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THE RIGHT OF EMPHYTEUSIS IN THE HISTORY OF THE RUSSIAN STATE (THE LATE 15th – EARLY 20th CENTURY)**

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The subject. The law of emphyteusis was studied in the Russian Empire in the middle of 19th – beginning of 20th century due to practical significance. The interest in this subject began to revive at the beginning of the 21st century, the first few publications appeared, but they were mostly replicas of Imperial period studies. The law of emphyteusis in Russia before the middle of the 19th century is not researched sufficiently.

The purpose of the study is to confirm or disprove hypothesis that the law of emphyteusis was initially implemented in the system of Russian law as a legislative institution, but since the middle of the 19th century it has acquired the status of a local legal custom. The Russian state, having preserved the former system of civil law (the Lithuanian Statute) in the Western lands annexed from Lithuania and Poland, created the basis for the formation of a different system of legal awareness among a part of the population, thereby consolidating the dichotomy of the Empire and the Western provinces. Since the issue of land ownership is a key issue for feudal society, the law of emphyteusis is the most striking example of the split in the unity of the legal system of the Russian state.

The methodology. The study is based on a combination of formal-legal and historical-legal methods: the methods of historicism, synchronous and diachronic comparison allow us to get an idea of the socio-political conditions in which the law of emphyteusis was formed and functioned.

The main results, scope of application. The institute of emphyteusis (Latin – census, German – zins, Polish – czynsz) was formed on the basis of the reception of Roman and Byzantine law in the feudal law of a number of European States. Emphyteusis comes to the Polish-Lithuanian lands as an element of German law. The article describes the socio-political processes in the territories annexed by Russia from the Polish-Lithuanian Commonwealth, where the right of emphyteusis was preserved in the middle of 17th - first half of the 19th century as a local civil law under the Lithuanian Statute system. After the abolition of the Statute of Lithuania (1840) an emphyteusis preserved as a regional legal custom. The analysis of legislation and law enforcement practice on the issue of emphyteusis on the borderlands of the Russian state is carried out. The ineffectiveness of the state policy on the elimination of emphyteusis is noted.

Conclusions. The revealed specifics of the development of emphyteusis in the Russian Empire are extremely poorly studied, although they indicate far-reaching consequences in the system of forming the legal consciousness of Russian, Ukrainian, Belarusian, Jewish (Ashkenazi) and other peoples.

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1. Introduction

The topic of Emphyteusis law belongs to the category of poorly studied and not popularized by modern legal science. At the same time, the very fact that the question aroused the keen interest of the authors-lawyers of the period of the Russian Empire of the XIX – early XX centuries, indicates the importance of the question for the contemporaries of the phenomenon. The research topic has very deep roots. Emphyteusis law has had a direct impact on the formation and development of the Russian state for more than 400 years, of which only the history of the last century has been systematically studied. In addition, even these research achievements are more related to the XIX century than to the present. Scientific interest in the topic, completely lost in the twentieth century, is only beginning to revive in the twenty-first century.

This study is urgently needed, since the Emphyteusis law is not only a relic of the past, but also a phenomenon directly related to the present. The history of emphyteusis in Russia allows us to understand how the processes of civil law regulation interact with the formation of ethnic groups, affect the legal understanding of the population of vast territories, the culture of peoples as a whole and the deep features of interethnic complementarity.

The history of law of emphyteusis points to the unsuccessful nature of the national policy of the Russian Empire in relation to the population of the Western provinces: Poles, Little Russians, Belarusians, Ashkenazi Jews. The experience of the Soviet government shows that it did not solve the problem, but only aggravated it. Learning from your own mistakes, making adequate conclusions from the miscalculations of state-legal construction is an integral element of developing a strategy for future development. It is important to understand: law of emphyteusis is not an incident, a combination of circumstances or a minor, already lost, specificity. We are talking about a specific pronounced feature that indicates a systemic breakdown in the ideas about the ethno-legal preferences of an entire group of neighboring peoples.

2. Research methodology.

The present study is based on a combination of historical and legal methods: the methods of historicism, synchronous and diachronic comparison allow us to get an idea of the socio-political conditions in which the legal institution was formed and functioned. The diachronic comparison method is applied to different legal systems (Polish-Lithuanian, Russian, etc.), to the structure of law (centralized legislation and regional custom), and to the law of different epochs (Roman emphyteusis, medieval European emphyteusis, and emphyteusis on the outskirts of the Russian state, despite their external similarity, perform different social functions). The formal-legal method of documentary evidence from the legislation of various epochs from the Lithuanian legal acts of the XVI century to the legislation of the Empire of the XIX century. and draft laws of the early twentieth century.

