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# Negative Servitude in Russian Law

## I. Introduction

Russian legislation in force does not contain a servitude definition. The conventional civil law doctrine regards servitude as a limited property right to use a neighbouring land parcel (servient land – *praedium serviens*) which belongs to the owner of a land parcel or another immovable property (dominant land or another immovable property – *praedium dominans*).[1] The servitude defined in that way corresponds to the characteristics of real easement in Roman law. Historically and today real easements can be classified on different grounds. But positive and negative, compulsory and voluntary easements will be of interest to us.[2]

In the doctrine it is pointed out that a positive easement gives the entitled person a right to exert a physical impact on someone else's property. For example, to walk or drive across it, or to build infrastructure lines. A negative easement gives the entitled person a right to prohibit the obliged person to perform certain actions towards the property of the latter. For example, to construct buildings of a certain height, to plant shady trees, to make windows overlooking the adjacent land plot.[3]

The causes of the emergence of negative easements in Roman law and, later, in European and Russian pre-revolutionary law are usually associated with the development of urban life when instead of one-story houses of the past isolated from each other, whose windows overlooked the courtyard, new kinds of buildings appeared, closely attached to each other, often multi-storey and with windows overlooking the street.[4] For example, in notary practice of Russia certain easements were mentioned – easements prohibiting construction on one plot of land if it spoils the view from the other land parcel; the uprooting of trees growing on the border of the land plots etc. These easements could not be qualified as restrictions for private participation (in the sense of limits of rights for the benefit of neighbours) as they provided the dominant tenement proprietor with the possibility to have an impact at someone else's property

1 See: *Rudokvas A. D.*, Private Easements in Russian Civil Law, The Bulletin of the Supreme Arbitration Court of the Russian Federation, 2009, № 4, p. 186.

2 When writing this article, inter alia, the materials published in the following work of the author were used: *Krasnova T. S.*, Negative Servitude in Russian Law, Leningrad Juridical Journal 2017, № 1, p. 102-112.

3 See: *Kopylov A. V.*, Real Rights to Land in Roman Law, Russian Pre-Revolutionary and Contemporary Law, Moscow 2000, p. 27-28.

4 See, for example: op. cit. p. 16; Civil Code. Vol. 3. Patrimonial rights: the Draft Made by Imperial Majesty's Editorial Commission on Drafting the Civil Code of the Russian Empire (with commentaries extracted from the documents of the Editorial Commission), ed. by I. M. Tyutryumov, Moscow 2008, p. 443-444.

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beyond the boundaries of the right of ownership belonging to them. The dominant tenement proprietor, if they acted only as an owner of the dominant estate, could not prohibit the servient tenement proprietor from committing these actions.[5]

Among the modern legal systems negative easements are formalised in § 1018 of BGB, § 472 of ABGB, art. 689 of the Civil Code of France, art. 533 of the Civil Code of Spain, art. 285 of the Civil Code of Poland etc.[6] In addition, negative easements are allowed by the law of Italy, England, Scotland, Northern Ireland, Canada, and the USA[7] and are provided for in art. 23, 25 of the Model Law "On Limited Property Rights" adopted by the Inter-Parliamentary Assembly of the Commonwealth of Independent States (hereinafter, Model Law "On Limited Property Rights").[8] In contrast, the list of easements in the Civil Code of the Russian Federation only contains positive varieties.[9]

It is believed that this state of affairs seems to be an obvious flaw of the Russian legislation. If an owner erects a building (structure) on their plot of land and thus breaks some regulations (urban planning norms and rules, sanitary norms etc.), the owner of the neighbouring land plot is entitled to bring a negatory action since the actions of the neighbour are unlawful and violate the real rights of the plaintiff. When the construction does not violate these provisions the developer acts in their own right. If in this case the interests of the neighbour are violated (the access of light to the land plot is limited, a pleasant view is closed etc.), there is a conflict of rights – a situation whereby the implementation of one right impedes the implementation of another right or makes it impossible. As a general rule, in such situations the principle of prevention is employed: each person exercises their right insofar as it is actually possible for him. However, if the land owner wants to guarantee themselves "an addi-

5 See: Civil Laws with the Commentary by the Governing Senate and Those by Russian Lawyers. Vol. 2, ed. by I. M. Tyutryumov, Moscow 2004, p. 134-137; *Zmirlov K. P.*, The Right to Light as One of the Types of Restrictions for Private Participation (art. 446, part 1, vol. X), Journal of the Ministry of Justice 1896, № 3, p. 211-217; *Kopylov*, op. cit. (fn. 3), p. 44-45, 49.

