most important human and civil rights².

In the case of the Constitution of the Kyrgyz Republic³ symbiosis of listed constitutional provisions can be observed. For example, article 4 of our Constitution, which has supreme juridical force⁴, states that in the Kyrgyz Republic private, state, municipal and other forms of ownership are recognized and protected. In other words, legal recognition of private ownership implies its importance as a basis for economic activity that the state must provide. Article 14 of the Constitution stipulates the right of everyone to own, use and dispose of their property. In this case, this provision stands as one of the most important human and civil rights.

In addition, by the content constitutions can be democratic, authoritarian and totalitarian. In conditions of transitional periods most constitutions are totalitarian-democratic with authoritarian elements⁵. However, our country, which experiences now transitional period, decided to step on the way of democratic development by adopting liberal constitution.

Content of legal norms and legal system depends mostly on the state will⁶. So, constitutions of different countries have ambiguous approach to the question about the objects of private

¹ A.S.Avtonomova, V.A.Sivitsky, A.I.Cherkasov, KONSTITUTSIONNOE (GOSUDARSTVENNOE) PRAVO ZARUBEZHNYH STRAN, 40 (2001)

² G.N. Andreeva, INSTITUT SOBSTVENNOSTI V KONSTITUTSIYAH ZARUBEZHNYH STARN I KONSTITUTSII ROSSIYSKOGO FEDERATSII, 201 (2009)

³ Constitution of the Kyrgyz Republic dated May 5, 1993, last amendment dated October 23, 2007

⁴ Law of the Kyrgyz Republic "On legal normative acts in the Kyrgyz Republic" dated July 20, 2009

⁵ N.A.Mihaylova, KONSTITUTSIONNOE PRAVO ZARUBEZHNYH STRAN, 44 (1999)

⁶ O.E.Leits, SUSHCHNOST PRAVA. PROBLEMY TEORII I FILOSOFII PRAVA, 123 (2002)

ownership rights. According to G.N. Andreeva, there are different versions of the legislative list of the private ownership objects:

- ❖ from an extremely limited list (a characteristic example of the socialist countries during the development of socialism)
- ❖ to the extremely wide range of mentioned type of objects (e.g., post-socialist countries)⁷.

Despite the scope of private ownership objects' list, there are always restrictions on several objects. One of these objects of private ownership is land. Land as a basis for sovereignty and as an object of civil rights is of particular value for policy and economy of each state. Because of this, any independent state is trying to maximally protect the sovereignty by imposing certain restrictions on the relationship associated with the land, and at the same time create a land market by encouraging participants of land relations in the form of exceptions.

Different states concern the issue of private land ownership in different ways. Some countries do not restrict the range of subjects in private ownership rights, allowing all participants of civil relations to own land parcels. Some countries have used the method of limits, set list of the land, which may or may not be in the private land ownership or a list of persons who can or cannot be landowners. Other countries hold fairly tough policy, leaving the land in the exclusive state ownership. The last policy was a priority for the Union of Soviet Socialist Republics, to which the Kyrgyz Soviet Socialist Republic, now the Republic of Kyrgyzstan, was part.

During the USSR era, the land could not be privately owned, because it was in exclusive ownership of the state. However, the 90s of XX century became heralds of a new phase in human history - the collapse of the USSR.

The USSR collapse and the establishment of a sovereign state of Kyrgyzstan marked the beginning of the reform period. The reforms have affected all spheres of our young nation's life. After the collapse of the former not only political but also economic systems, Kyrgyzstan needed to establish its own system for further development. A start was made - the transition from planned to market economy. One of the first layers, on which the young nation could rely, was land reform. President Askar Akayev, speaking at a session of People's Deputies Council in the Naryn Oblast, explained that the most important part of the new agricultural policy in the country is land reform⁸.

⁷ G.N. Andreeva, INSTITUT SOBSTVENNOSTI V KONSTITUTSIYAH ZARUBEZHNYH STARN I KONSTITUTSII ROSSIYSKOGO FEDERATSII, 207 (2009)

⁸ Unknown author, *Iz Nayomnyh Rabochih – v Hozyayeva Zemli*, Slovo-Kyrgyzstana (1991, March 26)

President noted that the essence of land reform tasks is the transformation of a peasant from an employee to the owner of the land⁹. In other words, at the beginning of the agrarian policy the objective was to introduce private ownership over the land.

However, the abrupt transition from state to private ownership could lead to problems that would result from citizens' unwillingness to accept a new institute. Therefore, land reform started with the adoption of several crucial laws and regulations, such as:

- ❖ the Law of the Kyrgyz Republic "On land reform"¹⁰,
- ❖ the Land Code of the Republic of Kyrgyzstan¹¹,
- ❖ the Republic of Kyrgyzstan President Decree "On measures concerning land reform in the Republic of Kyrgyzstan"¹², and others.

These regulations introduced temporary, life and permanent use of land. The purpose of this whole campaign was to prepare people of the Kyrgyz Republic to the institution of private ownership that was completely new for our country.

The land became the subject of ambitious reforms.

The Land Code of the Republic of Kyrgyzstan¹³ noted that the right to the land parcel as an object of land relations includes the right of land possession and the rights of land use. The right of disposal has not been included in this list, and meant that the land allocated to citizens is not a subject of sale and purchase, gift, mortgage, and other forms of land alienation. In other words, this provision says about the absence of the private ownership right. Consequently, no transactions with the land alienation could be committed.

The legal regulation of land relations involving foreign persons had special significance for the state because of the strategic importance of land as the basis for sovereignty. This led to the fact

⁹ Unknown author, *Iz Nayomnyh Rabochih – v Hozyayeva Zemli*, Slovo-Kyrgyzstana (1991, March 26)

¹⁰ Law of the Republic of Kyrgyzstan "On land reform" dated April 19, 1991, not valid

¹¹ Land Code of the Republic of Kyrgyzstan dated from April 19, 1991, not valid

¹² Decree of the President of the Republic of Kyrgyzstan "On measures concerning land reform in the Republic of Kyrgyzstan" dated from February 15, 1991, not valid

¹³ Land Code of the Republic of Kyrgyzstan dated from April 19, 1991, not valid

that the State had provided legal restrictions on this kind of relationships. Legislative restrictions on the rights of foreign persons in the field of land relations were provided by the Land Code of the Republic of Kyrgyzstan.

Life-long inheritable possession of land, which is very close to the right of ownership, was available only for citizens of the Republic of Kyrgyzstan. State legal entities were provided by permanent possession on the land. Foreign citizens have only the right of temporary use on the land.

According to the article 10 of the Land Code of the Republic of Kyrgyzstan responsible authority which is competent to allocate the land to citizens and public institutions for temporary use on a lease conditions are village, town and district People's Deputies Councils, to foreign persons - the Cabinet of Ministers of the Republic of Kyrgyzstan. This article reflects the State's attitude to foreign persons in land relations. Allocation of land on lease conditions to citizens of the Kyrgyz Republic was simple and easy, rather than to foreign persons. The complication of the land allocation process with the Government's participation at least meant time consuming process, and as a maximum – negative decision on the land allocation issue.

Despite reforms of land relations (land as an object of exclusive state ownership could be given only for use), the land remained a passive object of economic relations. Neither citizens nor legal entities were the owner of the land; therefore, they could not dispose the land to the extent to which it is entitled to the owner. This means that they could not participate in economical relations through trading with the land.

A new stage of land relations has begun - introduction of private ownership over the land in our republic.

The introduction of the institute of private land ownership rights was not a spontaneous decision or whim of a particular person. It was a deliberate step, because it was stated at the beginning of land reform that purpose of agrarian policy was transformation of land user to land owner. Of course, the question of private ownership on land parcels provoked a storm of emotions and hot debate.

Citizens living in the era of planned economy and state ownership over the land parcels, showed their attitude to this innovation in negative forms. Arguments were of a great diverse. It was said that the land is sacred, beggarly people will not resist temptation and will improve its material

welfare by selling the transferred to him for life-long land use at the first event and to the first buyer¹⁴.