3. The degree of scientific development of the problem.

In the 19th century, the issue of emphyteusis law was of practical importance for the judicial system of the Russian Empire, a significant number of judicial disputes about emphyteusis ownership were considered in the highest judicial body – the Senate. The norms of emphyteusis law were radically different from the general imperial legislation and traditions of land relations. Since the 70s of the XIX century, there has been a scientific interest in the problem, studies of legal scholars are regularly published.

The selection presented by the authors is the first experience of collecting a fairly complete historiography of works on emphyteusis law of the period of the Russian Empire. The works of pre-revolutionary authors are not divided according to different theoretical and methodological approaches, but are presented in chronological order in order to demonstrate the consistency and continuity of the process of studying the emphyteusis institute. In a number

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of cases, emphyteusis law is not addressed to the study as a whole, but only a part of it. It is necessary to mention the works of: D. I. Pikhno 1877 [1], I. P. Novitsky 1883 [2], Ya. V. Abramov 1883 [3], V. A. Nezabitovsky 1884 [4, p. 289-368], L. V. Gantover 1884 [5], S. Dymbovsky 1884 [6], V. D. Spasovich 1885 [7], A. M. Rembovsky 1886 [8], V. F. Levitsky 1886 [9], M. V. Shimanovsky 1886 [10], A. A. Kvachevsky 1887 [11], B. A. Friedman 1890 [12], A. L. Borovikovsky 1891 [13], K. G. Abramovich 1895 [14, pp. 227-230] and 1902 [15, p.287-291], K. P. Pobedonostsev 1896 [16, p. 492-513], N. M. Reinke 1900 [17], G. F. Shershenevich 1902 [18, p.438-448] and 1911 [19, p. 379-382], L. A. Casso 1906 [20, p. 224-231], P. A. Ananyeva 1908 [21], B. Landau 1908 [22], A. M. Gulyaev 1912 [23, p. 246-250], A. Andrievsky 1912 [24], A. N. Butovsky 1912 [25], V. I. Sinaisky 1914 [26, pp. 273-275]. In these works, a practice-oriented approach to the study of emphyteusis prevails, which is seen as an extremely specific institution, characteristic of the western provinces and requiring adaptation to the general imperial system of legislation. Noting the striking "survivability" of emphyteusis and the commitment of a part of the population to these forms of land ownership, which are absolutely not characteristic of the central provinces, the authors nevertheless do not draw far-reaching conclusions about the split of the right field they record and the depth of contradictions indicated by the violation of the unity of civil law regulation.

At present, the topic of emphyteusis law is a deeply forgotten problem, which is not mentioned in textbooks, unknown to a wide range of students and legal practitioners, even specialists in the history of law do not know everything about the existence of this institute. In the 90s of the twentieth century, a brief description of emphyteusis law is given in the journal publications of A.V. Kopylov 1992 [27, p. 83-84], 1993 [28, p. 147-149], the author expresses the opinion that emphyteusis law in Russia appeared not earlier than the XVIII century. Further, a few articles appear already in the XXI century, their authors: M. N. Bondar 2009 [29], A. P. Anisimov 2010 [30], P. A. Byshkov 2010 [31, p. 15-16], L. V. Schennikova 2010 [32], A.V. Ryzhik 2011 [33], N. V. and S. V. Ostroumov 2014 [34], A. R. Pashina 2014 [35, p. 100-101], M. A. Sorokoletova 2015 [36], O. E. Finogentova 2017 [37], N. V. Kornilov 2020 [38]. The works are mainly descriptive and refer to the period after 1840, when the Lithuanian Statute as a source of law in the territories of the Russian Empire was terminated. Two publications by E. V. Danilova (both 2007) [39, 40] although they contain a reference to the XVIII century in the names, they rely solely on the later legislation of the XIX century. In fact, the question of understanding the role of emphyteusis law is not formed, modern research is only a replica, repeating the theme and views of the authors of the period of the Russian Empire. The question of the appearance and development of emphyteusis on the territory of Russia until the middle of the XIX century is still very little studied.

