Journal of Social Sciences; ISSN 2233-3878

# General Overview of the Real Rights of Use under the Georgian Property Law

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## Abstract

This article examines in short the real rights of use – superficies, easements and usufruct under the Georgian law. According to the Civil Code of Georgia, real rights of use entitle a person to use the immovable property in different ways: in case of superficies a person has the hereditary and transferable right to erect on or beneath the other person's plot of land a construction; praedial easement is a real right which entitles the owner of a plot of land, to use the other person's plot of land within certain limits; usufruct means the right to use the immovable property like its owner excluding third persons from its use without the right to alienate, mortgage or transfer this immovable property by inheritance.

**Keywords:** easements, limited personal easement, praedial easements, superficies, usufruct

## Introduction

The Civil Code of Georgia classifies two kinds of real rights (rights in rem) – real rights of realisation and real rights of use. Real rights of realisation are pledge and mortgage: both are security rights (the means of security of an obligation) on movable and immovable property, by which the pledgee/mortgagee shall be entitled to satisfy his claim from the object of pledge/mortgage in preference to the other creditors of the debtor. Unlike the real rights of realisation, real rights of use – superficies, easements and usufruct do not lead to deprivation of the ownership for the purpose of satisfaction of the claim; they just entitle a person to use the other person's immovable property in various mode.

## Superficies

1. Notion of superficies and its content. Social importance of superficies

Almost all provisions of the Civil Code of Georgia regulating the legal institute of superficies are received from the German law. The main source of the relevant articles of the Civil Code of Georgia (Articles 233-241) is the German Law on Superficies adopted in 15.01.1919 ("Gesetz über das Erbbaurecht (Erbbaurechtsgesetz"). This law contains 39 paragraphs with detailed regulation of the provisions regarding the superficies.

The legal definition of superficies is provided in part 1 of the Article 233 of the Civil Code of Georgia:

"1. A plot of land may be transferred to the use of another person for a set period of time in such a manner as to grant him the hereditary and transferable right to erect on or beneath this plot of land a construction as well as the right to alienate, inherit, lend or lease such right (superficies)".

This definition is not quite correctly translated from its German counterpart. Part 1 of the Article 233 of the Civil Code of Georgia is the literal analogue of the first sentence of par. 1 of the German Law on Superficies, the correct translation into Georgian language of which shall be as follows: "A plot of land can be encumbered in such a way that the person for whose benefit the encumbrance is made shall have an alienable, inheritable, gratuitously lendable or leasable right to erect on or beneath this plot of land a construction (superficies)". Thus, superficies is a limited real right by which a plot of land is encumbered for a definite period of time in such a way that the entitled person – superficiary has a right to erect on or beneath this plot of land a construction. The law provides for only fixed term right of superficies; thus, the parties, – the owner of plot of land and superficiary, must indicate in the agreement a term for which the right of superficies is created; however, this term may not exceed the period of ninety-nine years (Civil Code of Georgia, Article 233, Part 3). The superficies is alienable and inheritable right. In addition, according to the law it is admissible to gratuitously lend or lease this right. If in the agreement on encumbering a plot of land with superficies the parties limit the superficiary's authority to alienate or lease his right with the requirement of the owner's consent, the latter cannot refuse to grant it without significant ground (Civil Code of Georgia, Article 235); as to what can be considered the significant ground, it must be determined by court taking into account all the circumstances of a case.

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The content of superficies is determined not only by the regulation of the law which can be found in part 1 of the Article 233 of the Civil Code of Georgia by providing the legal definition of the right of superficies and other provisions; the Civil Code of Georgia tacitly allows the parties to the agreement on encumbering a plot of land with superficies to stipulate various particular provisions, which will become a content of the superficies at the moment when the agreement comes into effect. Unfortunately, the Civil Code of Georgia does not specify the provisions agreed between the parties which may become the content of the right of superficies; in our opinion, such decision of the Georgian legislator is not desirable since making the content of a real right dependent on the parties' discretion cannot be considered as the proper decision as regards the legal technique. It is clear that any agreement, lawfully entered into, must create or amend an obligatory relationship, but – not the content of a real right. As we have already indicated above, the Civil Code of Georgia directly provides for some covenants, which are deemed as the agreements constituting the content of superficies; these are, for instance, limitation of the superficiary's authority to alienate or lease his right with the requirement of the owner's consent, stipulation to make periodical payments to the owner by the superficiary in the agreement on encumbering a plot of land with superficies, stipulation to terminate the agreement unilaterally by the owner for non-payment of the compensation for a period of two years and so on (Civil Code of Georgia, Article 236).