6 See, for example: *Bogustov A. A.*, The Legal Nature of the Servitude in the Legislation of Poland, The Notary, 2011, № 3, p. 17; *Yemelkina I. A.*, Property (Real) Easements in Russian Law and Foreign Legal Systems: Development Tendencies, Economy and Law 2010, № 12, p. 86-87; *id.*, The System of Limited Property Rights to a Land Parcel, Moscow 2013, p. 135-137; *Metelskaya V. V.*, Negative and Manufacturing Easements: Legal Nature, The Bulletin of the Federal Arbitration Court of North Caucasian District 2008, № 6, p. 103-112; Handbook of Polish Law, ed. by W. Dajczak/A. J. Szwarc/P. Wilinski, Warszawa 2011, p. 459; *Schuster E. J.*, Principles of German Civil Law, Oxford 1907, p. 417-418.

7 See, for example: *Krassov O. I.*, Land and Property Law in the Countries of Common Law, Moscow 2015, p. 84-87, 135, 359; *Alpa G./Zeno-Zencovich V.*, Italian Private Law, New York 2007, p. 145-147; *Harris L.*, Anstey's Rights of Light and How to Deal With Them, Coventry 2006, p. 3-4; *Merrill T. W./Smith H. E.*, The Oxford Introduction to U. S. Law, Property, New York 2010, p. 200-207.

8 Text, see: URL: http://www.iacis.ru/upload/iblock/ff8/prilozhenie_k_postanovleniyu_43_9.pdf.

9 The latter opinion is not shared by everybody. See, for example: *Monakhov D. A.*, Easements and Their Protection in Court: PhD Thesis in Law, St. Petersburg 2010, p. 142-143.

tional right of light and view", they must get the neighbour to establish a negative easement, which is impossible under current Russian legislation.[10]

Probably sharing the given point of view the authors of the Conception of the Development of Legislation on Property Law (et seq. Conception) and the Draft Federal Act № 47538-6 "On Introduction of Amendments to the First, Second, Third and Fourth Parts of the Russian Civil Code as well as to other Legislative Acts of the Russian Federation" (et seq. the Draft Civil Code of the RF)[11] provided for a general rule that easements can be both positive and negative.[12]

## II. Conflict resolution through (negative) easement

The issues of resolving conflicts of rights of neighbouring properties' owners are very salient. In conditions of modern densification, the problems of view from the land plot, of the access of light to the building are not less important from the point of view of their economic significance for the real estate market than the problem of maintaining power lines, communications, water, sewage etc..[13] The disputes on other similar problems are also urgent as evidenced by court decisions.[14] However, should the existing conflicts be resolved through the introduction of the category of "negative

10 *Rudokvas*, op. cit. (fn. 1), p. 188-189. See also: *Yemelkina*, op. cit. (fn. 6), Property (Real) Easements..., p. 86-87, 90-91; *id.*,. The System of Limited Property Rights to a Land Parcel, p. 138-139; *Kalinichev A. V.*, Land Servitude in Russian Legislation: Author's Abstract…. of the PhD Thesis in Law, Moscow 2007, p. 8; *Metelskaya V. V.*, The Issues of Statutory Regulation of Easements, Arbitration Practice 2009, № 2, p. 18-27; *Orobinsky V.*, Right to light, Economy and Law 2011, № 10, p. 120-123; *Ryabov A. A.*, Negative Easements and the Easement of View in Russian Civil Law, Journal of Russian Law 2007, № 5, p. 67-75.

11 For the texts see: URL: http://privlaw.ru/sovet-po-kodifikacii/conceptions/koncepciya5/; http://base.garant.ru/58024599/.

12 It is interesting that having formalised a general possibility of establishing negative easements the Draft Civil Code of the RF did not elaborate their types. Meanwhile, para. 5 of art. 301 of the Draft Civil Code of the RF stipulates that the types of easements are determined by the Civil Code of the RF; the creation of easement not provided for by the Civil Code of the RF is forbidden.

13 See, for example: *Orobinsky*, op. cit. (fn. 10), p. 120-121; *Ryabov*, op. cit. (fn. 10), p. 67; *Sklovsky K. I.*, Application of Property Legislation, Complicated Issues, A Commentary on the Ruling of the RF Supreme Court Plenum № 10, the RF Supreme Arbitration Court Plenum № 22 of April 29, 2010, Ruling of RF Supreme Arbitration Court Plenum of July 11, 2011 № 54, Information Letter of the Presidium of Supreme Arbitration Court of the RF of January 15, 2013 № 153, Moscow 2016, p. 191-193.