There are no monographic works on emphyteusis law, occasionally a small part of the work is devoted to the institute within the framework of a broader topic, for example, in the posthumous publication of the works of the famous Soviet scientist A.V. Venediktov (1887-1959) in 2004 [41, p.229-236], in the monographs: A.V. Kopylov 2000 [42, p. 98-113] and A. B. Babaev 2007 [43, p. 76-77]. Similarly, in dissertation studies, emphyteusis law was devoted to separate paragraphs: A.V. Kopylov 1998 [44, p. 159-183], V. A. Letyaev 2001 [45, p. 176-194], M. N. Bondar 2010 [46, p.61-88]. However, just as in journal publications, the legislation of the Russian Empire after 1840 is studied. In general, most authors note the "survivability" of the institution of Emphyteusis law, to the eradication of which or to its adaptation by the legal system of the empire, significant and unsuccessful efforts were made.

A separate group of journal publications of the authors: D. G. Yanchenko 2011 [47], E. I. Golovach 2017 [48], A. E. Kotov 2018 [49], A. A. Ivanov 2020 [50], is devoted to the activities of the State Duma in 1907-1913 in the development of draft laws on the Emphyteusis va issue. Here the authors are forced to admit that the bodies of

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the parliamentary monarchy showed a complete lack of ideas for solving the conceptual issue precisely during the period of aggravation of all sorts of nationalist sentiments. The path is traced from loud statements about the need to end the "relic of feudal relations" as soon as possible, to complete confusion and, as a result, maintaining the status quo with minimal updating of the regulations. The collapse of the Russian Empire is at the same time the disappearance of emphyteusis law, unacceptable under the Soviet state system.

The interest of foreign authors in the problem is insignificant and is mainly limited to the former area of distribution of Emphyteusis law: modern-Poland, Ukraine and Belarus

4. The concept of law of emphyteusis

The law of emphyteusis is an extremely peculiar institution of land use, defined as the perpetual inheritance of land. The authors of the period of the Russian Empire noted that traditionally " in Russia, among the Russian population, there was no such institution, but among the other nationalities that are part of the empire ...[there were] two: Khizanism in Georgia and emphyteusis relations in the provinces annexed from the former Polish Kingdom."

5. The history of the Institution of Roman and Byzantine law.

The heyday of the ancient Roman institute of Emphyteusis is associated with the period of the late Roman Republic and then the empire, where there was a need to develop large amounts of abandoned, primarily state land, to which holders are actively attracted [63, p. 233]. Although, as A.V. Kopylov notes, "the institution of emphytic rent in Roman law had a very ancient origin and was used in the practice of Egypt and Carthage ... in Greece as early as the third century BC" [27, p. 81].

For some reason, the fact that the institute performs the same function in slightly different conditions in the Byzantine Empire usually escapes from the field of view of researchers of emphyteusis law. The medieval institution of emphyteusis is inherently different from its predecessor, associated with the Byzantine state feudalism. The purpose of emphyteusis relations is to strengthen the patronage relations of the land owner and the chinshevik (emphyteusis owner), a large landowner (magnate) guarantees the chinshevik protection from the arbitrariness of the state and other magnates. In this way, the owners of the land plot were forced to voluntarily move from the category of owners to hereditary tenants of their own land.

6. Medieval Emphyteusis law in Germany, Poland, and Lithuania.

In Europe, the right-wing status of the emphyteusis vik was formed in Book 1 of the Land Law of the Saxon Mirror, a monument of German law of the XIII century (Article 54), and subsequently became widespread in various versions of European law. The penetration of emphyteusis relations in the Polish lands is evidenced by the statute of Wislica in 1347, issued by the Polish King Casimir III. In particular, it is regulated that a community member who has received land (settled) in accordance with German law cannot leave the allotment even after selling the rights to it, he must take measures to ensure timely payment to the pan, in particular, to make landings . Articles 63 and 68 of the Statute also speak of the wide application of German law by "many panes" and of its displacement of Polish law .

Emphyteusis was not only became widespread in the Polish-Lithuanian Commonwealth, it became a tool for reducing the Orthodox princes and boyars of "Lithuanian Rus" to the Zemyan class – the lowest politically inferior gentry. "The magnates, who needed farmers to cultivate their vast estates, willingly used the labor of the poor gentry, and sometimes directly resorted to violence to turn them into a dependent agricultural class."

