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SEPARATION OF OWNERSHIP AND COMPULSORY LAND LEASE IN LATVIA: CHALLENGES AND SOLUTIONS

When independence was proclaimed in Latvia in 1990, one of the problems to be solved was restitution. Latvia decided to restore ownership rights to the former owners (or their heirs) of the properties nationalized since 1940 rather than paying out compensation. Although the aim of returning the original properties was "to create owners" and thus promote economic growth, the result was social tension between the groups put into controversial positions, with previous owners and their heirs versus the persons now using their property. In the cases where ownership rights of the former owners or their heirs were restored to land on which apartment houses were built during the Soviet times, a unique situation arose whereby the land and the buildings on it had different owners. This is an exception to the general principle that real estate of land and buildings are indivisible. No other country in Central or Eastern Europe chose to return the original property if it had changed so significantly (had been developed). In 2015, in Latvia there were 285 549 buildings located on 95 254 land plots, owned by physical persons or entities other than building owners. 3 677 of those were apartment houses (totaling 110 970 apartments) located on 7 354 land plots. These numbers show the importance of the described problem as at least one tenth of the society is directly or indirectly involved in the problem of split ownership of a property. In 1991, the legislature of Latvia made the decision to regulate the relationships between the landowners and building owners as lease agreements. Practice has shown that apartment owners are unwilling to enter into lease contracts and pay the land lease. The courts are overwhelmed with statements of claims and civil proceedings between landowners and apartment owners. Apartment owners lodge complaints to the government, parliament, and ombudsman while landowners go bankrupt as they do not have the income to cover real estate taxes that they now must pay. Thus, it is apparent that even after almost three decades of independence and almost thirty years after the beginning of land reform Latvia has not dealt with the consequences of the decisions the legislature made in 1990s. It is now acknowledged by the government that policy and regulations should be adopted to solve the problems related to separation of ownership and resolve the social tension arising from the consequences of restitution, including compulsory land lease.The article discloses the main legal problems associated with separation of ownership and compulsory land lease, giving an insight into the historical circumstances that have led to the current situation.

Key words: property reform, restitution, separation of ownership, compulsory land lease.

Разделенная собственность и принудительная аренда земли в Латвии: проблемы и решения

Когда в 1990 году в Латвии была восстановлена независимость, одной из проблем, которую необходимо было решить, была реституция. В Латвии было решено восстановить права бывших владельцев (или их наследников) собственности, национализированной после 1940 года, вместо выплаты компенсации. Целью возвращения первоначальной собственности было «создать класс собственников» и способствовать таким образом экономическому росту. Но результатом стало социальное напряжение между группами, поставленными в противоречивые позиции с предыдущими владельцами и их наследниками, выступающими против нынешних владельцев квартир. В тех случаях, когда права собствен-

ности бывших владельцев или их наследников были восстановлены на землю, на которой в советское время были построены жилые дома, возникала уникальная ситуация, при которой земля и здания на ней имели разных собственников. Разделенная собственность – это исключение из общего принципа, согласно которому земельные участки и здания неделимы. Ни одна другая страна в Центральной или Восточной Европе не возвращала первоначальную земельную собственность, если на этой земле были построены здания.В 2015 году в Латвии было 285 549 зданий, расположенных на 95 254 земельных участках, принадлежащих физическим или юридическим лицам, которые не являлись владельцами этих зданий. 3677 из них были жилые дома (всего 110 970 квартир), расположенные на 7 354 земельных участках. Эти цифры показывают важность описанной проблемы, поскольку одна десятая часть общества Латвии в какой-то мере вовлечена в проблему разделенной собственности. В 1991 году законодатели Латвии приняли решение регулировать отношения между землевладельцами и владельцами зданий с помощью договоров аренды. Практика показала, что владельцы квартир не хотят заключать договора аренды и оплачивать аренду земли. Суды «завалены» исковыми заявлениями и гражданскими разбирательствами между землевладельцами и собственниками квартир. Владельцы квартир подают жалобы правительству, парламенту и омбудсмену, в то время как землевладельцы банкротятся, поскольку у них нет дохода для покрытия налога на недвижимость. Таким образом, очевидно, что даже после почти трех десятилетий независимости и почти тридцати лет после начала земельной реформы Латвия не справилась с последствиями решений, принятых законодательным органом в 1990-х годах. В настоящее время правительство признает, что должны быть приняты нормативные акты для решения проблем, связанных с разделением собственности, и для устранения социальной напряженности, возникающей в результате последствий реституции, включая обязательную аренду земли. В статье раскрываются основные правовые проблемы, связанные с разделением собственности и принудительной арендой земли, и дается представление об исторических обстоятельствах, которые привели к сложившейся ситуации.

Ключевые слова: разделенная собственность, принудительная аренда земли, земельная реформа.

Introduction

After the collapse of the Soviet regime, the restoration of prewar property relations was a legal and moral prerequisite for the restoration of the prewar state in most Central and Eastern European countries (Feldman 1999). Private property restitution was an integral part of the transition in most post-communist countries, including Latvia. It was a general acceptance that, in the interests of justice, some form of restitution was essential after the collapse of state socialism in the region (Blacksell, Born 2002).

The key to economic growth is efficient economic organization – establishment of institutional arrangements and property rights. Growth won't occur unless it is possible to channel individual economic effort into activities that bring the private rate of return. For that defined and enforceable property rights are essential (North, Thomas 1973).

Restitution was a cornerstone for economic organization and a precondition for economic growth after the restoration of the independence. From an exclusively economic perspective, restitution does not seem to represent the most rational or productive

use of state-owned property (Pogany 1997). However, although the restitution laws initially slowed economic reform, most countries chose in favor of restitution as it served an important moral purpose of justice. Restitution laws also introduced the concepts of private property and ownership and familiarized the society with market oriented legal principles and practices (Crowder 1994).