14 As proof see, for example: para. 8 of Information Letter of the Presidium of Supreme Arbitration Court of the RF of January 15, 2013 № 153 "Review of Court Practice on Some Issues of Owner's Rights Protection against Violations not Connected with Deprivation of Possession" (hereinafter, Information Letter № 153); Rulings of the Arbitration Court of Appeal № 9 of 06-7.2.2007 № 09AP-18416/2006-GK; Arbitration Court of Appeal № 17 of 28.4.2007 № 17AP-2004/2007-GK; Federal Arbitration Court of Western Siberian District of 7.8.2008 № F04-4621/2008(8903-A46-9); of 25.8.2008 № F04-5126/2008(10212-A75-22); Federal Arbitration Court of Northern Caucasus District of 10.9.2008 № F08-5442/2008; of 26.12.2008 № F08-7759/2008; Federal Arbitration Court of Ural Federal District of 13.5.2009 № F09-2864/09-C6; Appellate decisions by the Tambov Regional Court of

easement"? The answer to this question depends on a number of theoretical and practical factors. We will attempt to analyse them.

1) In accordance with cl. 2 of para. 1 of art. 274 of the Civil Code of the Russian Federation an easement can be established to meet the needs of the owner of the dominant estate which cannot be ensured without establishing an easement. In accordance with para. 3 of art. 274 of the Civil Code of the Russian Federation an easement is established by mutual agreement of the parties and, in case of failure to reach an agreement on the establishment or conditions of the easement, by court. In the vast majority of cases these rules are interpreted in such a way that an easement can only be established when there is an objective need of it, i. e. in case of impossibility or significant difficulty in providing the basic needs of the owner of the dominant immovable property. Thus, in accordance with the prevailing position any private easement under the existing Russian legislation must be objectively justified, which makes it possible to establish it forcibly.

The fact that some authors refer to the point that under Russian law an easement may be established by agreement of the parties or by a court decision[15] in itself determines nothing. We believe that two situations should be differentiated: 1) an easement is established by mutual agreement of the parties, in case of failure to reach a consensus on creation of the easement the party concerned could appeal to court; 2) an easement is established by mutual agreement of the parties, in case of failure to reach a consensus on creation of the easement the party concerned would have no objective grounds for appealing to court. In the former case we deal with a compulsory easement, in the latter case – with a voluntary one. In the former case the needs of the owner of the dominant estate (e. g. the passage to the land) cannot be ensured without establishing an easement, or alternative provision of these needs is significantly impeded (e. g. this will require building a new road). In the latter case the needs of the owner of the dominant estate (e. g. the passage to the land) can be ensured without establishing an easement (e. g. there is an alternative road) but the owner of the dominant estate finds it more convenient (more comfortable, more enjoyable) to meet such needs by establishment of an easement. Thus, in the former case there is an objective necessity of the passage, and in the latter case there is not. Theory and practice of Russian servitude law tend to perceive only the first option. In other words the design of the voluntary easement in its true sense is not formalised in Russian legislation.[16]

This state of affairs is a characteristic feature of the modern Russian law and order. For example, in Roman law servitude arose by agreement of the parties, by testa-

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30.9.2013 on case № 33-2842; the Stavropol Regional Court of 10.12.2015 on case № 33-8170/2015.

15 See, for example: *Ananyev A. G.*, Legal Relations in Terms of Servitudes: Author's Abstract… of the PhD Thesis in Law, Moscow 2005, p. 17; *Afanasyev I. V.*, Easement in the System of Limited Property Rights: PhD Thesis in Law, Moscow 2015, p. 108, 126-127; *Gartina Yu. A.*, Civil Law Regulation of Land Easement in the Russian Federation: The Issues of Theory and Practice: Author's Abstract… of the PhD Thesis in Law, Moscow 2009, p. 14; *Slepenok Yu. N.*, Servitude Law: the Grounds for Establishment and the Problems of Protection, Author's Abstract…. of the PhD Thesis in Law, Moscow 2015, p. 8.