It was also said that the sale of land will lead to a loss of patriotic feelings, hit monolithic character of nation, and state will become vulnerable to potential aggressors from the outside¹⁵. The most ardent opponent of private land ownership institute was a member of the Legislative Assembly, chairman of the committee on state system Absamat Masaliyev. He believed that the introduction of private ownership on land is an “anti-nation policy”, because 90 percent of the population in Kyrgyzstan is beggars. Consequently, only foreigners would buy the land. He also considered that with the beginning of land sale, immediately ethnic conflicts will start, as it was in Osh events and the Tajik-Kyrgyz border issues¹⁶.

The other side of this debate entirely did not agree with the arguments of their opponents. They had their own opinion and evidences to it. It claimed that according to the last statistics each year 30 percent of arable land disappears due to the absence of the land owner¹⁷. In other words, the land user concerns about the land not as an owner, but as a stranger, i.e. “user”. The biggest and the most important reason why he is not interested in land development is due to the threat that at any time state can confiscate his land parcel.

Anatoly Ponomarev, the manager of Joint Stock Company “Chuyinvest”, stated that nobody will invest in soil fertility without any guaranteed rights. The state does not have enough time and means to increase soil quality, land user or possessor uses it ugly and do not protect it from nitrates, salinity, because land does not belong to him. This type of psychology is the same with temporary worker’s one¹⁸.

Director of the Agency for Bank Reorganization and Debt Restructuring under the National Bank of Kyrgyz Republic Aknazarova Roza, referring to the introduction of private ownership institute over the land, was of the opinion that the real, not complicated with formalities right on the land will not only strengthen the market relations in agriculture sector, but also will serve as an impetus to the development of financial services market, and especially concerning mortgage

¹⁴ Nadyr Momunov, *Zemlya Trevogi Nasheyi*, Slovo-Kyrgyzstana, 3 (1991, March 26)

¹⁵ *Ibid.*

¹⁶ Artem Petrov, *Prodavat Zemlyu – Eto Velikoe Svinstvo*, Delo №, 5 (2000, December 6)

¹⁷ *Ibid.*

¹⁸ G. Luneva, *Zemle - Hozyaina*, Slovo-Kyrgyzstana, 3 (1998, October 6)

market¹⁹. Mortgage loans secured by private agricultural land will be the most appropriate form of expansion of crediting in the case of an agricultural producers' cash deficit²⁰.

The importance of this issue can be judged by the following data. Several issues were discussed in referendum. The representative of the Prime Minister in the Assembly of People's Representatives of our Parliament, Gutnichenko Larisa was a member of the working group, which analyzed received proposals from our population. Present working group discussed amendments to the Constitution which. She stated that, undoubtedly, most responses were received on the issue of private ownership²¹, nearly two thousand²². Despite hot debates, people of Kyrgyzstan made the choice.

In 1998, October 17, a new legal institution, the right of private ownership over the land, was adopted through referendum. This event, it may be stated with confidence, is a great achievement of our legislation not only in the sphere of land relations, but also in the policy of our country.

For a systematic and painless implementation of the new institution the Kyrgyz Republic Government worked out the regulation called the Conception "On introduction of private ownership over the land" (hereinafter "Conception"), which was approved by the Kyrgyz Republic's President Decree dated from October 13, 1998.

In addition, President created a special body, which drafted legal normative base for this institution and concerned all legal issues regarding land reform. It was a National Committee on people's rights protection in condition of further land-market relations development, on rational use of land and on protection of land resources (hereinafter "Committee"). This Committee consisted of representatives from Government, NGOs, agricultural legal entities, and local authorities²³.

In spite of sufficient changes in the legal regime of the land as an object of civil rights the issue on owners was determined by legislator from the position of states' interests. The draft of the new Land Code of Republic of Kyrgyzstan noted that foreign citizens, stateless persons, joint

¹⁹ Unknown author, *Poydyot Ipotechnoe Kreditovanie*, Slovo-Kyrgyzstana, 3 (1998, October 1)

²⁰ *Ibid.*

²¹ *Ibid.*

²² T.Namatbaeva, *Referendumu Skajem "DA!"*, Slovo-Kyrgyzstana, 2 (1998, October 7)

²³ Decree of the President of the Kyrgyz Republic dated September 19, 1998

ventures and other legal entities with foreign element are prohibited from buying and selling land. They were granted only the right for land use according to the conditions specified by law. Despite the bold step of introducing the right of private ownership on land, the state still was not ready to recognize this type of right for foreign persons.

It was foreseen by the Conception that in the case if people of Kyrgyzstan react to the introduction of private ownership on land positively, i.e. vote for it, moratorium on the sale-purchase of agricultural land would be declared with the term up to 5 years. This moratorium was aimed to protect citizens' constitutional rights on land, to establish equality for all forms of ownership, to observe interests of citizens, local communities and the state, to avoid possible negative consequences which result from the introduction of private ownership on land.

This campaign allowed the state bodies to create a single mechanism for transition of state ownership on land to private. Thus, in April 1999 after approval by the people of the Kyrgyz Republic a project of a new constitution through the referendum, Zhogorku Kenesh (i.e. Parliament) declared five-year moratorium. The moratorium did not last 5 years as it was indicated, but only 3 years.

In 2001, January 11, with the adoption of the Law "On agricultural land management" land of agricultural purpose became the subject of sale and purchase²⁴. This provision terminated above mentioned moratorium. From this date citizens had a legitimate right to acquire ownership rights on agricultural land and to dispose it at its discretion.

Mentioned process again was applicable only for citizens of the Kyrgyz Republic. Foreign citizens, stateless persons, joint ventures and other legal entities with foreign element were prohibited to be granted ownership rights over the agricultural land, except as provided by the Land Code of the Kyrgyz Republic. In other words, the new phase of land relations keeps the same legal restrictions for foreign persons as it was provided before.

Resuming this part of the present research, it is up to note that the institution of private ownership over the land parcels originated as a result of the rigid political fight between liberals, who strive for making land parcels as a part of civil turnover, development of agricultural sector, finance market, and conservative political forces, who feared to lose the sovereignty of the Kyrgyz Republic by introduction of private land ownership. Latter's arguments influenced the general

²⁴ Law of the Kyrgyz Republic "On agricultural land management" dated January 11, 2001, last amendment dated May 26, 2009

model of the present institution, in other words the private ownership over the land was allowed only for citizens of the Kyrgyz Republic.

CHAPTER 2: COMPARATIVE LEGAL ANALYSIS OF LEGAL REGULATION OF FOREIGN PERSONS' OWNERSHIP RIGHTS OVER THE LAND IN RELATION TO THE LEGISLATION OF OTHER COUNTRIES

Analysis of our domestic concept on foreign persons' private ownership on the land parcels considered to be not full without attempt to observe it through the prism of international experience of legal regulation. How is the question on foreign persons' ownership rights over the land solved in other countries? What pluses and minuses of the present issue's legal regulation and practice can be traced from those countries?

As noted above, the question on providing foreign persons with ownership rights over the land is treated differently in different states. It depends on states' policies. Some countries have set up the legal vacuum by prohibiting foreign persons to have any rights on the land. Others guarantee national treatment for foreign persons in their countries, thus erasing the legal distinction between their citizens and nationals of other countries.

Legal regime of the land is determination of content of ownership rights, other rights on the land, rights and obligations of persons...²⁵ In the case of foreign persons, state's legal regime of the land differs from the regime provided for citizens.

This thesis examines the legislation of such countries as the Russian Federation, the Republic of Uzbekistan and the United States of America in order to carry out a comparative analysis with the legislation of the Kyrgyz Republic.