The emphyteusis is a sign of the majorat system of inheritance characteristic of European feudalism, while the seigniory characteristic of Russian lands with a tendency to minorat offered a completely different concept of legal consciousness [65, p. 40-45]. An idea of the

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system can be obtained from Lithuanian Scribal Books of the XVI century. It is noteworthy that in the Polish-Lithuanian lands of the XV-XVI centuries, a new type of Jewish community based on the emphyteusis was also formed (shtetl) [68], different from the ghettos common in Western Europe. In conditions when many large cities of the Polish-Lithuanian Commonwealth, including: Gdansk, Warsaw, Krakow, Lublin, Kiev - used the right-Privilege de non tolerandis Judaeis (from Lat. - The privilege of impatience of the Jews), the latter were forced to move under the protection of the magnates, creating small settlements (towns) in privately owned lands.

7. The emphyteusis in the history of the Russian state.

7.1. The confrontation between the Moscow and Polish-Lithuanian states at the end of the XV-XVI centuries.

A century earlier, many of its subjects did not agree with the change in the legal foundations of the Golden Horde, and after the flow of serving Tatars led to a sharp strengthening of Lithuania and Moscow. In the middle of the XV century, the legal system of the Grand Duchy of Lithuania began to change, and not everyone agreed with this. According to the data given by the Belarusian scientist D. M. Demichev, in the middle of the XV century in the Belarusian lands of Lithuania, magnates (lords) of 29 surnames concentrated up to 40% of land holdings in their hands [57, p. 12], while by the middle of the XVI century, 162 thousand feudal lords (gentry) belonged to the class of feudal lords (gentry). people, or 9% of the population [58, p. 109]. This disparity could be formed only due to the mass distribution of the poorest gentry.

The church conflict became a harbinger of the conflict between the states of Lithuania and Russia. Since 1299, the department of the Metropolitan of "Kiev and All Russia" was located in Vladimir-on-Klyazma, since 1325 - in Moscow. In 1439, Metropolitan Isidore of Kiev, a Greek by birth, signed the Union of Florence with the Catholic Church. In Moscow, the union was not recognized, and Isidore himself was arrested as a heretic, but was able to escape. In 1448, at the Council of Russian Bishops, Photius was elected metropolitan, and the autocephaly of the local church was de facto established. In 1458. In Rome (Constantinople fell in 1453), Isidore, in violation of the canon, transferred the rank to Gregory the Bulgarian. Thus, two metropolitans of "all Russia" acted simultaneously, it should be noted that the Orthodox bishops of Lithuania took the side of Metropolitan Photius, who was in Moscow. However, since 1461, the split of the metropolitanate into Moscow and Kiev became final. In the period after the Mongol invasion, the Galician and Lithuanian metropolitanates were periodically created for political reasons, and even three metropolitan sees could operate simultaneously, but the impact of these processes on the church foundations was insignificant. The period after the death of Metropolitan Photius and until the middle of the XVII century. In the history of the church, it is clearly considered as a split into two different traditions [70, p. 59, 182].

The Gediminovichi managed to stop the first attempts to transfer the appanage Orthodox princes from Lithuanian citizenship to Moscow: in 1482, the princes Olshansky and Olelkovich, whose possessions were located along the Berezina River, were executed, and Prince Fyodor Belsky fled to Moscow [71, stb. 1445-1446]. It should be noted that they fled not only to the Moscow princes. In 1492, King Casimir put forward claims to Pskov: "Many of our people from our land of Polotsk and our boyars, many people zbegli and went to your Pskov land, and you do not want to give them to us."

7.2. Entry into the Russian legal system of territories with the tradition of emphyteusis law mid-XVII-XVIII centuries.

The situation changed dramatically after the victory in the Russian-Polish war of 1654-1667, Russia received territories with gentry land ownership. Moscow undertook to: abandon the practice of mass resettlement (Article 3), released from the oath given to the tsar the remaining Polish lands: Cossacks (Article 4), and nobles (Article 8). The nobles who fled from the Russian

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lands under the agreement of December 14, 1667 (Embassy) received monetary compensation.9 The free land fund was used by the Moscow government for distribution to new owners from among the service people, and the legislation fixes a new form of land ownership – "Smolensk Reitarsky dachas". However, in the Russian state there was a significant group of the population with a different legal understanding from the majority of the population. An environment that is interested in preserving the city-Magdeburg and land – Emphyteusis law. These systems of law are mutually dependent, since Magdeburg law included Emphyteusis land ownership in the city, but did not control Emphyteusis in rural areas. A. I. Ringelman pointed out the relationship and terminological confusion of the systems " ... the former Little Russian and Magdeburg and Saxon rights, generally called [Lithuanian] Statute" [73, ed. 4. p. 49].