16 *Rudokvas*, op. cit. (fn. 1), p. 191-193. See also: Real Rights in the Republic of Kazakhstan, ed. by M. K. Suleymenov (chapter 4), URL: https://online.zakon.kz/Document/?doc_id=1017907.

mentary refusal or by prescription time, and in judicial order they only appeared in case of land plot division or if it was necessary to get a fee for the passage to the cemetery where the ancestors of the dominant tenement proprietor were buried. In pre-revolutionary Russian law servitude arose almost on the same grounds as in Roman law (the appearance of an easement by force of law was added and unequivocal formalisation of the mentioned road easement was not provided). That is, in the Roman and Russian pre-revolutionary law the voluntary easements prevailed, while the Civil Code of the Russian Federation tends to perceive the coercive nature of easements.[17] This tradition remains intact in the Conception and in the Draft Civil Code of the RF.

The modern legal systems divide easements into voluntary and compulsory ones, in particular, in art. 1027-1099 of the Civil Code of Italy and art. 233-11-233-15 of the Civil Code of the Kyrgyz Republic. The term voluntary easements refers to those which occur in an indefinite number of varieties and where the principle of contractual autonomy exists (within the general design of the easement). Compulsory easements mean those whose fundamental characteristics are determined by the legislator, given the fact that they are the only ones where "mandatory" establishment on the initiative of dominant tenement proprietor is envisaged including their establishment by court. Taking into account this classification art. 1028 of the Civil Code of Italy stipulates that the benefit of an easement may consist not only in filling the shortcomings of the dominant estate (compulsory easement) but also in greater convenience or pleasantness of the dominant estate (voluntary easement). Similarly it may be associated with the industrial intended purpose of the dominant property.[18]

What necessity involves the establishment of a negative easement? In Russian doctrine all examples of negative easements are in one way or another connected with the creation of more favourable conditions of its utilization rather than with the need to compensate the shortcomings of the dominant estate. It results in the fact that a negative easement may be introduced in the domestic legislation either with the simultaneous introduction of the category of "voluntary easement" or if there are reasonable examples of the objective necessity of negative easements.[19]

If we address the first argument, we will find out that a voluntary easement is established for greater convenience or more pleasant use of the dominant estate, the im-

17 See, for example: *Dernburg G.*, The Pandects. Property Law/ ed. by A.F. Meiendorf; Translated by A. Yu. Bloch and others, St. Petersburg 1905, Vol. 2, p. 233-241; *Grimm D. D.*, Lectures on the Roman Law Doctrine, ed. by V. A. Tomsinova, Moscow 2014, p. 273-275; *Kopylov*, op. cit. (fn. 3), p. 29-33, 50-52, 69, 75-76; *Nardi E.*, Codice Civile e Diritto Romano. Gli articoli del vigente codice civile nel loro precedenti romanistici, Milano 1997, p. 50-51; *Schennikova L. V.*, Property Law: A Textbook, Moscow 2006, p. 136.

18 See, for example: *Bessone M.*, Casi e questioni di diritto privato per la pratica notarile. Parte prima, a cura di M. C. Andrini/M. Costanza/M. Di Paolo/A. Masi/R. Mori/R. Pastore, Milano 1995, p. 257; *Gallo P.*, *Natucci A.* Beni Proprieta e Diritti Reali, Torino 2001, Tomo II, p. 149; *Nardi*, op. cit. (fn. 17), p. 50; *Rudokvas*, op. cit. (fn. 1), p. 191-193; *Trabucchi A./Cian G.*, Commentario breve al Codice Civile. 7 ed., a cura di G. Cian, Padova 2005, p. 884, 888-889, 892-893.

19 For example, the Model Law "On Limited Property Rights" lists negative easements among voluntary ones. However, the Conception and the Draft Civil Code of the RF do not contain a category of a "voluntary easement" and, by all accounts, list negative easements among compulsory ones.

plementation of certain activities on (in) it; by mutual agreement of the parties but not by judicial procedure; has the right to follow and is subject to state registration; is subject to absolute protection in the realm of private law. On the one hand in the presence of such characteristics it is difficult to differentiate a voluntary easement from allied legal phenomena (for example from a long-term lease) and to give grounds for its praedial rather than personal nature. On the other hand, the voluntary easement can take its place in the system of Russian legal institutions if it is possible to justify its establishment for the benefit of the dominant immovable property, i. e. to prove that the greater convenience or pleasantness of use of the dominant estate, the implementation of certain activities on (in) it is not established in favour of a particular dominant tenement proprietor but in favour of any owner of the dominant estate.[20]

We believe that the introduction of the voluntary easement in Russian law should not be rejected peremptorily. Theoretically, it is possible to substantiate the application of this institute and its relationship with other branches of civil law of Russia. For example, the design of the voluntary easement could provide a positive answer to the question of whether there are good grounds for concluding a voluntary agreement on an easement in the absence of objective necessity of it. This question is not idle since the Russian legislation does not stipulate the obligation and the ability of a public authority to verify the objective necessity of an easement during its state registration. At the same time the demand to establish any easement by judicial procedure would be an excessive restriction of the autonomy of will of the dominant and servient tenement proprietors.

