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Origins of Separated Ownership and Possible Solutions for Unifying Thereof

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The article focuses on the issues of separated ownership of properties and compulsory land lease in the cities of the Republic of Latvia. Separation of ownership was a result of land reform, whereby land and buildings on it have different owners. The first part of the article examines the historical circumstances, in which separated ownership of properties and compulsory land lease originated and reveals why the legal relationships between landowners and building owners are regulated as lease agreements. Further on, the article analyses three possible ways (models) of unification of separation ownership of properties. While focusing on analysis of these models, the main unresolved issues concerning collection of land lease payments are outlined. Among these are the legal status of the community of apartment owners and representation of apartment owners in court proceedings.

Keywords: separated ownership, restitution, compulsory land lease, unification of ownership, a buyout, community of apartment owners, property right, restriction on property right, land reform.

Contents

Introduction

The continuity of the State of Latvia is 'the backbone' of Latvia's constitutionalism.[1] After the restoration of independence, one of the most significant symbolic steps to demonstrate the legal continuity of the State to the international community, was restitution, i.e., restoration of the title to the immovable property, which the owners had been deprived of during the years of Soviet occupation.[2] Restoration of the private land ownership and denationalisation of nationalised properties was an indispensable part of the transitional period in many countries of Central and Eastern Europe. At least partial restoration of the previous status in order to ensure justice following the collapse of the Soviet order was perceived as being self-evident.[3]

The Supreme Council of the Republic of Latvia could choose the form and the scope of restitution – either to return the original property or to use various other forms of compensation, as was done, for example, by Hungary.[4] Latvia decided to return original properties, or to compensate their value by government certificates in those cases, where it was impossible to return the property or a person entitled did not want to regain it.[5] The preference was given to the return of original property. This symbolically demonstrated the continuity of the state and, at least partial, restoration of the legal status of 1940. The 'creation of owners' was the essential basis to ensure the transition to the market economy, restore the significance and value of private property and private economic initiative.[6]

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1 *Endziņš, A.* Latvijas konstitūcijas apskats, kas rada šaubas un jautājumus [Overview of the Latvian Constitution, which Causes Doubts and Questions]. *Jurista Vārds*, No. 8(363), 2005, p. 4.

2 *Feldman, M.* Justice in space? The restitution of property rights in Tallinn, Estonia. *Ecumene*, No. 6(2), April 1999. Available: https://www.jstor.org/stable/44252046 [last viewed 24.09.2018], p. 168.

3 *Blacksell, M., Born, K. M.* Private Property Restitution: The Geographical Consequences of Official Government Policies in Central and Eastern Europe. *The Geographical Journal*, No. 168(2), June, 2002. Available: https://www.jstor.org/stable/3451616 [last viewed 24.09.2018], pp. 178–179.

4 *Pogany, I.* Righting wrongs in Eastern Europe. Manchester, New York: Manchester University Press, 1997, pp. 162–163.

5 Par valsts īpašumu un tā konversijas pamatprincipiem [On State Property and the Principles of Conversion thereof]. *Ziņotājs*, No. 19/20, 23.05.1991, *Diena*, No. 69, 11.04.1991, para. 3) of section 5; Par zemes reformu Latvijas Republikas pilsētās [On Land Reform in Cities of the Republic of Latvia]. *Ziņotājs*, No. 49/50, 19.12.1991, *Diena*, No. 242, 13.12.1991, the first part of section 12 in the wording that was in force until 14.11.1995.

6 *Grūtups, A., Krastiņš, E.* Īpašuma reforma Latvijā [Property Reform in Latvia]. Rīga: Mans Īpašums, 1995, p. 8; Par valsts īpašumu un tā konversijas pamatprincipiem [On State Property and the Principles of Conversion thereof]. *Ziņotājs*, No. 19/20, 23.05.1991, *Diena*, No. 69, 11.04.1991, Preamble.