Historical aspects

In 1990, when the independence of the Republic of Latvia was restored, one of the jobs for the Supreme Council (Parliament) and the Council of Ministers was to reinstate the role of private property and think about how to promote private economic initiative (Grutups, Krastins 1995). In order to ensure that ownership relations corresponded to market economy principles, conversion of state-owned properties was utilized (1). The goal was to ensure that the foundation for economic development would involve private initiatives and the liquidation of state-owned monopolies. This would mean restructuring the national economy and restoring justice (2).

The goal of property reforms was to influence the national economy, as well as to have an effect for each person, allowing him or her to change his or her lifestyle and standard of living (Augstaka Padome 1991a, S. Buka). The Supreme Council understood the possible social consequences of property conversion. "The use of conversion that is careless or based on unobjective assumptions could become one of the new reasons for a social explosion in Latvia if social guarantees are not ensured for everyone" (Augstaka Padome 1991a, S. Buka). Still, there were no alternatives to land reform and changes in property ownership rights in order for the transfer to a market economy to succeed (Grutups, Krastins 1995). The aim of the legislature was to "create owners" (Augstaka Padome 1991a, I. Godmanis), the hope being that this would also create an effective market economy (3).

Conversion of state-owned properties included the privatization of state-owned and local government properties, as well as the reinstatement of property rights. The principle of the continuity of the Latvian state was enshrined in the May 4, 1990, declaration on the restoration of Latvia's independence. The basic laws related to property conversion materialized this principle by strengthening restitution as one of the basic methods of conversion (4). The government nullified laws or regulations that related to the nationalization or otherwise unacceptable expropriation of properties. The fundamental principle was that ownership rights to properties that were alienated or otherwise expropriated after June 17, 1940, could be restored to any former owner or his or her lawful heir irrespective of the person's current citizenship. The drafting of these regulations offered the legislature a choice in form and scope of the restitution. This involved determining the range of subjects eligible to claim properties (Marcuse 1996), deciding whether to return the original property in old boundaries or instead use various forms of compensation mechanisms (Blacksell, Born 2002; Pogany 1997).

Land reforms in Latvian cities and in rural areas were considered separately and were regulated by different laws. At first the agrarian reform was held in the countryside. This model was used as a "tested prototype" so as to draft legal provisions

concerning reforms related to urban lands one year later (Grutups, Krastins 1995). Before land reforms began in the countryside, people were asked to share their opinions, and government policies were explained publicly. Parliament organized a sociological survey which found that people supported land reforms (Grutups, Krastins 1995). Public opinion led to the decision that former owners or heirs of properties that had been expropriated after June 17, 1940, would have their properties returned, or they would receive compensation in the form of certificates. The preference was to return original properties, not pay cash compensation, as the latter would not create private property owners, and it would not facilitate the country's move toward a market economy. It would also mean financial burden for the national budget (Grutups, Krastins 1995).

From the very beginning, it was clear that the main conflicts are going to be in terms of the interests of current holders of the land and those who owned the land in the past (Augstaka Padome 1991c, V. Dozorcevs). There were attempts to strike a balance between these groups of owners and their interests, counting on the status of a *bona fide* beneficiary (Grutups, Krastins 1995). There was a nearly prophetic warning from Parliament member J. Skapars, who said that restoration of property rights to former landowners "might replace old problems with new and very harsh new ones" (Augstaka Padome 1991d, J. Skapars). Despite this, arguments in favor of historical justice took the upper hand, with politicians deciding that the restoration of property rights would facilitate market development and maintenance of properties (Augstaka Padome 1991c, A. Grutups).

Both regulations concerning land reform in the rural areas and in the cities had the same underlying principle that former landowners and their heirs would have a priority in terms of regaining land that they once owned, though there were exceptions that were aimed at striking a balance between the users of the land and its former owners (Grutups, Krastins 1995). The initial version of the law "On land reform in the cities of the Republic of Latvia" (5) suggested limited rights of *bona fide* land users to gain ownership of the land. When reviewing the draft law on third reading, however, members of the parliament decided that it had to be returned to second reading so as to include rules that would protect the owners of individual buildings on plots of land, giving right to use and buy land on which their buildings were located (Augstaka Padome 1991d, V. Seleckis, L. Alksnis and A. Kirsteins). Once the law was adopted on final reading, it had an exception to say that landowners or their heirs could not regain properties that they had willingly sold after July 20, 1940. The same was true if Latvian citizens lived on the land and had legally built homes on it (Par zemes reformu Latvijas Republikas pilsetas 1991, Art. 12). In that case, compensation was to be paid to former landowners or their heirs with government issued compensation certificates (6). The government did not have money to buy the land or to pay cash compensation (Saeima 1996, A. Seile).

In other cases, in which there were buildings or planned buildings on the land of former owners that were necessary for public needs, former landowners or their heirs could:

- Request the restoration of ownership rights to the land and receive a lease fee from the owner of the building, with the amount of the fee being limited by law;

- Request an equally valuable plot of land in the same city;
- Receive compensation in accordance with the law (7).

There were problems in finding equally valuable plots of land simply because the amount of land was limited. There was a long-lasting lack of clarity about property compensation issues and insufficient assets to cover compensation certificates. This led to a situation whereby most former landowners and heirs chose to ask for the restoration of their rights even if there were buildings on the land (Grutups, Krastins 1995).

This meant that land reform laws restored property rights to former landowners or heirs to land that had been taken away between 1940 and 1980. At the same time, ownership rights were preserved in relation to buildings that had lawfully been built by the owners or legal managers of same. This led to the separation of ownership (*dalitie ipasumi* (in Latvian)), where land belongs to one person while the buildings on it – to another. The law also stated that legal relations among parties (owners of the land and buildings) must be regulated in accordance with terms of lease agreement. This lease agreement shall be established by the lessor and the leaseholder by fulfilling the duty set by law rather than concluding a voluntary agreement. Therefore, this legal concept is called a compulsory lease (Grutups, Krastins 1995; Rozenfelds 2004; Grutups, Kalnins 2002; Satversmes tiesa 2009, Case No. 2008-34-01, 4, 6, 14.2). These issues are regulated by Article 4(5) and Article 12 of the law on land reform in Latvian cities (Par zemes reformu Latvijas Republikas pilsetas, (8) and Articles 50 and 54 of the law privatizing state and local government-owned residential buildings (Par valsts un pasvaldibu dzivojamo maju privatizaciju (9).