As for the second argument the examples of the objective necessity of a negative easement may only include those situations that do not fall under prohibitions, rules or duties serving as the limits of rights for the benefit of any number of unspecified persons or neighbours. It appears that in the case of fundamental development of the

20 For example, the court practice of Italy shows that the authority to use someone else's property (i. e. the burden of an easement to the servient estate) is granted for the benefit of their own estate (i. e. easement's belonging to the dominant estate). An essential condition of servitude is an encumbrance of the estate for use or for the benefit or for greater convenience of another estate in respect of the former serving the latter one, which is configured as *qualitas fundi* although it translates into a personal obligation when an assigned right was provided for the benefit of a specific person or persons specified in the relevant constitutive act without any function for the benefit to the estate (98/8611). The concept of *utilitas* servitude is so broad that it could cover any item that, according to the social assessment, will be associated through instrumental connection with the purpose of the dominant estate and will be objectively identified with its use (80/835). The concept of *utilitas* understood as a constitutive element of an easement may not have reference to subjective and external elements that relate to personal activities of the owner of the dominant estate but should properly be reduced to the objective and "real" basis of the use, both active and passive, with the necessity of establishing direct benefit for the dominant estate as a means of better use thereof (97/10370) (*Trabucchi*/*Cian*, op. cit. (fn. 18), p. 888). See also: *Depoorter B. W. F.*/*Parisi F.*, Fragmentation of Property Rights: a Functional Interpretation of the Law of Servitudes, John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, Paper 284 (2003), p. 14-16; *Yiannopoulos A. N.*, Predial Servitudes; General Principles: Louisiana and Comparative Law, Louisiana Law Review 1968, Vol. 29, № 1, p. 24-26.

rules on the above mentioned limits that is to be exercised, no room may be left for the objective necessity of negative easements.[21]

We can agree with the authors who argue that, for example, a pleasant view from the windows of the building or additional sunlight to the premises are likely to benefit each owner of the dominant immovable property. This circumstance will increase the value of such property, which each owner will wish to preserve.[22] However, the question of whether maintaining the increased value of the dominant property is its objective necessity remains unanswered. In our opinion, the positive answer is not obvious.[23]

2) When implementing a positive easement a dominant tenement proprietor exercises possession and (or) utilization of their immovable property and the restricted utilization of someone else's immovable property. When implementing a negative easement a dominant tenement proprietor exercises possession and (or) utilization of their own immovable property with additional preferences in comparison to those provided by law and prohibits a certain type of utilization of someone else's immovable property. To qualify the mentioned preferences arising in connection with the mentioned prohibitions as a right of limited use of someone else's property it is necessary to employ an expanded understanding of legal authorities of utilization. In this regard supporters of negative easements also define the authority to use as the possibility to extract useful properties from servient real estate by creating more favourable conditions for the utilization of their own real estate.[24]

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21 See, for example: *Dozhdev D. V.*, Roman Private Law: A Textbook, ed. by V. S. Nersesyants, Moscow 2008, p. 394; *Zhivov A. A.*, On Law of Neighbouring Tenements and Praedial Easements, History of State and Law 2012, № 2, p. 21-23.

22 See, for example: *Dernburg*, op. cit. (fn. 17), p. 198-200; *Monakhov D. A.*, On the Necessity of Reintroduction of Negative Easements in Russian Legislation, The Bulletin of Civil Law 2012, № 1, p. 69-71; *Ryabov*, op. cit. (fn. 10), p. 67-75.

23 For example, in the Roman law it was provided that an easement should protect the interests of and provide benefits to the dominant immovable property, be *praedio utilis*, but it was not required that an easement should directly increase the value or yield of the dominant immovable property (Roman Private Law. A Textbook, ed. by I. B. Novitsky/I. S. Peretersky, Moscow 2015, p. 243-244). At the same time *J. A. MacKenzie* and *M. Phillips* write that sometimes it is difficult to differentiate personal benefit from the benefits of the land but if the right increases the value of the land plot or its liquidity, it will be enough to talk about the benefits for the land plot (*MacKenzie J. A./Phillips M.*, Textbook on Land Law, Oxford 2012, p. 478). This latter opinion is shared by the authors who substantiate the admissibility of the introduction of negative easements in order to limit competition (see, for example: *Vake A.*, The Freedom of Contract and Reservations on Professional Restrictions in Roman and Contemporary Law, Civil Studies, Issue 2 (2005), Moscow 2006, p. 545-547).