The right of superficies has the great social importance by means of which the participants of the private law relations can build their own houses or other constructions without purchasing a plot of land. Funds, which they had to use for purchasing a plot of land, in case of building a construction on a basis of the superficies, will be spent only for financing the construction works.

2. Legal regime of the right of superficies

The right of superficies is the strongest and greatest encumbrance of ownership on a plot of land. The great majority of the provisions regulating the legal status of the immovables apply to this right. Thus, the superficies is subject to the legal regime which exists in regard to the immovables; the superficies can be encumbered with the same real rights by which the immovables is encumbered including the right of superficies itself. In this latter case, there is a so-called sub-superficies.

The superficies can also be used for securing an obligation; since the superficies is subject to the legal regime existing in regard to the immovables, it must be mortgaged (encumbered with mortgage and not – with pledge!). The superficies is subject to the enforcement procedure existing in regard to the immovables. The superficiary is authorised to file the real claims protecting the ownership – replevin and actio negatoria.

3. Legal regime of the construction built on a basis of the superficies

A construction built on a basis of the superficies is not an essential part of the plot of land. A general principle of the Law of Property, according to which the buildings, structures and things firmly attached to the land and not intended for temporary use, are deemed as essential parts of the plot of land, does not apply in this case. A construction built on a basis of the superficies is considered as an essential part of the right of superficies itself and not of the plot of land; therefore, the construction is in the property of the superficiary during the term of validity of the superficies (Civil Code of Georgia, Article 234, Part 2).

4. Creation of the superficies. Registration. Rank of the superficies

As we have indicated above, the right of superficies is subject to the legal regime existing in regard to the immovables. Consequently, the provisions regulating the creation and transfer of the immovables apply to this right; in particular, for creation of the superficies a written agreement (document) between the owner of the immovables and the future superficiary and registration of this document in the Public Registry are required. Several plots of land can be encumbered with one right of superficies (so called common right of superficies).

The Civil Code of Georgia provides creation of superficies with or without compensation. The parties may adjust the amount of compensation after expiration of, at least, ten-year period; however, if the economic conditions are substantially changed, the parties shall again agree on the compensation (Civil Code of Georgia, Article 236, Part 3).

Contrary to the other real rights, the specific character of registration of superficies in the Public Registry is that it must be registered only as a first rank right and this rank cannot be altered afterwards (Civil Code of Georgia, Article 237).

5. Cancellation of the superficies. Transfer of the superficies to the owner of the plot of land

The right of superficies is cancelled after expiration of period of time for which it has been created. The essential parts of the right of superficies automatically become the essential parts of the plot of land. Consequently, the ownership of a construction built by the superficiary is transferred to the owner of the plot of land. If in the agreement on encumbering a plot of land with superficies the parties stipulate compensation for the superficies, the Civil Code of Georgia provides for an obligation of the owner of the plot of land to pay to the superficiary an adequate compensation for the construction; besides, the compensation sum is deemed adequate if it amounts to at least two-thirds of the value of the construction. However, based on the analysis of the provisions of the Civil Code of Georgia it is clear that the latter excludes the obligation of the compensation in case of gratuitous superficies for the reason that since during the period of exercising the superficies the superficiary has made no payment to the owner of the plot of land, the latter was not obliged to pay any compensation. Such a position of the Civil Code of Georgia cannot be considered as proper because despite the fact that the superficies was gra-

Journal of Social Sciences; ISSN 2233-3878

tuitous, as a result of cancellation of the superficies the superficiary is deprived with the valuable property – the erected construction. The purpose of payment is just to reimburse the value for this construction.

The owner of the plot of land may avoid the payment of compensation for the superficies by offering to the superficiary to prolong the term of superficies for the presumed period of further existence of the construction. If the owner refuses to prolong the term, he thereby loses the right to claim the compensation as well. In case of cancellation of the right of superficies, the superficiary is not authorised to remove the construction or its parts (Civil Code of Georgia, Article 239, Part 3).