1. Origins of Separated Ownership of Land and Buildings Thereon

1.1. Historical Circumstances That Created Separated Ownership

The principles of restitution were established in the law "On Land Reform in the Cities of the Republic of Latvia", which provided for the former landowners and their heirs the right to demand restoration of the property rights to the land plots previously in their ownership. Only exceptions were the cases, where the former landowners, after 22 July 1940, had alienated their property or if citizens of the Republic of Latvia had built their residential houses on these land plots. In all other cases landowners were given a choice: to demand restoration of the property rights and receive a lease payment from the owner of the building, or to demand an equivalent land plot, or to receive compensation.[7] Since it was difficult to allocate an equivalent land plot within city boundaries but the compensation matters were uncertain as to amount and means (coverage of certificates was dubious), the majority of the former owners chose to receive original property, even if buildings had been constructed on the land.[8]

Contrary to Latvia, neither Lithuania nor Estonia restored the property rights of the former owners to the land on which constructions owned by third persons were located; the State retained this land in its ownership and allowed the owners of the buildings to use and to buy it out.[9] This led to the establishment of characteristics of the dualistic system of ownership, which is an exception to the system of divided ownership stipulated in the Civil Law.[10] Thus, the law allowed the existence of two ownership rights, existing alongside each other, with respect to the same spatially delimited object; this is a legal solution unknown to any other legal system in Europe.[11]

In Latvian law this phenomenon is called *dalītie* īpašumi. This term has been translated into English by mass media and some articles as 'divided properties', although this literal translation is confusing. However, in the legal sense the term *dalītie* īpašumi means separated ownership of a property. Legally, the inseparable parts of a property that should be legally united (have one owner) according to the *superficies solo cedit* presumption, namely, buildings and the land, have different owners in case of separated ownership.

In 2015, there were 285 849 buildings and constructions (not including engineering constructions) in Latvia located on, in total, 95 254 land plots,

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7 Par zemes reformu Latvijas Republikas pilsētās [On Land Reform in Cities of the Republic of Latvia]. *Ziņotājs*, No. 49/50, 19.12.1991, *Diena*, No. 242, 13.12.1991, the second part of section 12 in the wording that was in force until 14.11.1995.

8 *Grūtups, A., Krastiņš, E.* Īpašuma reforma Latvijā [Property Reform in Latvia]. Rīga: Mans Īpašums, 1995, p. 10.

9 Piliečių Nuosavybės Teisių Į Išlikusį Nekilnojamąjį Turtą Atkūrimo Įstatymas [On Restitution of Citizens' Title to Property on Existing Immovable Property]. Available: https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=5sjolg0fi&documentId=TAIS.364111&category=TAD [last viewed 25.09.2018], section 12; Maareformi seadus [Land Reform Act]. *RT*, 1991, 34, 426. Available: https://www.riigiteataja.ee/en/eli/529062016001/consolide [last viewed 25.09.2018], section 7.

10 *Rozenfelds, J. Superficies solo cedit* Latvijas tiesībās [*Superficies solo cedit* in the Latvian Law]. *Latvijas Universitātes žurnāls. Juridiskā zinātne*, Vol. 3. Rīga: Latvijas Universitāte, 2012, pp. 108–110.

11 *Rozenfelds, J.* Pētījums par Civillikuma Lietu tiesību daļas (ceturtās, piektās, sestās un septītās nodaļas) modernizācijas nepieciešamību [Study of the Need to Modernise the Part on Rights *in Rem*, Chapter Four, Five, Six and Seven]. 2008. Available: http://www.tm.gov.lv/files/archieve/lv_documents_petijumi_cl_ceturta_piekta_sesta_un_septita_nodala.doc [last viewed 30.09.2018], p. 5.

owned by other persons.[12] Among these were 3677 apartment buildings (and 110 970 apartments therein), located on 7354 land units owned by other persons.[13] These numbers show that the issues of divided property affect a considerable number of Latvia's residents.