The experience of other countries

Lithuania and Estonia, in contrast to Latvia, did not restore property rights to former owners of land on which buildings owned by third parties were located. Such land was kept in the hands of the government, allowing the owners of the buildings to use and buy the land (10). Only in Latvia, a situation arose whereby two sovereign and parallel property ownership rights applied to the same spatially delimited object (Rozenfelds 2012). Such separated ownership temporarily existed in East Germany. After German reunification, the legislature purposefully transformed these relations to ones that established hereditary building rights, which meant voluntary (contractual) separated ownership on the land and buildings (Ruda et al. 2008). However, when the German government thought about restoring property rights to real estate that had been nationalized in the past, it also presented an exception to say that ownership would not be restored to land that was used by local governments or had buildings on it (Kozminski 1997).

After the collapse of the Soviet Union and its authoritarian socialist system, the transfer to a market economy occurred in nearly all Central European countries and some Eastern European countries. The only difference related to the way in which legislatures and governments in each country decided to compensate for property

right violations that occurred during the rule of the Communist regime. The choice in each country was based on various economic circumstances, including the expected influence on privatization and economic policies in the country, as well as political circumstances, including international agreements and foreign pressure (Pogany 1997; Gelpern 1993). Among the former republics of the Soviet Union, only the Baltic States approved regulations that spoke to restitution. No such regulations exist in any of the members of the Confederation of Independent States (Fisher, Jaffe 2000). To a greater or lesser extent compensation mechanisms related to the rights of former owners were created in Czechoslovakia, Hungary, the former East Germany, Bulgaria and Romania after they escaped the influence of the USSR (Fisher, Jaffe 2000). Property rights were not restored and compensation regulations were not approved in Poland, Albania or the former components of Yugoslavia (except for Slovenia).

Hungary decided to implement a compensation mechanism that had a few exceptional situations, with the compensation for the value of expropriated properties in cash or with certificates, ignoring the inevitable criticisms that said that the sums offered were nowhere near the market value of properties that had been expropriated (Blacksell, Born 2002; Pogany 1997). In Bulgaria, property rights were restored for rural properties. The issue was not important in cities, because in 1947 and 1948, all land that was appropriate for buildings was expropriated by the state. Landowners had received compensation in the form of flats in newly built apartment buildings (Strong et al. 1996). Czechoslovakia also decided to restore property rights related to formerly nationalized properties, but as was the case in Estonia and Lithuania there was the exception that property rights would not be restored to plots of land that had no buildings in the past, but had buildings at the time when restoration decisions were being made. In such cases, former owners only had the right to receive property compensation (Fisher, Jaffe 2000; Strong et al. 1996). Poland unlike other former socialist countries, did not pass a single set of regulations to regulate the restoration of property rights (Aslund 2007; Pogany 1997). There were several reasons for this, including that extent of nationalization in Poland was probably the lowest of all the socialist countries (Fisher, Jaffe 2000; Strong et al. 1996). Still, there was much grumbling about decisions that were made by the Communist Party in 1945 and 1946. These were known as the *Bierut Decrees* because the boss of the Communist Party was Boleslaw Bierut. These conflicts still have not ended. Former owners have used the right to restore property rights or gain compensation from the country though administrative processes and litigation, but there are still debates in Poland about approving a unified law that would speak to the compensation mechanisms for the rights of former owners (Wnukowski 2017).

All of this shows that among former socialist countries in Central and Eastern Europe, Latvia's choice to restore ownership to encumbered (built-up) properties was unique. This, in turn, means that no neighboring country has encountered the problem that Latvia has had to deal with – the collision among the interests of building and land owners in a situation of separated ownership.

The current situation with properties having separated ownership

Although legal norms provide for the pre-emption right to the owners of land and buildings, there are still a great many properties with separated ownership on the land and the buildings (11). The norms do not regulate a mechanism for the use of the pre-emption right, i.e. the scope of these rights, the usage procedures, the control mechanisms or the consequences of violations of these rights especially in cases when the sold land plot is used for the maintenance of several apartment buildings.

It was initially planned that separated ownership would be a temporary situation (Saeimas Valsts parvaldes un pasvaldibas komisija 2018). When initial land reforms were planned, members of the Supreme Council assumed that if there were buy-out right, right of first refusal or right of last refusal, or any kind of pre-emption right in the law, the issue of separated ownership would resolved on its own, because the ownership of the properties would merge (Augstaka Padome 1991b, A. Seile and J. Lazdins). That did not happen, at least regarding apartment buildings.

According to the Latvian State Land Service *(Valsts zemes dienests)*, there were 285 849 buildings in Latvia in 2015 which were on 94 254 plots of land that belonged to others (Tieslietu ministrija 2015). Among these were 3 677 privatized apartment buildings, containing 110 970 flats, and the buildings were on 7 354 plots of land that belonged to others (Tieslietu ministrija 2015). Approximately 30% of these buildings were in Riga, and there were lots of them in other major towns such as Jurmala, Daugavpils, Jelgava and Ogre (Valsts zemes dienests 2015). Most of these buildings were in large blocks of apartment buildings that had been erected during the Soviet era (Valsts zemes dienests 2015). In many cases, several buildings or parts of buildings were found on the same plot of land, because many of the land properties werelocated in areas that used to be suburban during the period of nationalization. This related to pastures and farmland on which new neighborhoods were built between the 1950s and 1980s (Rigas dome 2017). In most cases there is one apartment building on a plot of land, but there are cases in which as many as 40 buildings are on a single plot of land. There is also a case of whereby one building has been erected on nine plots of land (Valsts zemes dienests 2015).