The right of superficies can be cancelled by a unilateral declaration of the superficiary on renunciation of the superficies and registration thereof in the Public Registry (abandonment of the right of superficies); besides, renunciation of the superficies by the superficiary requires the consent of the owner of the plot of land (Part 1 of the Article 238 of the Civil Code of Georgia). The right of superficies shall not be cancelled by collapse of the construction; also, rescission of the agreement on encumbering a plot of land with superficies is inadmissible after the registration of the right of superficies in the Public Registry (Schwab K., Prütting H., 2003).

## Easements

1. Notion of easement and its types. Importance of easements in the modern life

Together with the superficies, the Civil Code of Georgia provides for the real rights of use as praedial easements (real estate easements), personal easements and usufruct. These real rights are united in the common name – easements (servitudes).

In the legal literature the easements are classified by 2 features: 1) as per the personality of the authorised person and 2) as per the content of the right.

As per the authorised person, the Civil Code of Georgia distinguishes praedial easements (real estate easements) and limited personal easement. A praedial easement belongs to the certain owner of the plot of land on the other person's plot of land. Consequently, it is closely attached to the ownership on the plot of land regardless of the personality of the owner. On the contrary, limited personal easement is always closely related to a certain person.

As per the content, there are easements of limited and full-scale use. A praedial easement, as a rule, grants only a limited use; an example of easement with full-scale use is usufruct.

Easements do not play any important role in the modern life which they actually did from the period of the Roman Empire till 19th century. During the 20th century there was a tendency to regulate by the public law provisions the legal relations which before were the objects of regulation by the private law legal institutes, for instance, construction rules, urbanisation, legal regime of public roads, etc. Due to various causes (lack of information, poor state of agriculture), easements are totally ignored by farmers in the modern Georgian villages; so, it can be said that by adopting a new civil code in 1997 the legal institute of easement has been predestined for disuse. We believe that gradually the easements will play much more important role for regulation of the factual relations when there is a conduction of communicational facilities (conduit, power transmission line, etc.) across a plot of land belonging to other person.

2. Praedial easements (real estate easements)

Praedial easement is a real right which entitles the authorised person – the owner of the plot of land, to use the other person's plot of land within certain limits or the latter is prohibited to perform certain actions regarding his own plot of land (servient land) in the interests of the authorised person or the owner of the servient land is precluded to exercise of certain rights with respect to the other plot of land (Civil Code of Georgia, Article 247, Part 1).

In case of praedial easements, there are two plots of land connected with each other: 1) the encumbered plot of land – servient land and 2) the beneficiary plot of land – dominant land. In any case, it is not necessary that these plots of land are to be neighbouring, however, it is the praedial easement's nature that certain nearness of the plots of land is required in order to enable the servient land to provide service for the dominant land (Schwab K., Prütting H., 2003).

The praedial easement belongs to the holder of the right not just as a person but – as the owner of the plot of land; any owner of the dominant land is also holder of the easement. Since the authorised person holds the praedial easement not personally but via the ownership on the dominant land, the praedial easement shall be characterised as subjective-real right, which opposes to a subjective-personal right (Wolf M. 1996).

According to the Article 247 of the Civil Code of Georgia, the content of the praedial easement is as follows:

1) first of all, based on this real right the authorised person may use the servient land within certain limits. The types of use can be various: right of way, use of water, pasture, etc. The owner of the servient land is obliged to tolerate this kind of use;

2) the second authority from the praedial easement is abstention by the owner of the servient land from certain actions regarding his plot of land; the owner cannot perform the actions to which he would be authorised based on his property right;

3) finally, as the content of the praedial easement the certain authorities of the owner of the servient land may be excluded.

The Articles 247-253 of the Civil Code of Georgia (articles regulating the praedial easements) contain no provision regarding creation of the easements. Thus, like in case of superficies, the provisions regulating the creation and transfer of the immovables also apply to the praedial easements (making a written document and its registration in the Public Registry). One

plot of land can only be encumbered for the benefit of one plot of land; creation of the praedial easements for the benefit of several plots of land is prohibited. As a rule, easements can be created only for indefinite term (Wolf M. 1996).

In addition to the agreement on the cancellation, the praedial easements are also terminated in case of unilateral declaration on renunciation by the authorised person of his right. The agreement on the cancellation as well as the unilateral renunciation of the right requires a written form and registration in the Public Registry. In any case the praedial easements may exist only if they ensure for the authorised person a benefit in using of his plot of land (Civil Code of Georgia, Article). Therefore, they must not encumber the servient land uselessly but only within such limits which correspond to the actual needs; consequently, the praedial easement is terminated (and its record in the Public Registry is subject to cancellation) if there are no more pre-conditions for its existence. For instance, since the access of the dominant land to the public road has been restored, there is no need for use of the right of way on the servient land.