In modern Ukrainian and a number of other historiographies, they try to present the existence of Magdeburg law as a kind of centuries-old tradition of municipal democratic freedoms. In fact, "we will not find two cities in the space of Southern Russia, the structure of which, allegedly based on the Magdeburg law, would be similar in detail to each other or would fully meet the norm established by German law" [74, p.90]. Rather, we are talking about local legal customs used in the interests of the upper middle class and Cossack elders, both for more than severe exploitation of the bulk of the population, and for obtaining various benefits from the central government [75].

Daniel Boavois notes the extremely non-constructive position of the elite of the western provinces:" The Polish noble class in Ukraine, which rejected the idea of a career on the basis of merit [in fact, rejected the legal attitudes of the Russian nobility] ... the only thing that the agricultural gentry dreamed of was the possibility of separating the gentry elite into a separate group within the Russian Empire; it deluded itself with the hope that St. Petersburg would allow it such isolation " [55, p.276].

The central government was forced to intervene in the events in the south-western outskirts and take measures to restore order. "Already in the first half of the eighteenth century, the government drew attention to the extreme uncertainty of the law in this area. In 1728, under Peter II and in 1734, under Anna Ivanovna, the question of codifying this right was raised. In 1743, at the behest of Elizabeth Petrovna, this idea was realized. A code was compiled in the city of Glukhov under the name "The rights under which the Little Russian people are sued". The project was not destined, however, to become a law" [18, p.439].

7.3. The emphyteusis law in the Russian Empire of the XIX – early XX centuries.

The partitions of Poland that took place at the end of the XVIII century further complicated the situation: the Russian Empire received a huge region, where it was forced to accept the temporary application of the laws of Poland and Lithuania, including the mass application of the Emphyteusis law and the persistent rejection by the population of the norms of general imperial legislation. The desire to remain within the patronage, that is, to interact with the state not directly, but through patrons, through noble lords personifying the power, has already become part of the legal consciousness for the population of the former Polish-Lithuanian Commonwealth and this behavioral stereotype in the XIX-XX centuries. it will not be overcome, in many ways becoming one of the reasons for the collapse of the entire empire.

Attempts to unify the legislation that took place in the XIX century: through the termination of the Lithuanian Statute (Decree of June 25 , 1840), through a direct order to buy out allotments and get out of the emphyteusis state (Regulation of June 9, 1886), and others, were not successful. "The Emphyteusis viks, whose ancestors had paid chinch since time immemorial ... considered it absurd to buy back land [like the Russian serfs], which they considered their property" [55, p. 744].

A very important theoretical feature is that after the termination of the Lithuanian Statute, Emphyteusis law lost the status of a legally

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established institution and turned into a regional legal custom, which was widely and effectively used by the Roman law of the dominant period. However, the legal system of the Russian Empire was not ready for such a challenge and did not develop an adequate way of interaction. The gap between the legal stereotypes of the population of the western and south-western suburbs and the legal policy of the state was too deep. The Government, fearing drastic measures, failed to develop a strategy for further development. At the same time, the activities of the established county and provincial emphyteusis affairs presences on the ground were simply boycotted and the results of their activities were negligible.

In the XIX-early XX centuries, the issue of emphyteusis law will appear more clearly and is reflected in the legislation of the Russian Empire and in the works of legal scholars of the time. However, during the previous three centuries, emphyteusis law already existed, and during this period the Russian state could not find an adequate solution to the problem of implementing the institution in its legal system, and could not prevent future problems of a political nature. According to the exact expression of the associate professor of the Imperial St. Petersburg University M. M. Mikhailova: "Mores and customs find their fullest expression in civil laws, more than in other laws" [81, p. 4]. In this case, the problems of civil law enforcement clearly and clearly signaled the impending threat.

8. Conclusions

The significance of the study of the long and complex history of emphyteusis law is undeniable. The legal institution, as contemporaries noted, showed an amazing "vitality" in conditions when, according to the authorities, it should have disappeared painlessly. The long history of emphyteusis law teaches that the legal and political system cannot endlessly ignore the signs of a painful state of society, sooner or later this leads to tragic consequences.

This study is only a statement of the problem, while the topic of emphyteusis law requires an in-depth and sufficiently detailed study. At the same time, the further study of the issue will inevitably be influenced by the presented historiographical selection, which has never been collected at such a level before. The source base of the study is well-known, but in the context of a systematic study of the history of emphyteusis law, these sources were not previously considered. The introduction of new sources into scientific circulation, including from the judicial practice of the Senate of the Russian Empire – is a task of the future and a promising direction for further research.

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