The issue of separated ownership and compulsory land lease affects a wide range of social strata. This includes the owners and residents of the aforementioned nearly 111 000 flats, and that means that the problem of separated ownership is seen as an important issue in politics (Saeimas Valsts parvaldes un pasvaldibas komisija 2018). Government declarations, work plans and programs have spoken to this issue since 2012 (12). At the government level, it has been understood that laws need to be amended to facilitate the unification of the ownership and prevent any future separation of ownership (Tieslietu ministrija 2012) (13). The first draft law on unification of separated ownership was prepared by the Ministry of Justice and submitted to Parliament in mid-2015 (Saeimas Valsts parvaldes un pasvaldibas komisija 2018). The concept of the draft law was based on the idea that after apartment owners would have the right to purchase land, special norms related to land lease fee limitations would be repealed so as to encourage apartment owners to buy-out the land that is

under their buildings (Tieslietu ministrija 2015). The purchase price for each household was planned to between 20 and 30 euros per month, with the whole sum being paid off over the course of 10 years (Tieslietu ministrija 2015). In thinking about various ways of unifying separated ownership, the Ministry of Justice indicated that this would best strike a balance among the parties that were involved in the process. A ruling from the European Court of Human Rights led the Ministry of Justice to indicate in its annotation to the law that forced ownership right transfer from one private individual to another could be seen as something that served public interests (European Court of Human Rights (1986), Case James and Others v. the United Kingdom, p. 39).

Still, the law was only adopted on first reading by the Saeima (14). After first reading, the working group that had been set up by the Saeima received a series of objections that made it impossible to reach agreement about several essential issues. Objections related to shortcomings in the law were presented by the Latvian Association of Large Cities and the National Ombudsman. The experts said that the draft law did not provide for an effective legal mechanism to unify separated ownership, because the schedule for paying the buy-out price was too short (Latvijas Lielo pilsetu asociacija 2016). There were also criticisms of the calculations that supported the draft law, the concern being that it would create too much of a financial burden for the owners of apartments (Tiesibsargs 2017).

In April 2018, the same working group developed a new draft law that was submitted to the Saeima. The goal of the draft law, again, is to ensure a chance to unify the separated ownership of property. The council of apartment owners can use a special legal right to buy-out the land that is necessary for maintenance of the building (Saeimas Valsts parvaldes un pasvaldibas komisija 2018). Despite the political goal of creating regulations to gradually unify the separated ownership, the legislature still has doubts about the most effective mechanism (15). On the other hand, despite possible models of buy-out procedure, there will always be buildings in which owners cannot or do not want to purchase the land. This means that separated ownership and compulsory land lease will be a legal reality in Latvia for a long time to come.

The legal concept of compulsory land lease

The 1991 law on land reform in cities spoke to protecting the rights of Latvian citizens who had, in *bona fide*, planted individual gardens or built residential buildings on land that was taken away from owners after June 17, 1940, providing for the right of such people to obtain plots of land under their buildings. This solution, however, did not apply to cases in which the owner of the building did not want to or did not have the right to buy the land because, for instance, he or she was not a citizen of Latvia. This led to a situation in which ownership rights to a building belonged to one individual or legal entity, while the ownership of the land belonged to another.

After the restoration of Latvia's independence, several pre-occupation legal acts were reinstated, among them the Latvian Civil Law from 1937. Taking into account the fact that 50 years had passed and changes in society and social order have taken place, it was decided to pass special laws about when and how certain parts of the

Civil Law would take effect, approving amendments, as well as transitional regulations (Augstaka Padome 1991e, J. Vebers).

The Civil Law part on property rights is based on Roman legal principles, including the presumption that everything that is built on land belongs to land *(omne quod inaedificatur solo credit)*. The Civil Law does not provide for the double ownership *(dominium duplex)*, i.e. a legal concept according to which the owner of real estate grants a long-lasting or permanent and inheritable usage rights to another person (Svarcs 2011). For that reason, taking into account the provisions already included in the land reform laws, the law that regulated the implementation time and procedure of the Civil Law part on property rights (16), included an exception to presumption of the unity of the land and the building (Par atjaunota Latvijas Republikas 1937. gada Civillikuma ievada, mantojuma tiesibu un lietu tiesibu dalas stasanas laiku un kartibu 1992).

This norm provided legal basisfor the exceptional existence of horizontal segregation of ownership in aproperty. It says that land and buildings can be two sovereign objects of ownership, with each of them having restrictions in relation to the other property (Rozenfelds 2008). The norm refers to special legal norms that establishe the lease relations between the land owners and building owners.

Legal doctrine state that "this regulation also includes fiction, because in practical terms, only one of the property rights can really be utilized, while the other property's owners suffer from restrictions and cannot fully exercise their ownership rights" (Rozenfelds 2008). Fictive or realistically unusable are the land owner rights, because land owners haven't got full right of control over their property, i.e. owners cannot possess and use their land. However, they must bear the obligations and duties ofthe maintenance of the land (Tieslietu ministrija 2012). The landowner only has the right to receive monetary compensation from third parties that are using his or her land.

Intricacies of the legal framework regulating compulsory land lease

When the law on land reform in Latvian cities was adopted in 1991, support was given to the proposal that owners of buildings should have the right to receive lease fee from the users of the land. Some members of the Supreme Council objected against this "feudal lease", which was created by these regulations, but the majority decided that the failure to restore property rights would legitimize what the Soviet Union did ("an international act of banditry" (Augstaka Padome 1991c, R. Rikards)) and what the Latvian SSR did, expropriating properties (Augstaka Padome 1991c, L. Mucins; Augstaka Padome 1991b, J. Bojars).