These countries are chosen not by chance. The reason for choosing the Russian Federation is in following. First of all, legislation of our countries is almost similar. From my point of view it can be explained through the fact that all fifteen former Soviet republics depended on Moscow not only economically and politically, but also legally. Even after the collapse of the USSR, the former Soviet republics could not get out from this situation and as a result they copy the legislation of the Russian Federation. From other side, Russia does not have such an acute shortage of land as it is in our country. From this point of view it was interesting to analyze the institution of private ownership rights of foreign persons over the land parcels in this country.

Legislation of the Republic of Uzbekistan has been chosen for the following reasons. First of all, our history with Uzbekistan for several centuries closely overlaps leaving behind common

²⁵ O.I.Krassov, ZEMELNOE PRAVO, 40 (2000)

events, characters, etc. Secondly, this country, like ours, is experiencing problems with land due to the growth of population. In this aspect, the experience of the Republic of Uzbekistan with regard to the discussed is curious.

United States of America, despite the recent global financial crisis, remains one of the most economically developed countries in the world. In this regard this country is substantially different from ours. Therefore, the selection and analysis of the United States' legislation on the private ownership of foreign persons over the land would have been useful. In addition this country belongs to the quite different legal system than we do. In this regard, the U.S. law is interesting. Based on the listed factors, from my point of view the choice of these countries is reasonable enough.

The approach of the Russian Federation in the sphere of regulation of foreign persons' land relations is in some aspect unique.

According to the Constitution²⁶ of this country land is the foundation of life and activities of nations living in its territory, and may be in private, state, municipal and other forms of ownership. Article 36 of the Russian Constitution stipulates that citizens and their associations have the right to private ownership on the land. Article 62 of the present law establishes the national treatment to foreign persons in the territory of the Russian Federation. National treatment is a legal equality between foreigners and national of the definite country except those rights which are inherent only to citizens of that country²⁷. Further analysis will show whether land ownership rights in the Russian Federation are inherent to its citizens.

It should be noted that provisions on ownership rights over the land parcels are reflected not only by land legislation of the Russian Federation but also by civil legislation.

In this regard an issue on whether the Land Code or the Civil Code of Russia is applicable in land ownership is raised. Civil Code of the Russian Federation in land ownership rights provisions focuses on the disclosure of the content of private ownership, while Land Code focuses on the list of land objects, which can be in ownership of subjects of land relations²⁸. Therefore, these two legal normative acts are appropriate in land ownership issues depending on the subject issue.

²⁶ Constitution of the Russian Federation dated December 30, 2008

²⁷ K.V.Aranovskiy, GOSUDARSTVENNOE PRAVO ZARUBEZHNYH STRAN, 348 (1998)

²⁸ R.Y.Vishnevskaya, G.A.Misnik, N.N.Misnik, POSTATEINYI KOMMENTARIY K ZEMELNOMU KODEKSU, 63-81 (2002)

The Civil Code of the Russian Federation²⁹ does not restrict the acquisition of land ownership rights specifying a target group, i.e. the list of people entitled to have mentioned right is not defined. Restrictions appear in the Land Code of the Russian Federation³⁰.

Thus, according to the Land Code of the present country foreign persons are prohibited from acquiring the right of private ownership on land of border areas, the list of which is determined by the President of the Russian Federation.

It should be noted that this list has not yet been determined by the President of the Russian Federation and adopted. This fact may lead to discussions concerning interpretation of the present article. Some can state that as the list of border area lands is not determined, those lands cannot be considered as land of border territories. Therefore, foreigners can acquire ownership rights over those lands. Some could state that the mentioned list is only a formality, because the meaning and the purpose of the pointed provision is to prohibit foreign persons to own border area lands. From my point of view, the last opinion is prevailing, because notwithstanding to the mentioned list, the purpose of the Russian legislation is to protect borders of this country by prohibiting foreign persons to own mentioned land parcels.

The above states restriction aims directly and indirectly to protect the territorial integrity of the Russian Federation. From this perspective, this restriction is justified not in legal terms, but more in political aspect, because in this case the land serves not as an object of civil law relations but as a basis for sovereignty.

Despite this limitation, the land legislation of the Russian Federation is loyal enough to the issue of foreign persons' ownership on the land, giving this right only for a payment³¹. Foreign persons may be granted land for the construction in the manner prescribed by law.³². Also, foreign nationals, stateless persons and foreign legal entities - the owners of buildings, constructions have preferential right to buy the land, on which the construction is³³. Foreign nationals, stateless persons and foreign legal entities - the owners of buildings, constructions have the right to acquire land in

²⁹ Civil Code of the Russian Federation dated from November 30, 1994

³⁰ Land Code of the Russian Federation dated from October 25, 2001

³¹ Land Code of the Russian Federation dated October 25, 2001, art.28 (5)

³² *Ibid.* art.30 (12)

³³ *Ibid.* 35 (5)

the property³⁴. As analysis showed land ownership rights in the Russian Federation are not inherent to its citizens, consequently foreigners can enjoy this right over the land with several restrictions.

In contrast to the position of the Russian Federation the Republic of Uzbekistan is stricter. According to the Constitution of Uzbekistan³⁵, land is a national treasure. This provision took further development in the law of the Republic of Uzbekistan “On property”³⁶. This law establishes that land is the exclusive state ownership except in several cases.

First, foreign persons, owners of the objects of trade and service sectors, have the right to land ownership³⁷. This provision is aimed on the interests of investors and entrepreneurs. Present provisions implies the importance of foreign participation in the trade, and consequently in the economy of the country.

Second, if the land is unprofitable or unproductive, then this type of land in the Republic of Karakalpakstan can be purchased by foreign persons through auctions in the last turn³⁸. Primarily citizens and legal entities of the Republic of Uzbekistan will be engaged in this process. If they were unable or unwilling to buy, then this right would be granted to foreign persons. Establishing this exception, the state also assumed its interests. Unprofitable and unproductive land is not economically interesting for the participants of civil relations. Why in this case not to provide foreign persons with this land. It is considered that the welfare of foreign persons is higher than the citizens of this country. Having finance and opportunity, foreign persons may at their own expense to process the land and turn it into a cost-effective land parcel. In practice this norm does not work.

Unlike the previous two countries, the United States of America is the most free and loyal country concerning this issue.

As it is well-known, this country has a dual system of legal regulation: the federal level and the state level. At the federal level, there are no restrictions on the acquisition by foreigners land ownership rights. Acquiring ownership rights on agricultural land is also not restricted by federal

³⁴ Land Code of the Russian Federation dated October 25, 2001, 36 (9)

³⁵ Constitution of the Republic of Uzbekistan dated December 8, 1992

³⁶ Law of the Republic of Uzbekistan “On property” dated October 31, 1990, last amendment dated December 13, 2002

³⁷ Law of the Republic of Uzbekistan “On foreign investments” dated April 30, 1998 last amendment dated December 31, 2008

³⁸ Resolution of Cabinet of Ministers of the Republic of Uzbekistan “On measures of decreasing land use effectiveness” dated November 29, 1994

law. The only condition is that the foreign persons who have acquired ownership of agricultural land must notify the US Secretary of Agriculture³⁹.

Limitations arise already at the state level. From all states only 28 of them have set different sorts of restrictions concerning private ownership over the land⁴⁰. For example, in Idaho foreigners are not allowed to buy lands, which belong to the state. In other agricultural states, such as Kansas, in general, foreigners are prohibited to buy agricultural land. In several states such as Georgia, Kentucky, Maryland prohibition on foreigners' ownership rights over the land applies selectively to citizens of certain states. In Indiana and other states area of the land that can be sold to foreigners is limited⁴¹.

Resuming comparative legal analysis, I would like to dispel the existing confusion regarding the fact that most states prohibit foreigner persons to acquire ownership rights on the land parcels. As we have been convinced land legislation of different states is ambiguous in the regulation of the present issue. There is full spectrum of legal decisions in the states: from the complete prohibition to the legal recognition of foreign persons' ownership rights over the land. By setting various restrictions over the land ownership rights of foreign persons (complicated procedures, payment, restrictions on land categories, etc.) legislator primarily stands from the State and its people position. In this regard, mentioned restrictions are justified.