Drafting the law "On Land Reform in Cities of the Republic of Latvia" in 1991, the legislature decided to regulate the legal relationships between the landowners and the building owners as lease agreements, providing for the landowner's right to receive a lease payment as a compensation from the user of the land. This decision derived from the historical and legal circumstances. In 1991, pursuant to article 6 of Declaration of 4 May "On Restoration of the Independence of the Republic of Latvia", the civil law relationships within the territory of Latvia were regulated by the norms of the Civil Code of the Latvian Soviet Socialist Republic, insofar these were not incompatible with articles 1, 2, 3 and article 6 of the *Satversme* [the Constitution] of the Republic of Latvia.[14] The aforementioned Civil Code did not recognise the ownership rights of individuals to land.[15] Neither did it recognise the concept of *superficies solo cedit*, nor did it provide for a right in the property of another (*ius in re aliena*), which is manifested in such institutions of the rights *in rem* as the servitude, inheritable lease or *superficies*, which, by retaining a united ownership, creates a restriction on ownership in favour of another person's rights.[16] The Supreme Council adopted the law "On the Civil Law of the Republic of Latvia of 1937" on 14 January 1992[17], by which it was decided to reinstate the Civil Law, determining, by special laws, the time and the procedure for separate chapters of the Civil Law to re-enter into force. The chapter on rights *in rem* of the Civil Law entered into force on 1 September 1991, i.e., almost a year after the law "On Land Reform in Cities of the Republic of Latvia", and only at this point the legislation on servitude was restored.[18] It follows from the above that the legislature's choice in favour of the compulsory land lease was the most appropriate in the specific legal conditions, since at the time of drafting and adopting the laws that regulated land reform no other suitable regulation for the legal relationships between landowners and building owners was available. Thus, at that point the legislature even did not

[12] Latvijas Republikas Tieslietu ministrija. Dalītais īpašums [The Ministry of Justice of the Republic of Latvia. Divided Property], 2015. Available: http://onecrm.lv/lps/meetingsearch/displaydocument.aspx?committeename=Tehnisko%20probl%BAmu%20komiteja&itemid=24635919229989771030&meetingid=1602005K%20%20%20%20%20%20%20&filename=Dal%EFtais%20%EFpa%B9ums.pdf&cc=Document [last viewed 24.01.2017].

[13] Valsts zemes dienests. Nekustamā īpašuma tirgus pārskats [The State Land Service. Overview of the Immovable Property Market]. Available: http://kadastralavertiba.lv/wp-content/uploads/2018/05/Parskats_15052015_gala.pdf [last viewed 15.06.2018], p. 5.

[14] Par Latvijas Republikas neatkarības atjaunošanu [On Restoration of the Independence of the Republic of Latvia]. *Ziņotājs*, No. 20, 17.05.1990, section 6.

[15] *Vēbers, J.* (ed.). Latvijas PSR Civilkodeksa komentāri [Commentaries on the Civil Code of the Latvian SSR]. Rīga: Liesma, 1979, p. 141.

[16] *Rozenfelds, J. Superficies solo cedit* Latvijas tiesībās [*Superficies solo cedit* in the Latvian Law]. *Latvijas Universitātes žurnāls. Juridiskā zinātne*, Vol. 3. Rīga: Latvijas Universitāte, 2012, p. 109.

[17] Par Latvijas Republikas 1937. gada Civillikumu [On the Civil Law of the Republic of Latvia of 1937]. *Ziņotājs*, No. 4/5, 30.01.1992.