Members of the Supreme Council did not debate whether these lease relationships should be considered as rights on property (right *in rem*) or ones that emanate from obligation. Civil legal relations at that time were still regulated by the norms of the Soviet Latvian Civil Code, and these norms did not distinguish obligation rights and property rights. The code did not even allow private individuals to buy property or have a right in the property of another, like encumbrance *(ius in re aliena)* (Vebers

1979). On the other hand, the code did have general rules about concluding agreements and about rent of properties (17).

Parliament member L. Mucins had this to say during the debates: "I think that rent exists in the world, as well as the circumstances where the real estate ownership is separated, if the land belongs to one person, while the building belongs to someone else; all of this can be resolved with legislation". He added that the Legislative Issue Commission was dealing with the issue of including a whole chapter in the Civil Code. L. Mucins also said that before the Civil Law took effect in 1937, Baltic laws had norms that in great detail regulated relationships when land belonged to one person, while the building belonged to another (Augstaka Padome 1991c, L. Mucins). Presumably L. Mucins was thinking about quitrent (18) regulated in Local Law Collection of Baltics (19).

Legislative decisions about land reform were always focused on protecting and guaranteeing both the rights of landowners and building owners so as to ensure the fairest balance possible between their interests. When regulations were being prepared, the legislature did not think about nuances related to the new legal concept of lease, assuming that these issues could be addressed in greater detail in the Civil Law. The right to receive a lease fee was seen by the legislature as the most appropriate way of ensuring that the rights of landowners would be observed and legal relations between landowners and building owners would be regulated (Satversmes tiesa 2009, Case No. 2008-34-01, p. 4).

In the Civil Law, that was reinstated after the laws on land reform took effect, the principle of freedom of contract is enshrined (Svarcs 2011). Compulsory land lease bears little similarity to contract and it is not in line with the definition of leases in the Civil Law and content of legal concept of lease in the Civil law system. Article 2112 of the Civil Law states that "a lease or rental contract is an agreement pursuant to which one party grants or promises the other party the use of some property for a certain lease or rent fee. "Under Latvian law of obligations, a contract within the widest meaning of the word is any mutual agreement between two or more persons on entering into, altering, or ending legal relations. In the narrower sense, a contract is understood as an expression of common intent of the parties with the purpose of establishing obligations (Article 1511 of the Civil Law). When it comes to properties with separated ownership, compulsory land lease does not comply with the principle of freedom of contract. It is not established by voluntary agreement. Lease relations begin before any agreement has been reached on the lease fee and the payment terms. Obligations between landowners and building owners are established when the ownership rights of both owners are registered in the Land Book (and sometimes even before that). Parties have limited rights to agree on the essential elements of a lease agreement – the object of the lease and the fee (as it is required by Article 2124 of the Civil Law). Parties often do not know the boundaries of the land plot that is being leased. In most cases, this is determined by administrative acts, allowing parties to agree only on the lease fee (Par zemes reformu Latvijas Republikas pilsetas 1991, 12 (1) note under 1) and 2); Par valsts un pasvaldibu dzivojamo maju privatizaciju 1995, 1. 20), 54 (1). If agreement is not reached, the lease fee is determined by law or a court ruling.

Existence of compulsory land lease relations mean that both the landowner and the building or apartment owner are obliged to enter into a land lease agreement (Par zemes reform Latvijas Republikas pilsetas 1991: 12 (1) note under 1) and 2), 12 (2), 12 (2^1), 12 (3), Par valsts un pasvaldibu dzivojamo maju privatizaciju (1995), 50 (1) 3), 54 (1), Augstakas tiesas Senats 2007a, SKC-535/2007; Augstakas Tiesas Senats 2007b, SKC-712). Parties cannot choose their contractor, and they cannot terminate the lease agreement (Satversmes tiesa 2009). Restriction to terminate the lease relations in other way than by unifying the ownership of the property means that the legal aspects of these relations bears more similarity to rights on property (rights *in rem*) than to obligations. These legal relations are related to a property not to a person, owner of a property, as it would be under the law of obligations (Rozenfelds 2008). All of this leads to a conclusion that compulsory land lease under the Civil Law system has characteristics of right on property, namely, real right on the property of another that can be used even against the will of the owner.

Compulsory land lease is more comparable to an encumbrance – usufruct or real right (20). It manifests as a restriction on landowners' right to use, enjoy, and dispose of their property. In accordance with Articles 2130–2014 of the Civil Law it is the duty of the land owner to transfer the property into the building owner' possession and to ensure it can use it as a lessee (Rozenfelds 2008). When it comes to building owners, one can observe characteristics of servitude, real right, building right *(emphyteusis)* as well as elements of the quitrent not regulated in the Civil Law. Owners of buildings or apartments have no restrictions on the use and possession of their property. They also have the right to use the property of another (usufruct), i.e. the right to possess it and to derive the utility, profits, and advantages that land may produce, bearing only the duty to pay the fee to the landowner.

In 1940, in commenting on the Civil Law, Professor V. Sinaiskis argued that the use of the property of another in the civil legislation can be regulated in two ways: 1) as usufruct – a real right on the property of another and 2) as contractual right under the law of obligations. The difference between the two is that in the former case, the use of someone else's property is absolute (direct) in the sense that the user can use the property irrespective of the other party (owner of the property). In the latter case, the usage rights are relative (indirect), as they to involve the agreement with the other party (Sinaiskis 1996). When it comes to compulsory land lease, the right to use the property of another, although to a limited extent, is absolute as this right does not depend on the will of the owner of the property. Thus, its legal characteristics bring it close to the right *in rem*.