³⁹ Cliff P. Dobitz, *Foreign Ownership of American Agricultural Land*, available at <http://www.entrepreneur.com/tradejournals/article/7689691.html> (visited on April 24, 2010)

⁴⁰ Byuletten OO "LARK", 7 (2008)

⁴¹ *Ibid.*

CHAPTER 3: LEGAL REGULATION OF FOREIGN PERSONS' OWNERSHIP RIGHTS OVER THE LAND IN KYRGYZSTAN

Returning to the legislation of the Kyrgyz Republic it is interesting to analyze on what extent our national legislator is reasonable in its ongoing land policy and in the sphere of legal status of foreign persons.

Constitution of the Kyrgyz Republic⁴² states that land and other natural resources may be in private, municipal, state and other forms of ownership. These provisions legally assign right to private ownership over the land parcels in the Kyrgyz Republic. However, the Constitution does not specify, the scope of persons who are entitled to have mentioned right. Thereby the need to examine of other legal normative acts arises.

The basic provisions on the content of the ownership right are identified by the Civil Code of the Kyrgyz Republic dated May 8, 1996⁴³. According to the Civil Code the right of ownership is recognized and protected by legislation as a right of the subject at its discretion to possess, use and dispose his property. Consequently, the ownership consists of three components - the right to possess, the right to use and the right to dispose. A key element to the right of ownership is the right to dispose, since it enables us to determine the legal destiny of the property such as to sell, exchange, etc⁴⁴.

In general provisions on the ownership rights over the land it is provided that the land may be in state, municipal ownership, and in ownership of citizens and legal entities. However, this provision as the norm in the Constitution of the Kyrgyz Republic does not indicate citizenship of these citizens and legal entities to any country, to the Kyrgyz Republic or to a foreign country. In substance, this provision is quite broad. Therefore there is a high possibility of being interpreted as including foreign nationals and foreign legal entities. This will mean that all citizens notwithstanding to the citizenship could have ownership rights over the land in our republic.

The risk of being interpreted broadly will result in some problems.

In the case of broad interpretation of mentioned provision, legal normative acts prohibiting foreign persons to own land parcels in our country can be considered as invalid and contrary to the

⁴² Constitution of the Kyrgyz Republic dated from May 5, 1993, last amendment dated October 23, 2007

⁴³ Civil Code of the Kyrgyz Republic, Part I, dated May 8, 1996, last amendment dated October 12, 2009

⁴⁴ A.P.Sergeev, Y.K.Tolstoy, GRAZHDANSKOE PRAVO, 411 (2002)

Constitution. Therefore, there is a need to identify scope of people in order to clarify discussed provision and to prevent possible consequences. Notwithstanding to it, there is a separate legal act, which regulates the status of foreign nationals in the Kyrgyz Republic.

Thus, under article 11 of the Law of the Kyrgyz Republic “On legal status of foreign citizens in the Kyrgyz Republic”⁴⁵, foreign nationals may, in accordance with the legislation of the Kyrgyz Republic, have the property. Consequently, according to this norm foreign citizens are equal with citizens of the Kyrgyz Republic in the sphere of property relations.

All above mentioned normative legal acts are not directly regulate land relations with foreign participation. Therefore there is a need to refer to the Land Code of the Kyrgyz Republic, which regulates land relations in the Kyrgyz Republic, grounds for origin, implementation and termination of land relations and procedure of registration. It also aims to establish the land-market relations in the state, municipal and private ownership over the land and its rational use, and protection.

Transfer and granting agricultural land to foreign persons for ownership are prohibited by article 5 of the Land Code of the Kyrgyz Republic, and the law of the Kyrgyz Republic “On agricultural land management”. The last law also clarifies that the spouses, one of whom is a citizen of a foreign country, are prohibited to own agricultural land.

With regard to the land within the boundaries of the settlement (cities, towns, villages) Land Code provides that foreigners and foreign legal entities may be granted with the temporary use rights on them or these lands can be transferred to the foreign persons’ ownership in the case of mortgage lending of house building⁴⁶.

Foreign persons can be granted with the land outside settlements, except agricultural land, for temporary use by the Government of the Kyrgyz Republic⁴⁷. Legislative authorization of the present issue by the Government implies the importance of the land relations with foreign element for state’s policy.

In other cases lands outside settlement can be transferred and allocated for foreign persons through universal succession for temporary use.

⁴⁵ Law of the Kyrgyz Republic “On legal status of foreign persons in the Kyrgyz Republic” dated December 14, 1993

⁴⁶ Land Code of the Kyrgyz Republic dated June 2, 1999 last amendment dated May 26,2009, art.5 (2)

⁴⁷ *Ibid.* art. 5(3)

Summarizing present part of the research paper it should be stated that generally legislation of the Kyrgyz Republic concerning land ownership rights over the land parcels is strict enough, because it prohibits mentioned category of land relation participants to own present object of civil relations. Foreign persons can obtain temporary use rights over the land parcels in our country, except agricultural lands. However, there are several cases when foreign persons are allowed to own the land.

Section 3.1 Cases providing foreigners with ownership rights over the land in Kyrgyzstan

As it was mentioned before land is not only basis for sovereignty, but also an object of civil turnover. Therefore, every state tries to develop land market encouraging participants of the civil relations with some exceptions. Land code of the Kyrgyz Republic states exceptional cases from the general prohibition. Foreign persons can own the land parcels (except agricultural lands) in the following cases:

3.1.1. Mortgage lending of house building

Present exceptional case did not get necessary attention from our legislator and was not developed by legislation. In other words, there is nothing about the mechanism of realization mortgage lending of house building in laws. The absence of the present mechanism is sufficient for foreign persons, because this case is the only exception from the strict prohibition for them to own the land parcels in our country.

3.1.2. Universal succession

According to the Land Code and the Civil Code of the Kyrgyz republic universal succession can be in form of inheritance and reorganization of organization.

Foreign persons are not allowed to be granted with agricultural land, except otherwise is provided by the law⁴⁸. Transfer of ownership rights over agricultural land to foreign citizens through universal succession leads to the consequences provided in paragraphs 2 and 3 of article 37 of the Land Code of the Kyrgyz Republic.

Paragraph 2 of article 37 of the Land Code provides that if a foreign citizen obtained

⁴⁸ Land Code of the Kyrgyz Republic dated June 2, 1999 last amendment dated May 26,2009, art.5 (1)

agricultural land through inheritance, he must alienate present land parcel within one year from the date of land right accrual to citizen of the Kyrgyz Republic. Paragraph 3 of present article provides that when a foreign person failed to alienate agricultural land within one year, this land is to be alienated by a court decision rendered by the request of the state agency or local government. This land will be subject to forced sale at the value determined by the court with indemnification of losses to former owner and to the local authorities for organizational expenses concerning the tender at value.

Briefly there are two exceptions for foreign persons to be granted ownership rights over the land parcels in our county: mortgage lending of house building and universal succession. Mentioned cases are not perfect in the legal aspect because of some gaps. In practice, these gaps lead to problems, which will be discussed in the following section.

Section 3.2 Problematic aspects of legal regulation of foreign persons' ownership rights over the land and suggestions for its improvement

Legislation of the Kyrgyz Republic on foreign persons' private ownership over the land establishes several restrictions. However, legal regulation of those restrictions is not worked out enough. This leads to several problems, which are the subject of the present section.

3.2.1. Definition of foreign entity according to the Land Code of the Kyrgyz Republic

Civil Code of the Kyrgyz Republic and the law of the Kyrgyz Republic "On state registration of legal entities, subsidiaries (representatives)"⁴⁹ do not provide with the definition of the foreign legal entity. However, following the meaning of the mentioned legal acts, it could be reasonably defined that foreign legal entity is an entity which was registered according to the foreign legislation. This definition is used and accepted in civil relations. In the case of land relations, this definition is not applicable.