[18] Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ievada, mantojuma tiesību un lietu tiesību daļas spēkā stāšanās laiku un kārtību [On the Date and Procedure for Entering into Force of the Introduction, Part on Inheritance Rights and Rights *in Rem*]. *Ziņotājs*, No. 29, 30.07.1992, *Diena*, No. 135, 24.07.1992.

have a choice as to whether the civil law relationship between the landowner and the building owner would be regulated as servitude or as compulsory land lease.[19]

On 7 July 1992, the law determining the time and procedure for the coming into force of the chapter of the Civil Law on the rights *in rem* was adopted. This law provided for a significant exemption to the general presumption of *supercifies solo cedit,* included in section 968 of the Civil Law, in order to legalise the already established situation of separated ownership.[20] Although it was theoretically possible at that time, the legal provisions that were included in land reform laws were not amended, failing to use the opportunity to create a system compatible with the Civil Law, replacing the compulsory land lease by, for instance, the servitude. It must be noted that the regulation, which established the servitude rights, was later adopted with respect to the lands of free ports.[21] However, with regard to the separated ownership of properties in the cities of the Republic of Latvia, the legislature reinforced the aspects of dualistic system of property, and continued applying the concept of 'lease' to the quasi-contractual legal relationship, although the latter lacked the element of the parties' will integral for contracts and whose coercive nature suggests it being more like an encumberment of ownership.[22] The only right left to the landowner is the right to demand the payment of land lease, retaining both the obligation to pay the immovable property tax and to upkeep the property, and to assume both civil and administrative responsibility for it.

1.2. Current Situation Concerning Properties with Separated Ownership

In the transitional period, the legislature's choice was appropriate for the legal situation and the political aims of the time. At the time, when the separated ownership and compulsory land lease relationships originated, it was impossible to forecast the problems of legal, economic and social nature that these solutions might cause. The legislature chose, in its opinion, the most appropriate solution to balance the lawful interests of the former landowners with the lawful interests of the owners of buildings.[23]

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[19] Judgement of 13 February 2009 by the Constitutional Court of the Republic of Latvia in case No. 2008-34-01. *Latvijas Vēstnesis*, No. 27(4013), 2009. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/07/2008-34-01_Spriedums_ENG.pdf [last viewed 15.06.2019], para. 23.1.

[20] Par atjaunotā Latvijas Republikas 1937. gada Civillikuma ievada, mantojuma tiesību un lietu tiesību daļas spēkā stāšanās laiku un kārtību [On the Date and Procedure for Entering into Force of the Introduction, Part on Inheritance Rights and Rights *in Rem*]. *Ziņotājs*, No. 29, 30.07.1992, *Diena*, No. 135, 24.07.1992, section 14.

[21] Rīgas brīvostas likums [The Free Port of Riga Law]. *Latvijas Vēstnesis*, No. 111/112(2022/2023), 28.03.2000, *Ziņotājs*, No. 8, 20.04.2000. Available: https://likumi.lv/ta/en/en/id/3435-the-free-port-of-riga-law [last viewed 15.06.2019], section 4; Ventspils brīvostas likums [The Free Port of Ventspils Law], *Latvijas Vēstnesis*, No. 1/2(716/717), 03.01.1997, *Ziņotājs*, No. 3, 13.02.1997. Available: https://likumi.lv/ta/en/en/id/41737-the-free-port-of-ventspils-law [last viewed 15.06.2019], section 4.

[22] Compare, see *Rozenfelds, J.* Pētījums par Civillikuma Lietu tiesību daļas (ceturtās, piektās, sestās un septītās nodaļas) modernizācijas nepieciešamību [Study of the Need to Modernise the Part on Rights *in Rem*, Chapter Four, Five, Six and Seven], 2008. Available: http://www.tm.gov.lv/files/archieve/lv_documents_petijumi_cl_ceturta_piekta_sesta_un_septita_nodala.doc [last viewed 30.09.2018], pp. 5–6.

[23] See Judgement of 13 February 2009 by the Constitutional Court of the Republic of Latvia in case No. 2008-34-01. *Latvijas Vēstnesis*, No. 27(4013), 2009. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2008/07/2008-34-01_Spriedums_ENG.pdf [last viewed 15.06.2019], paras. 4, 24.