24 See, for example: *Metelskaya V. V.*, The Issues of Statutory Regulation of Easements, p. 22; *id.*, op. cit. (fn. 6), Negative and Manufacturing Easements..., p. 105-108; *id.*, Easements in the Legislation of Spain and Russia: Author's Abstract…. of the PhD Thesis in Law, Moscow 2008, p. 17-18. See also: *Annenkov K. N.*, The System of Russian Civil Law. Property Rights, St. Petersburg 1895, Vol. 2, p. 377-378, 402; *Biryukov A. A.*, On the Notion and Legal Design of the Servitude in Contemporary Russian Law, Civil Law 2014, № 5, p. 39; *Dernburg*, op. cit. (fn. 17), p. 183-184, 198-200; *Dozhdev*, op. cit. (fn. 21), p. 455; *Goronovich I.*, Study of Easements: A Report Presented at the Kiev Law Society on November 13, 1882, St. Petersburg 1883, p. 32; *Kopylov*, op. cit. (fn. 3), p. 20, 22; *Monakhov D. A.*,

We believe that this abstract understanding of restricted use of someone else's property does not quite match its proprietary characteristics as a right that provides the possibility to extract useful properties of a property by means of periodic or constant direct active influence on it but not exclusively by means of prohibiting certain actions in respect of it.[25]

3) One of the main theories of legal relations object is the theory according to which the object of a proprietary relationship is a property whereas in case of an in personam relationship it is the activity or inactivity of an obliged person. At the conclusion of an agreement on a negative easement the owner of the dominant estate receives the right to demand from the owner of the servient immovable property that they should refrain from certain actions. In other words the behaviour of the person liable will constitute the object of the legal relationship.[26]

Such a requirement can be classified as a part of an obligation with negative content stipulated by para. 1 of art. 307 of the Civil Code of the Russian Federation because the interests of the authorized person are not accommodated by committing actions in relation to another person's property but by the obliged person's refraining from any actions in respect of the property belonging to them (the obliged person). Thus between the entitled person and another person's property there emerges a third person – the owner of that property.[27]

Since, as a general rule, an in personam relationship is only binding upon the participating entities (para. 3 of art. 308 of the Civil Code of the Russian Federation) it does not have the right to follow. If this state of affairs does not serve the interests of

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Easements and Their Protection in Court, p. 134-136, 144-145; *Ryabov*, op. cit. (fn. 10), p. 68-73.

25 See, for example: *Belov V. A.*, Studies of Property Law. Academic Polemic Notes: Training Aid for Bachelor and Master Programmes, Moscow 2016, p. 38; *Kasso L. A.*, Russian Land Law, Moscow 1906, p. 76-77; *Rybalov A. O.*, On the Light Servitude in Russian Law, The Bulletin of the Supreme Arbitration Court of the Russian Federation 2011, № 5, p. 10.

26 The idea that a landscape is an object of the right of view, while the object of the right to light is light, proposed by *D. A. Monakhov* (*Monakhov D. A.*, Easements and Their Protection in Court, p. 211-236), appears to be meritless, at the very least, because the owner of the dominant estate enters into a legal relationship with the owner of the servient property rather than with the owners of the landscape or of the light (whoever they might be). See also: *Deryugina T. V.*, Objects of Legal Relations in Terms of Servitudes, Journal of Russian Law 2001, № 5, p. 44-46.

27 As *K. P. Pobedonostsev* remarked "the distinctive feature of property law is that it contains dominion over possessions having the value of a property [...] and, moreover, that dominion is immediate so the owner extends all their right to cover the very property in person, not related to any other person or through any other person, but themselves. When a person extends their right to the property through another person who has undertaken obligations towards them to act in their favour or to refrain from the action of this property (facere aut non facere, pati), it will not constitute immediate relation to the property, consequently, it will not be property law" (*Pobedonostsev K. P.*, A Course in Civil Law. Part 1: Patrimonial Rights, Moscow 2002, p. 189). See also: *Agarkov M. M.*, Obligation in Soviet Civil Law, Moscow 1940, p. 32-33, 41; *Belov*, op. cit. (fn. 25), p. 27-33; Civil Law: A Textbook. In 4 vol., ed. by Ye. A. Sukhanov, Moscow 2007, Vol. 1, p. 133-134 (chapter written by *V. S. Yem*); op. cit. Vol. 2, p. 5, 12, 140-141 (chapters written by *Ye. A. Sukhanov*); *Yeliashevich V. B.*, Restriction for Private Participation and its Protection, St. Petersburg 1914, p. 7.