The Civil Law part on property rights was reinstated on September 1, 1992. To legalize existing properties with separated ownership, the law (21)included an exception from the general *superficies solo credit* presumption that is enshrined in Article 968 of the Civil Law (22). The legislature did not amend norms that regulated reforms so as to replace the legal concept of compulsory land lease with, for instance, servitude or real right that could be included in the Civil Law system. Neither did the legislature reinstate the provisions on quitrent, provided in Local Law Collection. Instead the concept of a "lease"is still applied to quasi-contractual legal relations which, in contrastto the legal concept of lease under the Civil Law, are not contracts. They do not

contain the essential element of a contract – common intent of the parties. The coercive nature thereof means that compulsory land lease is more similar to encumbrance than contract (Rozenfelds 2012).

Alternatives in regulating legal relations in properties with separated ownership

Legal relations that are very similar to compulsory land leases in Latvia are regulated also in a different way. The exception relates to properties at the free ports in Riga and Ventspils. Respective laws provide that the free port has the right to establish a personal servitude on the land occupied by it if the land belongs to another (23). If a servitude is established, the free port pays the taxes and covers the expenses relating to the maintenance of the land. If the free port does not exercise the right to establish a personal servitude on the land owned by other persons, it is presumed the rights of the owner are not restricted and the respective taxes and expenses are to be paid by the owner of the land. The law provides that the user of the land pays compensation for the servitude to the owner in amount that shall not exceed five per cent annually of the cadastral value of the land.

It is said that differences in freeport regulations are down to the fact that "the legislature has decided that a port is a closed territory with a special operation regime and particular conditions of economic activities" (Satversmes tiesa 2009, Case No. 2008-34-01, 15.1). The main difference relates to the rights of the land user. The free port has not only the right to use the land that is owned by other persons for port needs, but also to lease it out and construct buildings and structures that are necessary for the operation of the port. This means that the free port can use the land and deal with it disregarding the will of the landowner. This right is far more extensive than is the case, for instance, apartment owners. When it comes to compulsory land lease, owner of a building has the rights to use the land parcel only at the extent provided for in a lease agreement (if it has been concluded in writing) (Satversmes tiesa 2009, Case No. 2008-34-01, 15.2).

Legal scholars have argued that buildings on the land that is owned by other person could be classified in law as a predial servitude (Satversmes tiesa 2009, Case No. 2008-34-01, p.4). This would need an addition to the list of existing servitudes on the basis of the example that is found in the Swiss Civil Law. Alongside the existing predial servitudes Article 1172 or Article 1173 of the Civil Law could state that a servitude to the land that is necessary to maintain the building may also be established for the benefit of buildings (Rozenfelds 2008). The fact that compulsory land lease is more comparable to predial servitudes in the sense that there is a right to use and not to possess the land disregarding the will of the landowner, derives from the predial servitudes connection with the property not with the owner of it. The owner of the property is free of any active obligations vis-à-vis the user of the servitude, and the obligations largely mean refraining from things that would hinder the ability to use the servitude right (Article 1140 of the Civil Law). It has also been argued that a return to the hereditary lease *(emphyteus)*, building rights or *dominium directum* and

dominium utile would help to deal with the problem of separated ownership. The Civil Law, for instance, could enshrine a new legal concept of compulsory land lease, similar tohereditary lease (Rozenfelds 2008). Parliament has objected to this idea, however, arguing that the replacement of compulsory land lease with a servitude would be useless and complicated (Satversmes tiesa 2009, Case No. 2008-34-01, 23.1).

What Parliament member L. Mucins said during the debates about the right of landowners to receive "rent" from the building owner suggest that as the draft law was being prepared, there was an idea about restoring the regulation of quitrent so as to regulate legal relations between the owners of land and buildings on it (Augstaka Padome 1991c, L. Mucins). However, this was not done. The law on land reform in Latvian cities still includes the right to receive a "lease fee" without any reference to a special norm *(lex specialis)*. Thus, this right is dependent on the execution of the lease agreement.

The Civil Law does not include the legal concept of hereditary lease (*emphyteusis)* that is part of Roman law. This concept was regulated by Articles 4132–4154 of the Local Law Collection (Tiutriumov'' 1927). Although there are some similarities between compulsory land lease and hereditary lease, where the actual right to use the property belonged to the person who does not have formal ownership, these concepts are very different (Rozenfelds 2008). Hereditary lease is heritable and transferable obligation to economically use the immovable property belonging to another person, gaining fruits from it in return to a specific annual lease fee. Historically this legal concept was introduced by the Roman Empire, which leased out its plots of land to ensure independent farming (Kalnins 2010). Hereditary leasedoes not cover the legal issues of the construction of individual buildings on leased property, as this is regulated under building right *(right of superficies)* or hereditary building right known in Germany *(Erbbaurecht)*. Building right is heritable and transferable real right on the property to erect and use a building built on a land owned by another. After the end of the building right the building erected on the basis of the building right becomes the property of the landowner as an essential part of the land. In 2015, the Civil Law of Latvia was amended to include regulations for building right, but these norms apply to the right to build and use non-residential buildings or engineering structures (Article 1129.[1] of the Civil Law). The building right only regulates the voluntary establishment of separate ownership and the scope of the rights and obligations of the parties during the existence of the building (Saeimas deputati 2013, [2]).

The 1937 Civil Law includes a regulation for an atypical legal concept for Roman law – a charge established on an estate (Rozenfelds 2008). Yet the Civil Law did not take over the regulation of quitrent that was included in the Local Law Collection. Quitrent was regulated in the Local Law Collection as a subtype of a charge established on an estate. The decision was made because at the time the Civil Law was written, it was assumed that existing cased separated ownership will be eliminated by unifying the property rights under the procedure specified in a special law (24). Although there are noticeable similarities between quitrent and hereditary lease, quitrent was a concept of rights on property while, while hereditary lease was a concept of law of obligations. The latter could become a real obligation if the agreement is corroborated in the Land Book (Bukovskii 1914; Konradi, Valters 1935). Norms regulating quitrent as a special

case indicated the situation in which the lessor built a building on the leased plot of land, finding that in that case the buildings remained the property of the lessor (Konradi, Valters 1935). Quitrent ended when the last less or died if he did not have any heirs, or there was a confusion of rights such as in case of the landowner exercising the right of first purchase to acquire the building or the owner of the building buying the land. The rights of landowners were protected by a law that said that if quitrent payments had not been paid for three years, then the landowner had the right to demand that the building be sold via a public auction (Konradi, Valters 1935).