Land legislation of our republic determines a foreign entity other than it is in civil relations. Under this definition legal entity which is:

⁴⁹ Law of the Kyrgyz Republic "On state registration of legal entities, subsidiaries (representatives)" dated February 20, 2009, last amendment dated December 18, 2009

- ❖ established or controlled by foreign persons,
- ❖ created or incorporated under foreign law or through interstate agreement,
- ❖ fully owned by foreign persons or registered in the Kyrgyz Republic and
- ❖ 20 percent of authorized capital stock of which owned by foreign persons or foreign legal entities

is recognized as a foreign legal entity⁵⁰. This notion is imperfect in a legal sense, as it causes several related problems.

Identification of a foreign legal entity through the establishment of 20 percent limit of foreign investment in the authorized capital stock brings out from these legal entities those organizations that do not have authorized capital stock, for example, non-commercial organizations, cooperatives, etc. Consequently, it may be implied that organizations, which do not have authorized capital stock, can “be considered” as Kyrgyz legal entities. As a result they can acquire private ownership over the land parcels, because Kyrgyz legal entities are not restricted in owning land parcels.

From my point of view, when putting this restriction Kyrgyz lawmaker aimed to limit not only those legal entities with 20 percent of foreign investment participation in their authorized capital stock, but also all types of legal entities. In this sense, the 20 percent limit for authorized capital stock is not entirely justified, since it is possible to create evasion of law scheme by creating a cooperative (*for more information see part 3.2.9.*).

In addition from my opinion 20 percent limit should be increased to at least 50 percent, as it is practiced in the Russian Federation⁵¹.

Kyrgyz Republic is a developing country which is not outstanding for its big stock of natural resources and for availability of its manufacturing industry. The way for solution this situation is and will be attraction of foreign investors in the economy of our country. It is known that the majority of banks, financial institutions and legal entities in the Kyrgyz Republic are financed by foreign persons. Respectively they have investments in mentioned organizations. 20 percent limit automatically puts these organizations to the level of foreign organizations which not only do not

⁵⁰ Land Code of the Kyrgyz Republic dated June 2, 1999 last amendment dated May 26,2009, art.1

⁵¹ Law of the Russian Federation “On agricultural land turnover” dated July 24, 2002

enjoy national treatment in our country but also are subject to certain legal restrictions, particularly relating to land issues. If this limit would be increased, the amount of foreign participation in these organizations will rise up respectively. This modification has only positive consequences, since foreign persons will invest in our economy not 20 percent as it was before, but instead 50 percent at least. In this case there is a high possibility to contribute in our economy and therefore make it more financially developed.

3.2.2. Universal succession

As it was mentioned, foreign citizens can acquire ownership rights over the land parcels in the Kyrgyz Republic through universal succession. In this case foreign citizen must alienate inherited land plot within one year. If it fails to follow this obligation, the court will dispose discussed land plot in obligatory way. This case leads to several problems which in fact is impossible to solve.

First of all, the law does not fix or identify the price at which the land must be sold. Due to this gap in legislation, lawmaker gives the judge a wide range in setting the price on the land. Price determined by judge may be adequate to real market, or may not be such. In the latter case, rights of foreign owner may be infringed. This situation contradicts to the justice of judicial system, which aim is to provide with objective decision. The reasonable solution in this case is adding to this provision the sentence saying that "*price of the land should be indicated adequately in accordance with the market price*". From my view, this amendment will limit judge's power in setting the price and is directed to the interests of land owner.

Secondly, this article refers only to certain categories of land, in this case agricultural land. The problem arises when the object of inheritance is land parcel other than agricultural. We can assume that this gap admits to leave the land in foreigner's ownership. However, despite the absence of an explicit prohibition, this interpretation of the article contradicts to the meaning of the law and intention of our lawmaker. Thus, lawmaker should prepare regulation concerning other categories of land, because they also can be an object of inheritance.

Thirdly, article 37 of the Land Code states that land can be freely transferred from individuals and legal entities to others in case of universal succession (inheritance and reorganization) in accordance with civil legislation. However it is silent on the process and conditions of acquiring land parcels by legal entities through universal succession in form of reorganization.

Here it is not understandable whether legislator made it on purpose or by accident. In any way this gap allows the foreign entity to circumvent the ban on the acquisition of ownership rights over the land, interpreting the article in its favor, i.e. saying that what is not prohibited is allowed (principle of permitted direction of civil legal regulation)⁵². This norm states that land can be freely transferred in accordance with civil legislation. It was mentioned before, that our Civil Code doesn't prohibit land ownership rights based on subjective feature. Consequently, foreign persons may state that through reorganization they can acquire land ownership as it was provided by article 37 of the Land Code, i.e. "land can be freely transferred", and according to the Civil Code, which doesn't set prohibition on foreign persons' land ownership rights. Of course this approach is not proper and true, because the intention of the land legislation and especially present provision is to prohibit foreigners in this right. Nevertheless, for avoiding future problems our land legislation needs to modify present norm.

In accordance with the article 222 of the Civil Code of the Kyrgyz Republic, ownership right is termless. Article 37 of the Land Code limiting the ownership right with time frame, i.e. one year, contradicts to the nature and essence of ownership right institute. Thus, lawmaker introduces a new institution called "temporary ownership right"⁵³.

3.2.3. Ownership rights of foreign bank and other specialized financial institutions over agricultural land parcels

Identified problem have continued in respect to financial credit sector.

According to article 5 of the Land Code, foreign banks and specialized financial and credit institutions have the right of ownership on agricultural land within one year. International Business Council in its research⁵⁴ raises important question. It worries about the fate of the land after the specified term if the land was not alienated.

In addition another important issue takes place in this situation. If because of some factors the price for land during this year decreases to the extent which will not cover bank's expenses concerning issuance and refund of the credit. As a result, the bank becomes a hostage of the

⁵² A.P.Sergeev, Y.K.Tolstoy, GRAZHDANSKOE PRAVO, 26 (2002)

⁵³ Mezhdunarodnyi Delovoy Sovet, *Zashchita Prava Sostvennosti v Kyrgyzskoy Respublike* (2008),not published

⁵⁴ *Ibid.*

restrictions of the legal limitation and forced to balance between the violation of law and its own commercial interests. In other words, the problem in this case is the absence of statutory regulation after the above mentioned time period.

It was stated above that legal regulation relating to the restriction of ownership rights with timeframe limitations contradicts to the nature and essence of the institute of ownership right. International Business Council in their research “Protection of ownership rights” claims that main feature of the ownership right is its perpetuity nature⁵⁵. Therefore, lawmaker by introducing a new institute “temporary ownership right” contradicts and impugns the basis and principles of civil legislation.

In such dilemma between state and commercial organizations’ interests the purpose of the legislator is to decide its priority. From one side as called “threat to state sovereignty”, from another - interests of financial organizations, which mostly are foreign, because they are part of economical turnover.

In this case legislative restriction on the foreign financial organizations based on “threat to state sovereignty” is not justified. First of all, the main purpose of the financial institutions is issue credit and benefit from this activity, but not to trade with land. Secondly, land is an object which can not be moved or taken off without the loss of its inherent features. If it moved, it is not land anymore. Therefore, sovereignty of the state is not under the threat. Even in the case of foreign ownership right on the land, land always will stay within the boundaries of the state.

3.2.4. Sale-purchase of the building

One of the problems in the legislation of the Kyrgyz Republic concerns the scope of the land rights which goes to a foreign person in the sale-purchase of the building.

It is well known that the legislation of the Kyrgyz Republic does not limit the ownership rights on a house, apartment, building, and this kind of immovable property, while on land - bans.