If the dominant land is divided, the praedial easement continues to exist for the separate parts; however, the use of the easement is admissible only in such a way that it does not become more burdensome for the owner of the servient land. Where the servient land is divided, then, if the use of the easement is limited to a particular part of the servient land, the parts that lie outside the area of use are released from the easement (Civil Code of Georgia, Articles 250-251).

Based on the praedial easement there is an obligatory relationship between any holder of the praedial easement and any owner of the servient land which is partly regulated by the provisions of the Civil Code of Georgia. First of all, in the real agreement on the praedial easement the parties may stipulate remuneration for the easement which may be paid periodically. Based on the real right of the praedial easement the authorised person is obliged to respect the interests of the owner of the servient land and exercise his right with as much caring as possible. If the proper exercise of the easement involves the use of a construction situated on the servient land, the authorised person shall be bound to maintain this construction (Civil Code of Georgia, Article 249).

As a real right the praedial easement is protected by law against any third person. The Article 250 of the praedial easement provides the authorised person with the possessory actions; in particular, against the violation of the right of easement he can file the replevin as well as actio negatoria in accordance with the Articles 160 and 161 of the Civil Code of Georgia.

3. Limited personal easement

According to its content, limited personal easement is similar to the praedial easement, however, contrary to the latter it is related to a certain person and – not to the ownership of a certain plot of land. Therefore, in case of the limited personal easement, the personal needs of an authorised person are decisive, the main of which are described by law such as using a building or its part for the habitation of the authorised person or his family (Civil Code of Georgia, Article 253).

The limited personal easement is not subject to transfer, however, it is permissible to use the authorities derived from this right within the limits of the legal relation of lease provided that such use does not contradict the content of easement. The use of the authorities always requires the consent of the owner of the servient land (Schwab K., Prütting H., 2003) (Wolf M., 1996).

## Usufruct

Unlike not only the German Civil Code but also the legislations of many Romanic law system countries, the Civil Code of Georgia provides for the creation of the right of usufruct only on the immovables. In the first draft of the Civil Code of Georgia a provision stipulating the legal definition of the usufruct permitted the encumbrance with the right of usufruct also the movables, however, later this possibility has been rejected. By this decision the Georgian legislator significantly limited the sphere of use of the usufruct; unlike the German Civil Code where the legal institute of usufruct is regulated by 65 paragraphs (paragraphs 1030-1089), the Civil Code of Georgia contented itself with just 5 articles (Articles 242-246). Such “niggardliness” of the Georgian legislator is caused by minimal practical significance of the right of usufruct in the modern life. Mostly, in Georgia the legal institute of usufruct is exploited in case of transferring the state property into the temporary use of the legal entities of public law. As a rule, the state grants the usufruct on the state immovable property gratuitously which could not be achievable by leasing since the lease is always onerous transaction. Besides, the encumbrance with usufruct is permissible for more period of time than transferring the immovable property upon a lease agreement, the maximum term of which shall be 10 years.

The legal definition of the usufruct is provided in the first sentence of the Article 242 of the Civil Code of Georgia:

“An immovable thing may be transferred to the use of another person in such a manner as to grant to him the right to use this thing like its owner, and to exclude third persons from its use; however, unlike the owner, he has no right to alienate, mortgage or transfer this thing by inheritance (usufruct)”. Like the legal definition of superficies, this definition is not quite correct translated from the German language; incorrect is the following wording in the text: “may be transferred to the use of another person in such a manner”. Similar to the superficies and easement, the usufruct is a real right by which the real estate is encumbered, i. e. disposed and not simply “transferred to the use”! The analogous German wordings in the German Law on Superficies and the German Civil Code are as follows:

“Ein Grundstück kann in der Weise belastet

Journal of Social Sciences; ISSN 2233-3878

werden, daß demjenigen, zu dessen Gunsten die Belastung erfolgt, das veräußerliche und vererbliche Recht zusteht, auf oder unter der Oberfläche des Grundstücks ein Bauwerk zu haben (Erbbaurecht)";

„Eine Sache kann in der Weise belastet werden, daß derjenige, zu dessen Gunsten die Belastung erfolgt, berechtigt ist, die Nutzungen der Sache zu ziehen (Nießbrauch)".