It may be that the inclusion of the regulation of the legal concept of compulsory land lease in the part on property rights in the Civil law, in line with the building rights, as a special case of quitrent, would have resolved a series of practical problems related to receiving payments for the use of land. E.g., this may have solved the issues in relation to the binding nature of the court rulings to the new building owners and building managers, and also helped in seeking out ways of unifying the separated ownership of property (Snipe, Slitke 2007).

Challenges in applying the law

Currently disputes between landowners and building owners are reviewed by courts on the basis of the law on land reform in Latvian cities and the law on privatization of state and local government residential buildings. The rights and duties of building managers are regulated by applying norms from the law on administration of residential houses (25). Although both the privatization and the land reform process concerning the specific property has long been completed, the disputes are still dealt in accordance with the norms from laws that regulate land reforms and privatization. This is because the Civil Law and other laws do not have any regulations concerning the compulsory land lease. To a certain extent, legal norms of the Civil law regulating lease agreement can be applied, but due to the previously described peculiar legal characteristics of the compulsory land lease these norms do not resolve a series of problems.

There are essential differences in opinions expressed in legal writing and case law with regards to the sources of obligations in case of compulsory land lease: do these obligations arise from a contract or directly from the law, regardless of a declaration of will. The answer to this question is crucial as it depends on the scope of rights and obligations of the parties, the time when obligations have to be fulfilled, and the limitation period of the claims.

Article 1402 of the Civil Law says that obligations arise from contracts, from wrongful acts or directly from law. The formulation of this text suggests that obligation can only have one of the three bases. Unlike the property rights, obligations cannot rise from court ruling, as it has only a declarative force. Court ruling specifies the basis of the obligation, but does not create one (Klot 1940). In legal writing, an opinion has been expressed that one obligation can have several bases (Rudans 2006). Still, a separation between two semantically similar concepts should be made: there is a "basis of an obligation" in obligation law and "basis of a claim"in civil procedure.

The latter relate to actual factual matters concerning establishment of obligations (adjudicative facts) which the claimant brings to justify their claim (Augstakas Tiesas Senats 2006, SKC-635/2006). This means that a distinction must be drawn between competing bases of claims and the basis of an obligation. The same facts can give rise to various obligations; this concept is called competition of claims (Brox 2000). The person who is raising the claim can choose and change the subject-matter of the claim, but that does not mean that there is just one obligation between the parties.

The compulsory land lease being a part of the law of obligations, over the course of time, led courts and legal scholars to express opposing views about the basis of obligations in these relations – is the basis of the obligations a contract or do these obligations derive directly from law.The identification of the basis of obligations is linked to the moment when obligations are established, when the right to claim the performance is established and when this right terminates or expires. There is also the debatable issue of the time when the duty to pay taxes is established. Court rulings about this issue are radically different, thus inevitably causing social tensions in society.

Given that compulsory land lease affect so many people, there is a reason to think that ensuring legal certainty is necessary which can be achieved with normative regulation of these relations. The law must address the main problems in application of substantive and procedural provisions of law that are currently incomplete, as seen in many court cases. The author of the article is a sworn attorney who specializes in the area of compulsory land lease issues. Author's clients, landowners, during years 2017–2018, have asked for legal help with more than 4000 claims against the apartment owners regarding collection of lease fees.

Experts have made several proposals on regulation of compulsory land lease, which include drafting a new law to regulate compulsory land lease or establishing servitudes where now compulsory land lease relations exist. It would be desirable to ensure that compulsory land lease is regulated as a separate and new legal concept, but from the perspective of the legal system, this legal concept should be included in the Civil Law system, as opposed to creating a new hybrid, legal concept bearing the characteristics of both rights on property and law of obligations.

Final remarks

Creation of the separated ownership was a political decision made in order to enable restitution of original properties. From today's perspective, this political decision of 1990's may be criticized. Nonetheless, the current legislature has to deal with the consequences of this decision. As a considerable part of the society is directly involved in these relations, it is a challenge for the legislature to adopt a regulation that is not populistic and short-sighted. There may be a temptation to adopt a regulation favorable to apartment owners while infringing the fundamental rights of land owners, as the 110 000 apartments affected house a big part of voters.

Currently the legislature has chosen to approach the problem by drafting a law for unifying separated properties, however a single law will not solve this multilayered problem. In author's opinion, the public policy should be directed in three directions

simultaneously. First, a law should be drafted that would provide a procedure to voluntarily unify the ownership of property. Second, a public policy should be adopted to motivate the involved parties to use this procedure (i.e. tax exemptions, state aid or state guaranteed loans for purchasing the land under a building). Third, the legislature should adopt amendments to the law that would guarantee a simple and easy procedure for collecting lease fees until the ownership is unified.

Further on, given the characteristics of the compulsory land lease described in the article, the author believes that a new Civil Law chapter should be adopted to regulate basic aspects of compulsory land lease. It should consolidate regulations currently included in the laws regulating land reform and privatization processes so as to determine the rights and obligations of parties in compulsory land lease legal relations. This chapter should be included in the part on property rights of the Civil Law, in lieu of the former chapter of quitrent. It shall describe the content of obligations, the origin and scope of the right to claim, the amount of lease fees for the cases where the parties haven't got an agreement, the criteria to determine the border of the leased land plot and other obligations and rights for the parties, as well as the termination of compulsory land lease relations (i.e. with the confusion of rights, or if a building was destroyed).