In practice, this issue flows into the following situation. Kyrgyz and foreign citizens conclude contract on sale-purchase of the building. In accordance with the law of the Kyrgyz

⁵⁵ Mezhdunarodnyi Delovoy Sovet, *Zashchita Prava Sostvennosti v Kyrgyzskoy Respublike* (2008), not published

Republic “On state registration of rights to immovable property and transactions with it”⁵⁶ foreign person registers his ownership over the house. In other words, it becomes the owner of the building and when it comes to the land - only the user.

The problem here concerns disappearance of the ownership right over the land. This right does not remain in previous owner, because along with the ownership right on the building he disposes appropriate ownership right on the land. Some people suggest transferring disappeared land ownership right to local authorities⁵⁷. However, local authorities can not acquire discussed right to land, because there is no legal fact of land right transfer to those authorities⁵⁸. This situation in its turn leads to a number of other problems.

Under article 44 of the Land Code of the Kyrgyz Republic a person who acquires ownership rights on building and construction through transfer, transition, mortgage gets the right to the land as set forth for buildings and construction on the same terms and at the same level, that the previous owner of the building and construction has, unless otherwise provided by agreement of the parties.

Imagine a situation where the foreign person has decided to alienate previously owned by him the building to citizen of the Kyrgyz Republic. According to the above stated provision the citizen of the Kyrgyz Republic can purchase from a foreign person, previous owner, only the right to use the land plot, because previous owner of the building had only the use right to the land.

A citizen of our country in accordance with the law has right to own the land freely. In this case if our citizen wants to acquire ownership to the land, who is authorized to give this right, when this right disappears from the legal field? Mentioned problem, i.e. disappearance of ownership right, arises again. In this case lawmaker’s intention to prohibit foreigner to own the land used under the building is not justified. Present land is not of a high value, because its destination is to serve the building. Present land is not agricultural, which represents an importance in the economy of the Kyrgyz Republic since it presents only 28 percent of the whole territory of the Kyrgyz Republic⁵⁹.

The most appropriate solution in this case is to grant foreign persons with ownership rights

⁵⁶ Law of the Kyrgyz Republic “On state registration of rights to immovable property and transactions with it” dated December 22, 1998, last amendment dated March 30, 2009

⁵⁷ Mezhdunarodnyi Delovoy Sovet, *Zashchita Prava Sostvennosti v Kyrgyzskoy Respublike* (2008),not published

⁵⁸ *Ibid.*

⁵⁹ Government Regulation of the Kyrgyz Republic “On results of state land registration on January 1, 2009 ”dated July 6, 2009

on the land which is used under building, construction and other immovable properties. This experience is provided by the Russian Federation as it was mentioned in the CHAPTER II of the thesis work.

3.2.5. Share in common property

According to article 46 of the Land Code, land of the house in which there are several flats and (or) non-residential buildings (apartment building) may be indivisible and belongs on the right of common ownership to apartment or non-residential building owners.

The same provision can also be found in civil legislation. Article 246 of the Civil Code stipulates that the owner of the apartment has a share in ownership right on common property of the house. And the next article, i.e. 247, of the same law states that the adjacent to the house land plots belongs to common property of the house.

Concerning to all these provisions it follows that when buying an apartment a foreign person should automatically acquire a share in the common property⁶⁰, and in particular on the adjacent land. However, our legislation prohibits foreign persons to own the land; consequently they can not have a share in the common property of the house. In such a situation the fate of the foreign person's share in common property on the land is unclear.

This vagueness leads to the next confusing situation. Should foreigner who owns an apartment but does not have share in common property pay costs relating to common property maintenance? There is no answer to this question. From one side foreigner is the apartment owner; he uses this land along with others. From the other side, he does not have a share in common property; therefore he is not obliged to pay. The only suggestion in this complicated problem is allowance for foreigners to own land plots adjacent to the apartment building. This solution will wipe off the present problem.

3.2.6. Ownership right of spouses, one of which is foreign citizen, over the land parcels not belonging to agricultural land

Law of the Kyrgyz Republic “On agricultural land management” prohibits spouses, one of

⁶⁰ Mezhdunarodnyi Delovoy Sovet, *Zashchita Prava Sostvennosti v Kyrgyzskoy Respublike* (2008), not published

which is a citizen of a foreign state, to acquire ownership on agricultural land.

This provision is quite clear and it does not result in misunderstandings. The problem lies in another. There is no any legal regulation concerning lands other than agricultural. During the marriage Kyrgyz citizen spouse for common money can buy land parcel belonging to nonagricultural land. This land according to family legislation will be considered as a common property, i.e. both spouses are owners of the land⁶¹. This provision directly contradicts to the land legislation, according to which the foreigner can not be landowner.

Another problem relates to possession, use and disposal of common property. In accordance with article 36 of the Family Code, the possession, use and disposal of common property is managed by mutual consent of spouses. When the foreign spouse can not be the owner of the land, is his consent required to approve transactions regarding the land parcel in common property? If yes, this way, we automatically recognize the right of ownership of the foreign spouse and contradict to the Land Code. If no, then we are violating the norms of family law. In this case the only suggestion may be to work out legal regulation on lands other than agricultural ones.

Imperfect and ambiguous legislative regulation on private ownership rights to land leads to situations that are impossible to solve in practice. One of the biggest problems arising from the legal regulation is the disparity between the actual situation, i.e. emerging enforcement practice and the law. This situation leads to a variety of schemes directed to circumvent the law. These schemes are mostly aimed at establishing the factual and legal control over the land, which is almost equal to the ownership right.

3.2.7. Fictitious loan agreement

One of such schemes is fictitious land agreement.

Under this scheme the foreign person (the lender) and a citizen of the Kyrgyz Republic (the borrower) conclude fictitious loan agreement, security of which is the land parcel. In fact, foreign person buys the land parcel and registers it after our citizen. Borrower under this agreement does not receive the loan. For services rendered, of course the, the borrower requires certain fees. These

⁶¹ Family Code of the Kyrgyz Republic dated August 330, 2003, last amendment dated June 20, 2005

relationships are negotiated between the lender and the borrower. If a citizen of the Kyrgyz Republic somehow creates distrust of the foreign person or commits certain “questionable” activities related to land, the lender files a legal action to recover the amount owed under the loan agreement. Since the agreement was a sham and the borrower did not perform obligations under the loan agreement and the law, then the lender has a great chance to win the case. Since Borrower has no money to repay the debt, because such contracts are mostly concluded with residents of areas that have little income and because of that they agree to be involved in such impure things. Therefore the process on loan realization begins. Foreign person will get his money, which he pays to buy a land parcel. Then he again concludes such contract and this process will last forever.

3.2.8. Court decision

Another scheme to circumvent the law is the legalization of land ownership right through judicial decisions.

This scheme is by design not as elegant as the previous one. It is straightforward and rigid on enforcement. This scheme originates from the corruption of our judicial system. Nowadays decision of the Supreme Court entered into force serves as the most reliable guarantee of rights.

According to article 258 of the Civil Procedure Code of the Kyrgyz Republic⁶², decision of the Supreme Court of the Kyrgyz Republic is final and is not the subject for appeal. The purpose of the foreign person is to make a case on disputed land to reach the court of last resort. Thus, he, going through the trials, could consolidate the ownership right through desicion of the Supreme Court, which decisively recognizes the right of ownership of a foreign person on the disputed land.

3.2.9. Cooperatives

Another scheme which in fact means the ownership right over the land of foreign persons is creation of cooperatives.

According to the Kyrgyz legislation cooperative is a voluntary union of individuals and legal entities on the basis of membership with purpose to satisfy their economical and other needs⁶³.

⁶² Civil Procedural Code of the Kyrgyz Republic dated December 29, 1999, last amendment dated August 10, 2007

⁶³ Law of the Kyrgyz Republic “On cooperatives” dated June 11, 2004, last amendment dated June 12, 2007

Cooperative is attractive for foreign persons, because it does not have authorized capital stock, therefore it does not fall under definition of foreign legal entity, determined by our land legislation. This scheme is very convenient for foreign persons, as it gives the opportunity to freely possess, use and dispose of land, while the formal owner is cooperative.