participants of civil legal transactions, there is no need to create a negative easement. The same effect can be achieved by legally formalising the permissibility to grant individual obligations with the right to follow on the model of such foreign designs as qualitative duties and restrictive covenants. Remaining an in personam legal instrument such a restriction will be endowed with the right to follow and recorded in the State Register of Property Rights as a voluntary "extension" of limits of the right to the dominant estate and as a "narrowing" of limits of the right to the servient immovable property.[28]

Here we should briefly talk about what is qualitative duties and restrictive covenants. For example, as consistent with the Dutch Civil Code (Burgerlijk Wetboek) it is acceptable to create so-called "negative" obligations not to do something – qualitative duties. The agreement that after the sale of premises for five years it is forbidden to place in these premises shopping facilities under penalty of a fine may serve as an example of the "negative obligation". Such provision has to be included in all agreements on property alienation during the following five years and has to be notarized and registered. As scholars point out this effect cannot be achieved by the creation of a negative easement because in case of a qualitative duty usually there is no dominant tenement, i. e. the provision is set up in personal interests of a certain body but not in interests of this body as an owner of a dominant tenement. Moreover, the subject of a qualitative duty is the behaviour of the obliged person and such duty is subject to protection in the realm of the law of obligation. At the same time a qualitative duty acts as an encumbrance of the right of ownership of the servient immovable property; it is subject to notarization and state registration, and has the right to follow. Consequently a qualitative duty can be seen as a sub-category between the real right and the right of obligation.[29]

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28 In the law of England an easement of daylight necessary for the normal use of the property for its intended purpose is a historically established kind of negative easement, while the easements of view and (or) sunlight, as a general rule, are not seen as negative ones. However, the English court practice and civil law doctrine recognize the existence of a closed list of negative easements proving that the creation of new types of negative easements is not allowed. In case a need for such new types arises, in personam legal designs should be used (see, for example: *Dixon M.*, Modern Land Law, New York 2009, p. 324; *Harris*, op. cit. (fn. 7), p. 4-6; *MacKenzie*/*Phillips*, op. cit. (fn. 23), p. 487, 526; Property Law and Economics, ed. by B. Bouckaert, Northampton/Massachusetts 2010. p. 139-140; *Smith R. J.*, Property Law, Dorchester 2014, p. 647-649; *Sparkes P.*, A New Land Law, Oxford and Portland/Oregon 2003, p. 725, 728-730).

29 See more: *Krasnova T. S.*, Servitude Types: Foreign Experience and Draft Amendments to Russian Legislation, Zeitschrift für Europäisches Privatrecht 2017, № 3, p. 669-688. See also: *Akkermans B.*, The New Dutch Civil Code: the Borderline Between Property and Contract, Towards a Unified System of Land Burdens? Antwerpen/Oxford 2006, p. 172–175; *Van Erp S.*/*Akkermans B.*, Cases, Materials and Text on National, Supranational and International Property Law, Oxford and Portland/Oregon 2012, p. 294-298. Similar obligations can also be found in court decisions of Germany, France and Belgium. See, for example: *Sagaert V.*, The Fragmented System of Land Burdens in French and Belgian Law, Towards a Unified System of Land Burdens? Antwerpen/Oxford 2006, p. 43-46; *Van Erp*/*Akkermans*, op. cit., p. 264-270. See also: *Monakhov D. A.*/*Timmermans B.*, The Easement Fee, The Bulletin of Civil Law 2016, № 4, p. 30-39.

English restrictive covenants can be certain analogues of Dutch qualitative duties apart from the fact that the creation of restrictive covenants may require dominant tenements, and that they are established for the benefit of dominant tenements.[30]

4) When assessing negative easements, another consequence of the qualification of this or that legal right as a real one is equally important – it is its absolute protection in the realm of private law.