Restoring the ownership rights also to the lands that were encumbered by apartment buildings meant restitution of the historical justice with respect to the lawful owners of land and their heirs. Today, it is often forgotten that during the years of Soviet occupation many citizens of Latvia were evicted from their family homes in the cities and large apartment buildings were constructed in their stead to house the migrants that were flown in from the republics of the USSR. On the other hand, it turned out that separated ownership on a property was probably not successful means to promote a market economy. The mass media reports and also observations of the legal proceedings regarding collection of the land lease show that the apartment owners do not always understand why the land had not been transferred into their property free of charge and are reluctant to accept the statutory obligation to pay the land lease to landowners.[24] However, it must be noted that the amount of land lease fee for apartment owners may differ significantly since it depends on the area of the land plot necessary for the apartment building and also on the location of the property. The landowners, in turn, are restricted by the obligation set in the law to 'conclude a lease agreement', which is a pre-condition for collecting the land lease through the court.

Although the deficiencies of the separated ownership and compulsory land lease sometimes are exaggerated not only in media but even in expert discussions, undeniably, due to legal policy, social and economic considerations, legislator could do far more to support and stimulate the unification of ownership. In the consideration of the above mentioned, both the executive power and the legislature have expressed the opinion that the preferable long-term solution would be the unification of ownership in properties with separated ownership.[25] The aim is to reach a point where the buildings and the land upon which they are erected have the same owners. The involved parties understand that this is a complex and perplexing process, which is proven by the prolonged work of the working groups established by the Ministry of Justice and by already the second draft law submitted to the *Saeima* [the Parliament] to unify the ownership.[26] However, the recognised directions and aims of legal policy are to be taken into consideration in law-making process, as well as facts, background and possible impact of the policy on the involved parties. The circumstances that foster or, quite to the contrary, have a negative impact on the interest of the involved persons in unifying the ownership must particularly be taken into consideration. Moreover, the legislature may not choose a solution for unifying the ownership in properties and compulsory land lease relationship that violate the rights to property of the involved parties that are provided for in article 105 of the *Satversme* (the Constitution of the Republic of Latvia).

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[24] *Dzedulis, Z.* Zemes nomas ķīlnieki [Hostages of Land Lease]. *Latvijas Avīze*, 17.08.2018. Available: http://www.la.lv/zemes-nomas-kilnieki [last viewed 20.10.2018].

[25] Grozījums Ministru kabineta 2010. gada 13. septembra rīkojumā Nr. 541 "Par Koncepciju par Civillikuma lietu tiesību daļas modernizāciju" [Amendment to the Cabinet Order of 13 September 2010 No. 541 "On the Concept Paper on Modernising the Part on Rights *in Rem* of the Civil Law]. *Latvijas Vēstnesis*, No. 94(4697), 15.02.2012; Transcript of the Sitting of the 12th *Saeima* of the Republic of Latvia on 17 March 2016. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/FAF4C0D35BA5CCE9C2257F8C0023E471 [last viewed 16.08.2018].

[26] Latvijas Republikas Tieslietu ministrija. Dalītais īpašums [The Ministry of Justice of the Republic of Latvia. Separated ownership]. 2015. Available: http://onecrm.lv/lps/meetingsearch/displaydocument.aspx?committeename=Tehnisko%20probl%BAmu%20komiteja&itemid=24635919229989771030&meetingid=1602005K%20%20%20%20%20%20%20&filename=Dal%EFtais%20%EFpa%B9ums.pdf&cc=Document [last viewed 24.01.2017].

2. The Possible Models for Unifying Separated Ownership

On 12 April 2018, the Constitutional Court of the Republic of Latvia delivered judgement in case No. 2017-17-01, repeatedly ruling on the constitutionality of the decrease in the amount of the compulsory land lease fee.[27] The decrease in the amount of the lease fee, set by the *Saeima*, from 6% of the cadastral value of the land annually provided in the law until 2017, to not more than 5% in 2018, not more than 4% in 2019 and not more than 3% in 2020 was contested before the Constitutional Court. The Constitutional Court recognised the respective norms as being incompatible with the *Satversme* and void as of 1 May 2019.