In addition, according to the law of the Kyrgyz Republic “On agricultural land management” private ownership over the agricultural land parcels can be granted to the state, citizens, who have lived in rural areas not less than two years, cooperatives and legal entities of the Kyrgyz Republic, which cultivates and processes of agricultural production. So, cooperative is not only attractive, but perfect solution of foreign persons’ problem concerning land ownership prohibition. First of all, it does not have authorized capital stock, thus may be considered as Kyrgyz entity, secondly law directly grants cooperatives the ownership right over the land parcels.

3.2.10 Share in property of legal entity

The last scheme to circumvent the law is to buy share in legal entity property to foreign persons.

Legislation of the Kyrgyz Republic concerning legal entities provides that the member of the legal entity can transfer his share to other people⁶⁴. For example a legal entity was established. In accordance to all requirements it is considered to be Kyrgyz legal entity. It has land parcels in its property, on which entity members have shares. Present owner decides to sell it to foreign persons. In this case foreign persons own land parcels. This situation seems to be confusing, because our Land Code did not recognize land ownership right under foreigners.

Article 5 of the Kyrgyz Republic Land Code prohibits transition of the land but not share in legal entity property.

Foreign person purchasing legal entity owns not land parcels, but shares in property. Thus, foreign person without violating any laws easily acquires land parcels, even if it is prohibited for them. Solution of the present problem depends on the lawmaker’s intention and purpose. From analyzing land legislation it is clear that lawmaker aims to protect sovereignty, thus prohibits

⁶⁴ This provision is reflected in several legal acts. Civil Code of the Kyrgyz Republic, Part I, dated May 8, 1996, last amendment dated October 12, 2009. Law of the Kyrgyz Republic “On business partnerships and companies” dated November 15, 1996, last amendment dated January 27, 2006

mentioned rights in relation to foreign persons. Therefore, this gap must be taken into account and appropriate regulation should be worked out.

Undoubtedly, each of the listed schemes, directed to solve the problems, contains some legal risks. However, in whole, this does not change the situation, because contract parties are not interested in its contesting and supervising organs do not have enough evidences.

Summarizing present chapter we see that legislation of our country relating to foreign persons' ownership rights over land parcels is imperfect, full of gaps, which in practice lead to unsolved problems. In addition, legislative restrictions are not justified in economical aspect, which leads to unnecessary legislative restrictions.

Conclusion

Only private ownership as a significant social category, as the history shows, helps to stimulate economic activity and on this basis progressive development of society⁶⁵. Notwithstanding to the importance of the land in economical sense, states also take into consideration their political interests in case of foreign persons ownership rights over land parcels. Economy and policy issues put state lawmakers in dilemma. From one side, state's economical prosperity, which can be increased by developing land market, and from another territorial integrity and sovereignty issues, which can be put under threat. Different states deals with foreign persons' land rights differently.

Some states are very rigid in this aspect, because they did not provide any exceptions to somehow own land parcels. Some are very loyal, because they allow every person notwithstanding to any factors to enjoy land ownership rights. Others found consensus by accepting satisfactory solution.

Notwithstanding to their approaches every state can justify its decision based on political and economical grounds. The issue on the profitability of their solution is from another plane.

Our country chooses the decision of the present issue in a tough and strict way.

Lawmaker sets prohibition for foreign persons to own land parcels in our country. There are only two exceptional cases from this regulation: mortgage lending of house building and universal succession. Each of them are not free of problematic aspects. In the first case it lacks the mechanism of this exception realization. In the second one it concerns procedures, object, and others.

However, legal regulation of the Kyrgyz Republic on foreign persons' ownership rights over land parcels gives birth to many problems. They cover different relations: beginning from civil legislation and ending with family law. These problems can be avoided if lawmaker softens its position and improves legislative regulation.

Each state practice concerning foreign persons' ownership rights over land parcels in its territory depends on the policy of the state. Comparing land legislations of different countries in the present research I came to the conclusion that the legal regulation of foreign persons' land

⁶⁵ A. KOSAREV, M. MALINKOVICH, S. POKROVSKAYA I DR., ZAKON I PRAVO, 8 (1998)

ownership rights of the Russian Federation is the most useful for the practice of our country. In other words it is about the legislative prohibition for foreign persons to own the land of border areas. From the present provision it follows the direct intention of the Russian Federation which is to protect and preserve the territorial integrity of the state.

This ban is politically justified and does not hurt the economic interests of the state. Consequently, the land, except agricultural land and land of border areas, can be provided for foreign persons for a payment without any restrictions. Providing land, besides some exceptions, for payment, Russian law creates a very attractive market for land. Thereby it encourages foreign investors and entrepreneurs to invest their finance or other actives in its economy.

The policy of our country in foreign persons' land ownership rights also is over justified politically, but not directed to the economic development of our country. Strict prohibition of ownership with respect to all categories of land is unnecessarily.

Land is not the object of civil rights, which can be moved easily from one location to another. Even if the owner of the land is a foreign person, he can not carry a piece of his land to the territory of another country.

In this sense, position of the Constitutional Court of the Russian Federation is a very interesting. In its decision "On the case of the constitutionality of the Land Code of the Russian Federation in connection with the request of the Murmansk Regional Duma" dated 23 April, 2004 the Constitutional Court states that the object of land ownership is the land plot, which represents part of the earth's surface within the territory of the Russian Federation. Granting land to private ownership, owner of the land does not transfer part of the national territory, but land as the object of civil rights, that does not affect the sovereignty of the Russian Federation and its territorial integrity.

So, Kyrgyz legislation's restriction on ownership rights of foreign persons over all categories of land is not based on reasonable attempts to protect state's sovereignty. It over regulates and controls land legislation by such strict restriction. Our country is developing one, which needs a progress. Progress can be achieved by stimulation of economy. In this sense, land market, even if it doesn't influence widely our economy, may contribute to the whole prosperity of the Kyrgyz Republic.

Taking into account all above mentioned, it is important to note that undoubtedly land is one of the beneficial object of economical relations. In this sense, the country need reasonably protect its sovereignty by limitations only on border area lands, and at the same time provide with effective

land market through encourage land relations regarding to all other land categories.

Bibliography

Books:

1. B.V.Erofeyev, Zemelnoe Pravo (1999)
2. S.A.Bogolyubov, Zemelnoe Pravo (2003)
3. O.I.Krassov, Zemelnoe Pravo (2000)
4. R.Y.Vishnevskaya, G.A.Misnik, N.N.Misnik, Postateinyi Kommentariy k Zemelnому Kodeksu (2002)
5. A.S.Avtonomova,V.A.Sivitskiy, A.I.Cherkasov, Konstitutsionnoe (Gosudarstvennoe) Pravo Zarubezhnyh Stran (2001)
6. N.A.Mihalyova, Konstitutsionnoe Pravo Zarubezhnyh Stran(1999)
7. K.V.Aranovskiy, Gosudarstvennoe Pravo Zarubezhnyh Stran (1998)
8. A.A.Mishin, Konstitutsionnoe (Gosudarstvennoe) Pravo Zarubezhnyh Stran (1998)
9. G.N. Andreeva, Institut Sobstvennosti v Konstitutsiyah Zarubezhnyh Starn i Konstitutsii Rossiyskoy Federatsii (2009)
10. A.P.Sergeev, Y.K.Tolstoy, Grazhdanskoe Pravo (2002)
11. O.E.Leits, Sushchnost Prava. Problemy Teorii i Filosofii Prava (2002)

Legal normative acts of the Kyrgyz Republic:

1. Constitution of the Kyrgyz Republic dated May 5, 1993, last amendment dated October 23, 2007
2. Civil Code of the Kyrgyz Republic, Part I, dated May 8, 1996, last amendment dated October 12, 2009
3. Land Code of the Kyrgyz Republic dated June 2, 1999 last amendment dated May 26, 2009
4. Law of the Kyrgyz Republic “On legal normative acts in the Kyrgyz Republic” dated July 20, 2009