We believe that the contractual prohibition to perform certain actions in respect of the servient immovable property could be broken by already known persons – the owner of the servient immovable property and (or) those who have access to this property by their will. In such a case, the entitled person can present an in personam claim in support of the limits of their right of ownership "extended" by the contract. Proprietary claims (in particular, a negatory action) can be presented by the specified person only in case if the statutory limits of their right of ownership are violated.[31]

It is noted in the literature that this contractual requirement does not meet the interests of the owner of the dominant estate because the owner of the servient immovable property can "retain the wrongfully erected structure by simply paying for it".[32] We believe that taking into account the recent alterations in the legislation the right holder of the dominant estate may receive full protection of their right by demanding from the partner the execution of the negative obligation in deed, accompanied by the compensation of losses (para. 6 of art. 393 of the Civil Code of the Russian Federation) and a court penalty (art. 308.3 of the Civil Code of the Russian Federation, para. 28 of the Ruling of the Plenum of the Supreme Court of the Russian Federation of 24.3.2016 № 7 "On Court Application of Certain Provisions of the Civil Code of the Russian Federation on Liability for Breaking Obligations").

The situation is different if the violation of a contractual prohibition is not committed by the owner of the servient immovable property or by any affiliated parties but by another alien person, for example, in the absence of the owner of the servient immovable property. On the one hand, in this case, the granting of the owner of the dominant estate with proprietary protection *erga omnes* would be an efficient measure. On the other hand, the perpetration of certain actions by an unauthorized person on the servient immovable property can be regarded as improper conduct of the owner of

30 See, for example: *Dixon*, op. cit. (fn. 28), p. 371-406; *Duddington J.*, Land law, Harlow/Essex 2011, p. 127-146; *Edmunds R./Sutton T.*, Who's Afraid of the Neighbors, Modern Studies in Property Law, ed. by E. Cooke, Oxford, Portland/Oregon 2001.,Vol. 1, p. 133-148; *MacKenzie/Phillips*, op. cit. (fn. 23), p. 530-564; *Smith*, op. cit. (fn. 28), p. 695-728; *Sparkes*, op. cit. (fn. 28), p. 730-735; *Swadling W.*, Land Burdens – An English Perspective, Towards a Unified System of Land Burdens?, Antwerpen, Oxford 2006, p. 129-131; *Van Erp/Akkermans*, op. cit. (fn. 29), p. 331-338.

31 As proof see, for example: items 6, 8 of the Information Letter № 153; item 46 of the Ruling by the Plenum of the Supreme Court of the RF № 10, by the Plenum of the Supreme Arbitration Court of the RF № 22 of 29.4.2010 "On Certain Issues Emerging in Court Practice in Solving Disputes Connected with the Protection of the Right of Ownership and Other Real Rights"; Rulings by the Federal Arbitration Court of Volga-Vyatka District of 16.1.2013 on case № A11-9526/2011; Federal Arbitration Court of Northern Caucasus District of 19.2.2013 on case № A53-18267/2012.

32 *Mattei U./Sukhanov E. A.*, Main Provisions of the Right of Ownership, Moscow 1999, p. 258-259.

such real estate because they did not ensure the proper implementation of the contractual prohibition. Consequently, the entitled person may demand the execution of the contractual prohibition in deed by judicial procedure and also, due to the lack of an obliged person, the implementation of court decisions by the entitled person (independently or involving experts) at the expense of the obliged person collecting the necessary expenses from the latter (part 1 of art. 206 of the Civil Procedure Code of Russian Federation, part 3 of art. 174 of the Arbitration Procedure Code of the Russian Federation). A bailiff is also entitled to organize the implementation of the said decision at the expense of the obliged person as an enforcement measure (part 3 of art. 68, part 2 of art. 105 of Federal Law № 229-FZ of 2.10.2007 "On Enforcement Proceedings").[33]

## III. Conclusion

Given the information above we can conclude that the model of negative easement appears to be quite developed and well-reasoned (especially where it relies on the voluntary easement model). However, the urgent need for its introduction into current Russian legislation requires additional justification. The majority of the issues emerging in this area can be resolved through public law and law of neighbouring tenements as well as through agreements on the establishment of commitments with negative content. However, if the discussion of the above-mentioned aspects[34] becomes "less acute", in future the legislator could allow negative easements to resolve individual issues in servitude law[35] and to provide parties to civil legal transactions with the possibility of choosing between several private law instruments.

33 See: Civil Law: A Textbook. In 3 vol., ed. by Yu. K. Tolstoy, Moscow 2011, Vol. 1, p. 560 (chapter written by *A. D. Rudokvas*). See also para. 13 of the Information Letter № 153.

34 Namely questions about whether there is an objective need for a dominant estate in a negative servitude; whether the establishment of a negative servitude is accompanied by the granting of the right to use a servient estate; whether there is a practical need to endow a negative servitude with the right to follow and absolute protection.

35 In particular, questions about the establishment of a servitude in favour of certain categories of persons or any number of unspecified persons.