At the press conference, which was held after pronouncing the judgement, the President of the Constitutional Court Ineta Ziemele underscored that, by leaving the norms that were incompatible with the *Satversme* in force, the Constitutional Court had decided to not create additional tension in society. Following the principle of justice, the Constitutional Court had given time to the legislature for finding a solution to the particular situation, in the procedure of developing which the possible restrictions of persons' fundamental rights would be duly assessed and in which the rights of landowners and the owners of apartment buildings would be duly balanced.[28]

Following the pronouncement of the judgement, the legislature has focused their attention to the drafting of a legal framework to unify the separated ownership. Whereas until the beginning of 2019, just few months before the norms that were contested in case No. 2017-17-01 will become void, the enforcement of the Constitutional Court's judgement and setting the amount of the lease fee that would comply with the *Satversme*, remains unaddressed.[29]

Upon selecting public policy instruments, it is of utmost importance to start with defining the aim to be attained: is it the complete unification of ownership in all the properties by imposing the obligation on both parties, accordingly, to sell or to buy out the land, or should only the procedure be adopted how to unify the ownership when there is a mutual consent of the parties, or should the new regulation impose an obligation on apartment owners to buy out the land, if the landowner wishes to sell it. There are several possible models for unification of ownership of the buildings and the lands, and with respect to each of them it must be assessed, how complex it is to commence this process, what is the amount of the related costs and who covers these, and how the fundamental rights of the involved persons are to be protected. In each of the possible models, it is essential to follow

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[27] Judgement of 12 April 2018 by the Constitutional Court of the Republic of Latvia in the case No. 2017-17-01. *Latvijas Vēstnesis*, No. 74(6160), 2018. Available in English: http://www.satv.tiesa.gov.lv/en/press-release/the-norms-which-as-of-1-january-2018-decrease-the-amount-of-compulsory-land-lease-are-incompatible-with-the-satversme/ [last viewed 15.06.2019].

[28] The Constitutional Court of the Republic of Latvia. 12.04.2018. Press Conference on the Judgement in case No. 2017-17-01. Available: https://www.youtube.com/watch?v=x3MMD9962NI [last viewed 14.05.2018].

[29] See Ministru kabineta atbilde Nr. 18/TA-2000. Par Latvijas pilsoņu kolektīvo iesniegumu "Zemei zem daudzdzīvokļu mājām jābūt tikai šo māju iedzīvotāju īpašumā" [*The Cabinet of Ministers*. Reply No. 18/TA-2000. On the collective application by the citizens of Latvia "The land beneath multi-apartment buildings should be owned only by the owners of these buildings"]. Available: http://tap.mk.gov.lv/doc/2018_10/TMVest_221018_Dalita_izbeigsa.2000.docx [last viewed 19.11.2018]; Transcript of the Sitting of the 12th *Saeima* of the Republic of Latvia on 17 March 2016. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/FAF4C0D35BA5CCE9C2257F8C0023E471 [last viewed 16.08.2018].

the united policy that is oriented towards unification of ownership using tools that motivate both landowners and apartment owners.

2.1. Unification of Ownership on the Basis of Special Law by Decision of Community of Apartment Owners (Model 1)

The purpose of the draft law "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings" (No. 1211/Lp12; 115/Lp13) prepared by the Public Administration and Local Government Committee of the *Saeima* of the Republic of Latvia is to ensure that the whole land plot that is functionally necessary for the building is bought out.[30] Although the draft law (in Latvian) uses the term 'redemption rights', it must be stressed that this term is not related to the redemption rights regulated in section 1381 and the following sections of the Civil Law.