Notes:

(1) See: Section 2 of the Decision No. 120 of Ministru Padome (the Council of Ministers) (1990) "Par neatliekamiem ipasuma konversijas realizacijas pasakumiem Latvijas Republika" [On urgent measures for the implementation of property conversion in the Republic of Latvia]. Available: https://likumi.lv/doc.php?id=72721. (In Latvian)

(2) See the preambul of the decision of Augstaka Padome (the Supreme Council) (1991) "Par valsts ipasumu un ta konversijas pamatprincipiem" [On State property and the basic principles of its conversion]. Available: https://likumi.lv/doc.php?id=65829. (In Latvian)

(3) For comparison see Crowder 2012, p. 262.

(4) See *supra note* 2, Sections 3.1) and 5.3).

(5) Par zemes reformu Latvijas Republikas pilsetas (1991) [On land reform in the cities of the Republic of Latvia]. Available at: https://likumi.lv/doc.php?id=70467 (In Latvian)

(6) See Regulation No. 220 of Ministru Kabinets (the Cabinet of Ministers) "Par kompensacijas aprekinasanu bijusajiem zemes ipasniekiem vai vinu mantiniekiem un maksas noteiksanu par ipasuma nodoto zemi pilsetas" (1994) [The calculation of compensation for former landowners or their heirs and setting the payment for urban land transferred]. Available: https://likumi.lv/doc.php?id=58871 and Regulation No. 171 of Ministru Kabinets (the Cabinet of Ministers) "Noteikumi par kompensacijas aprekinasanu bijusajiem zemes ipasniekiem vai vinu mantiniekiem un maksas noteiksanu par ipasuma nodoto zemi pilsetas" (1997). Available: https://likumi.lv/doc.php?id=43364. (In Latvian)

(7) See *supra note* 5, Section 12 (2) in wording in force until 14.11.1995.

(8) See *supra note* 5.

(9) Par valsts un pasvaldibu dzivojamo maju privatizaciju (1995) [On privatization of state and local government residential houses]. Available: https://likumi.lv/doc.php?id=35770. (In Latvian)

(10) Maareformi seadus (1991) [Land Reform Act]. Available: https://www.riigiteataja.ee/en/eli/529062016001/consolide, see Section 7; Pilieciu Nuosavybes TeisiuI Islikusi Nekilnojamaji

Turta Atkurimo Istatymas (1997) (Law on the restoration of the rights of ownership of citizens to the existing real property Nr. VIII-359. Available: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=5sjolg0fi&documentId=TAIS.364111&category=TAD, see Section 12. (In Lithuanian)

(11) Pre-emption right is provided in: Section 14 of Par atjaunota Latvijas Republikas 1937.gada Civillikuma ievada, mantojuma tiesibu un lietu tiesibu dalas speka stasanas laiku un kartibu (1992) [On the time and procedure of entry into force of the reinstalled introduction, inheritance rights and property rights parts of the Civil Law of the Republic of Latvia, 1937] Available at: https://likumi.lv/doc.php?id=75530, Section 17 of Par zemes reformu Latvijas Republikas pilsetas, see *supra note* 5, Section 54(3) of Par valsts un pasvaldibu dzivojamo maju privatizaciju: Latvijas Republikas likums, see *supra note* 9. (In Latvian)

(12) See section 119.1 of the Order No. 84 of Ministru Kabinets (the Cabinet of Ministers) "Par Valdibas ricibas planu Deklaracijas par V. Dombrovska vadita Ministru kabineta iecereto darbibu istenosanai" (2012) [On the government action plan declaration on the implementation of the planned activities of Valdis Dombrovskis' Cabinet of Ministers]. Available: https://likumi.lv/doc.php?id=244182. (In Latvian)

(13) See Order no 541 of Ministru Kabinets (the Cabinet of Ministers) "Par Koncepciju par Civillikuma lietu tiesibu dalas modernizaciju" (2010). [On the concepts on modernization of the part on property rights of the Civil Law]. Available: https://likumi.lv/doc.php?id=217866. (In Latvian)

(14) See the database of parliamentary documents of 12th Saeima. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf. (In Latvian)

(15) On 11.03.2019. a public discussion in possible models for unifying the separated ownership was held in Saeima. Information and presentations Available: http://saeima.lv/lv/aktualitates/saeimas-zinas/27738-diskusija-saeima-parruna-dalita-ipasuma-izbeigsanas-problematiku. (In Latvian)

(16) See *supra note* 11.

(17) Compare Chapter 3, Chapter 29 of the Civil Code of LSSR.

(18) Grund- oder Erbzinsrecht in German; *czynsz* in Polish, *cens* in French, and *census* in English.

(19) Svod mestnikh uzakonenii gubernii Ostzeiskikh (In Russian); Provincialrecht des Ostseegouvernements (In German)

(20) According to regulation No. 241 (2006) of Ministru Kabinets, a building owned by a third person is considered as an encumbrance of the land property.

(21) Section 14 of the law "Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ievada, mantojuma tiesibu un lietu tiesibu dalas speka stasanas laiku un kartibu". See *supra note* 11.

(22) Section 968 of the Civil Law provides: "A building erected on land and firmly attached to it shall be recognized as part thereof."

(23) Section 4 of Rigas brivostas likums [The free port of Riga law]. Available at: https://likumi.lv/ta/en/en/id/3435-the-free-port-of-riga-law; Section 4 of Ventspils brivostas likums [The free port of Ventspils law]. Available: https://likumi.lv/ta/en/en/id/41737-the-free-port-of-ventspils-law. (In Latvian)

(24) Likums par dalitu ipasuma tiesibu atcelsanu (1938) [Law on abrogation of separated ownership]. Valdibas Vestnesis, Nr. 288, 15.12.1938.

(25) Dzivojamo maju parvaldisanas likums (2009) [Law on administration of residential houses]. Available: https://likumi.lv/ta/en/en/id/193573-law-on-administration-of-residential-houses (In Latvian)

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