5. Law of the Kyrgyz Republic “On agricultural land management” dated January 11, 2001, last amendment dated May 26, 2009
6. Law of the Kyrgyz Republic “On legal status of foreign persons in the Kyrgyz Republic” dated December 14, 1993
7. Law of the Kyrgyz Republic “On state registration of legal entities, subsidiaries (representatives)” dated February 20, 2009, last amendment dated December 18, 2009
8. Law of the Kyrgyz Republic “On state registration of rights to immovable property and transactions with it” dated December 22, 1998, last amendment dated March 30, 2009
9. Law of the Kyrgyz Republic “On business partnerships and companies” dated November 15, 1996, last amendment dated January 27, 2006
10. Land Code of the Republic of Kyrgyzstan dated from April 19, 1991, not valid
11. Law of the Republic of Kyrgyzstan “On land reform” dated April 19, 1991, not valid
12. Decree of the President of the Kyrgyz Republic dated September 19, 1998
13. Decree of the President of the Republic of Kyrgyzstan “On measures concerning land reform in the Republic of Kyrgyzstan” dated from February 15, 1991, not valid

Legal normative acts of the Russian Federation:

1. Constitution of the Russian Federation dated December 30, 2008
2. Civil Code of the Russian Federation dated from November 30, 1994
3. Land Code of the Russian Federation dated October 25, 2001
4. Federal law of the Russian Federation “On agricultural land turnover” dated July 24, 2002
5. Federal law of the Russian Federation “On legal status of foreign citizens in the Russian Federation” dated July 25, 2002, last amendment dated May 6, 2008
6. Federal law of the Russian Federation “On the demarcation of the ownership over the land” dated April 17, 2006, last amendment dated June 3, 2006

7. Federal law of the Russian Federation “On foreign investments in the Russian Federation” dated July 9, 1999, last amendment dated April 29, 2008
8. Federal law of the Russian Federation “Ob osobennostyah otchuzhdeniya nedvizhimogo imushchestva, nahodyashchegosya v gosudarstvennoy sobstvennosti v gosudarstvennoy sobstvennosti subyektov Rossiyskoy Federatsii ili v munitsipalnoy sobstvennosti i arenduemogo subyektami malogo I srednego predprinimatelstva, i o vnesenii izmeneniy v otdelnye zakonodatelnye akty Rossiyskoy Federatsii” dated July 22, 2008, last amendment July 17, 2009
9. Decision of the Constitutional Court of the Russian Federation “On the case of the constitutionality of the Russian Federation Land Code in connection with the request of the Murmansk Regional Duma” dated April 23, 2004

Legal normative acts of the Republic of Uzbekistan:

1. Constitution of the Republic of Uzbekistan dated December 8, 1992
2. Civil Code of the Republic of Uzbekistan dated March 1, 1997, last amendment dated December 25, 2009
3. Land Code of the Republic of Uzbekistan dated April 30, 1998, last amendment dated December 25, 2009
4. Law of the Republic of Uzbekistan “On property” dated October 31, 1990, last amendment dated December 13, 2002
5. Law of the Republic of Uzbekistan “On foreign investments” dated April 30, 1998 last amendment dated December 31, 2008
6. Resolution of Cabinet of Ministers of the Republic of Uzbekistan “On measures of decreasing land use effectiveness” dated November 29, 1994

Periodicals:

1. Unknown author, *Iz Nayomnyh Rabochih – v Hozyayeva Zemli*, Slovo-Kyrgyzstana (1991, March 26)
2. Nadyr Momunov, *Zemlya Trevogi Nasheyi*, Slovo-Kyrgyzstana, 3 (1991, March 26)

3. Artem Petrov, *Prodavat Zemlyu – Eto Velikoe Svinstvo*, Delo №, 5 (2000, December 6)
4. G. Luneva, *Zemle - Hozyaina*, Slovo-Kyrgyzstana, 3 (1998, October 6)
5. Unknown author, *Poydyot Ipotechnoe Kreditovanie*, Slovo-Kyrgyzstana, 3 (1998, October 1)
6. T.Namatbaeva, *Referendumu Skajem “DA!”*, Slovo-Kyrgyzstana, 2 (1998, October 7)
7. G.Zhalkubaeva, *Net Prava Chastnoy Sobstvennosti na Zemlyu*, Slovo-Kyrgyzstana, 2 (1998, October 7)
8. R.Abdyraimova, *Kto Byl Nichem, Tot Stanet Vsem*, Slovo-Kyrgyzstana, 3 (1998, October 14)
9. N.Shagapova, *Glavnoe, Chtoby Zemlya Ostavalas Kormilitsey*, Slovo-Kyrgyzstana, 2 (1998, October 29)
10. N.Ryabova, *Tot Zakon Horosh, Chto Rabotaet*, Slovo-Kyrgyzstana, 2 (1998, October 15)
11. A.Akaev, *Narod Sdelal Vybor*, Slovo-Kyrgyzstana, (1998, October 20)
12. R.Dzhaliieva, *Grazhdanstvo i Pravo na Zemlyu*, Slovo-Kyrgyzstana, (2006, January 17)
13. A. Turkmenov, *Zherdi Ech Kim Eksporttop Ziberbeyt*, Erkin Too, 9 (1998, October 2)
14. A. Akmataliev, *Menchik Boor Et Menen Ten*, Erkin Too, 9 (1998, September 25)
15. K.Duysheev, *Zher Satyslbasa, Anyn Chynygy Eesi Zharalbayt*, Erkin Too, 5 (1998, September 23)
16. O.Sultanov, *Zher Maselesinde Kyzyl Kulaktyk Kyluuga Zhol Berilbeyt*, Erkin Too, 1 (1998, September 23)
17. S.Zhusuev, *Zhoobubuz biroo gana – “Ooba”*, Erkin Too, 6 (1998, October 14)
18. V.Myakinnikov, “*Vladet Zemley Imeem Pravo, a Parazity Nikogda!*”, Nasha Gazeta, 14 (1998, October 10)

Web resources:

1. Cliff P. Dobitz, *Foreign Ownership of American Agricultural Land*, available at <http://www.entrepreneur.com/tradejournals/article/7689691.html> (visited on April 24, 2010)

2. Gerald Spencer, *Warren Buffett Fears Foreign Ownership* ..., posted December 16, 2009, available at <http://capital-flow-analysis.info/capital-flow-watch/warren-buffett-fears-foreign-ownership.html>
3. *The Constitution of the United States of America*, available at http://www.docstoc.com/docs/DownloadDoc.aspx?doc_id=8388811
4. S.Adyanova, *O Priobretenii Zemelnyh Uchastkov Inostrantsami i Litsami bez Grazhdanstva* (2004) available at <http://www.novostroy.ru/land/pubone5.htm>
5. N.Misnik, *Veshchnye Prava na Zemlyu v Rossiyskoy Federatsii* (2003) available at <http://grant-urfak.econ.rsu.ru/public/misnik4.doc>
6. Unknown author, *Prava Inostrannyh Grazhdan I Yuridicheskikh Lits na Zemlyu v Rossiyskoy Federatsii* (2003) available at <http://www.romanshmelev.ru/page/6/>

Other sources:

1. Stephen Hodgson, Cormac Cullinan, Karen Campbell, *Land Ownership And Foreigners: a Comparative Analysis Of Regulatory Approaches To The Acquisition And Use Of Land By Foreigners*, December 1999
2. Byuletten OO “LARK”, 7 (2008)
3. Mezhdunarodnyi Delovoy Sovet, *Zashchita Prava Sobstvennosti v Kyrgyzskoy Respublike* (2008) not published
4. S.Kolesnichenko, *Problemy Prava Sobstvennosti v Kyrgyzskoy Respublike* (2009)