If this model is implemented, then the community of apartment owners will have to take a decision on buying the land, i.e., the apartment owners, who, numerically, own more than a half of the apartment properties in the building, must vote on commencing the procedure for exercising the buyout rights.[31] Although, if the buyout is successfully exercised, the ownership on the property would be united (the land and the building will have the same owners or joint-owners), the procedure in general is so cumbersome that serious doubts arise, whether it would be feasible in a building consisting of more than just a couple of apartments.[32] A successful course of the procedure requires a decision by the community of apartment owners on commencing the buyout procedure, an effective meeting of apartment owners, as well as payment of full purchase price.

2.1.1. Apartment Owners' Obligation to Buy Out the Land

Substantially, the draft law No. 155/Lp13 sets not only the landowners' obligation to sell the land (section 4 of the draft law) but also imposes the obligation to participate in the buyout of the land on those apartment owners (the minority), who have voted against commencing the buyout procedure. Moreover, payment of the total buyout price is the pre-requisite for exercising this right. Consequently, it follows that someone else has to pay the purchase price instead of those apartment owners, who do not want or are unable to buy out the land, acquiring the right to claim recourse from the respective apartment owners. Otherwise, the buyout rights are recognised as not having been exercised and all activities conducted in

[30] Likumprojekts "Piespiedu dalītā īpašuma privatizētajās daudzdzīvokļu mājās izbeigšanas likums" [Draft law "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings"]. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/webSasaiste?OpenView&restricttocategory=1211/Lp12 [last viewed 30.10.2018].

[31] Dzīvokļa īpašuma likums [Law On Residential Properties]. *Latvijas Vēstnesis*, No. 183(4375), 17.11.2010. Available: https://likumi.lv/ta/en/en/id/221382-law-on-residential-properties [last viewed 15.06.2019], sections 5, 16(3); Likumprojekts "Piespiedu dalītā īpašuma privatizētajās daudzdzīvokļu mājās izbeigšanas likums" [Draft law "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings"]. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/webSasaiste?OpenView&restricttocategory=1211/Lp12 [last viewed 30.10.2018], section 5.

[32] Latvijas Republikas Saeimas Juridiskais birojs. Atzinums par likumprojektu "Piespiedu dalītā īpašuma privatizētajās daudzdzīvokļu mājās izbeigšanas likums" [Legal Bureau of the Saeima of the Republic of Latvia. Opinion on the draft law "Law on Terminating the Enforced Separated Ownership in Privatised Multi-apartment Buildings]. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/1036916E0888874EC2258294002A933D [last viewed 21.10.2018].

the framework of the procedure, except only determination or reviewing of the functionally necessary land plot, would have been conducted in vain.[33]

When analysing the proposed legislative approach of Model 1, it is important to recognise that it would impose the obligation to participate in the buyout of the land on those apartment owners, who do not want it. This obligation should be evaluated from the perspective of article 105 of the *Satversme* (enshrines the protection of property). There would be no violation of the right to property, provided for in article 105 of the *Satversme*, if the apartment owner, who would be forced, against his will, to participate in the buyout of the land, would not be imposed an obligation to make payments that exceed the lease fee paid thus far. If the buyout payments would exceed the current lease fee, the proportionality of the obligation to buy out the land could be contested.[34]

It can be concluded that the legislature's attempts to lower the lease fee, as it was done by adopting the amendments of 22 June 2017 to section 12 of the law "On Land Reform in Cities of the Republic of Latvia" and the amendments of 1 June 2017 to section 54 of the law "On Privatisation of State and Local Government Residential Houses", do not facilitate reaching of the legislature's aim, i.e., a buyout of the land. If significant restrictions on the amount of the lease fee are set in law, there is a risk that the fundamental rights of those apartment owners, who do not agree to the community's decision to buy out the land, will be infringed upon. Namely, these apartment owners, possibly, will have to make larger payments for buyout compared to the lease fee defined in law. Moreover, the amount of lease fee defined in law will not serve as an incentive for apartment owners to buy out the land.