The above wordings are used to a certain extent also by the Civil Code of Georgia in the legal definitions of easements and mortgage (Civil Code of Georgia, Articles 247 and 286).

It is interesting that the Georgian legislator was quite original while making the provisions of the Article 242 of the Civil Code of Georgia because they have not been directly and literally received from the German Civil Code; par. 1030 of the German Civil Code indicates to the encumbrance of the thing in such a way when the usufructuary is entitled to "take the emoluments of the thing"; further, according to part 2 of this paragraph, the usufruct may be limited by the exclusion of individual emoluments. Unlike these German provisions, the Article 242 of the Civil Code of Georgia indicates to the use of the thing by the authorised person like its owner; therefore, by such expression the Georgian legislator attempts to characterise the usufruct as the absolute right of use of a real estate, however, it provides the limits for this right and the kinds of use of the real estate by the usufructuary like lease and agricultural lease are dependent on the consent of its owner.

The Civil Code of Georgia distinguishes onerous usufruct and gratuitous usufruct; also – a usufruct created for a fixed term or a usufruct for life (in case of a legal person – for the period of its existence) of the usufructuary (Civil Code of Georgia, Article 244). Because the usufruct is a real right, its content is strictly determined by law; the latter describes in detail the rights and obligations between the owner and the usufructuary arising from the right of usufruct. However, the parties to the legal relation of usufruct may determine certain matters of the content of the usufruct by agreement, for instance, determination of onerousness or gratuitousness of the usufruct as well as its term.

Like in case of superficies and praedial easements, the provisions regulating the creation and transfer of the immovables apply to the usufruct: a written document shall be made between the parties and this document is subject to registration in the Public Registry.

The owner and the usufructuary may regulate the relations between them by the usufruct agreement and determine in detail their mutual rights and obligations. However, some rights and obligations of the usufructuary, which according to the law are to be deemed essential for the effectiveness of the right of usufruct, are directly provided by law. First of all, based on the right of usufruct, the usufructuary is entitled to use the immovables in person that involves the right to possess the thing as well as to derive the fruits from it. Deriving the fruits means acquiring the ownership on each fruit of the immovables by the usufructuary; the latter acquires the ownership on the fruit at the moment of its separation from the immovables. As a rule, the usufructuary is entitled to those fruits of the immovables that are derived from ordinary economic use of the thing. However, he may obtain the fruits that are not derived from ordinary economic use of the thing but in such case he is bound to compensate the owner for the damage caused to the thing as a result of such use (Civil Code of Georgia, Article 245, Part 3). The usufructuary may alienate the individual items belonging to the object of the usufruct within the limits of normal economic activities. In this case he shall acquire new items which will take the place of the alienated items (Civil Code of Georgia, Article 245, Part 7).

The usufructuary is obliged to:

a) preserve the substance of the immovables. He may not alter the object of usufruct without the consent of the owner;

b) insure the immovables for the duration of the usufruct;

c) notify immediately the owner if the object of usufruct has been perished or damaged or unexpected expenses have arisen for its maintenance;

d) return the immovables to the owner when the usufruct is terminated.

Like in case of superficies and praedial easements, the usufruct is protected by law against any third person. Because the usufructuary is the possessor of the object of usufruct, he is protected with the possessory actions too.

The usufruct is cancelled after expiration of period of time for which it has been created. If the usufruct has been created for life (in case of a legal person – for the period of its existence) of the usufructuary, it is cancelled by the latter's death or winding-up of a legal person. Part 2 of the Article 246 of the Civil Code of Georgia provides for the cancellation of the usufruct in case of confusion – i. e. coincidence of the features of owner and usufructuary (for instance, when the usufructuary buys the object of usufruct or otherwise acquires the ownership on it).

## Conclusion

Above we have briefly the real rights of use – superficies, easements and usufruct under the Georgian law. We pointed out that the superficies is alienable and inheritable real right, by which a person is entitled to right to erect on or beneath the plot of land a construction. Easements are usually classified as per the personality of the authorised person and as per the content of the right: as per the authorised person, there are praedial easements (real estate easements) and limited personal easement. Praedial easements belong to the certain owner of the plot of land on the other person's plot of land. Limited personal easements are always closely related to a certain person. And finally, usufruct is the right to use the immovable property like its owner excluding third persons from its

use without the right to alienate, mortgage or transfer this immovable property by inheritance.

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