2.1.2. Contesting the Decision of Community of Apartment Owners

If the community of apartment owners decides to buy out the land then those apartment owners, who have voted against the buyout procedure, will have the right to contest the community's decision in a court. This right follows from section 16(4) of the law "On Residential Properties", which provides that the community's decision may be contested if the decision or the procedure for taking thereof are in contradiction with the provisions of this law.

The community of apartment owners is the administrative body of a residential house which is partitioned into apartment properties (apartment building). The composition of the community of apartment owners shall include all apartment owners of the building. A decision of the community of apartment owners is binding for all apartment owners, if the apartment owners who represent the respective share (usually – more than a half) of the apartment properties in the building, have voted in favour of the respective decision.

Bringing of a claim against a community of apartment owners is encumbered by the fact that it is not an independent legal or natural person, and thus has not been vested with the capacity of being a party to court proceedings. Thus, although the law provides that the claim should be brought 'against the community', it cannot

[33] Latvijas Republikas Saeimas Juridiskais birojs. Atzinums par likumprojektu "Piespiedu dalītā īpašuma privatizētajās daudzdzīvokļu mājās izbeigšanas likums" [Legal Bureau of the Saeima of the Republic of Latvia. Opinion on the draft law "Law on Terminating the Enforced Separated Ownership in Privatised Multi-apartment Buildings]. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/1036916E0888874EC2258294002A933D [last viewed 21.10.2018].

[34] Compare, see *Balodis, K.* Komentārs pie Satversmes 105. panta [Commentary on Article 105 of the *Satversme*]. In: Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. Rīga: Latvijas Vēstnesis, 2011, theses 25, 32, 33.

be a party in the court proceedings. Pursuant to the legal definition included in the law "On Residential Properties", the community consists of all apartment owners, therefore the claim against the community should be brought as a claim against all joint owners of the building. In the case law, this norm is interpreted to mean that the claim regarding recognition of the decision as void can be brought only by an apartment owner (and not, for example, by the building manager) and it should be brought against all those apartment owners, who have adopted this decision. [35]

Lawyers have criticised the concept of the community of apartment owners regarding the capacity to be a party to court proceedings of the community, pointing to the procedural deficiencies that are linked to summoning a large number of defendants to the court.[36] Legal proceedings, involving a large number of joint owners, are not only costly but also lengthy or, actually, even impossible. If the buyout rights are exercised, it means that in the case the dispute is brought to court, the statutory deadlines cannot be met. Contesting the decision of the community of apartment owners automatically means that it will be impossible to exercise the buyout rights in the particular building.

A community of apartment owners can neither assume obligations nor acquire rights. A community of apartment owners is an unincorporated institution – an association in accordance with the regulation of section 2241 to 2261 of the Civil Law lacking legal capacity. The law provides for an exemption with regard to the landowners who has the right to bring a claim regarding conclusion of a lease agreement against one defendant – the manager, which represents the interests of all the apartment owners in the court. However, in those cases, where the decision or action of the community of apartment owners is contested, there is no legal provision facilitating legal proceedings and ensuring the procedural economy.[37] The Constitutional Court has stressed that the State has the obligation to create such legal system and establish such procedure that would allow a person to effectively defend his rights and lawful interests.[38] To ensure resolution of the cases involving a community of apartment owners, the legislature should consider and introduce a solution, pursuant to which a community of apartment owners could have a capacity to be the plaintiff and the defendant in a court. The respective legal provision should be included in section 15 of the law "On Residential Properties", which defines the status of the community of apartment owners.

At the same time, the person, who may represent the community of apartment owners, should be defined in the law. From the perspective of the right to a fair trial, provided for in article 92 of the *Satversme*, it is essential to define one person responsible for performing the managerial activities for the building. This person

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[35] Judgement of 7 October 2015 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-201/2015. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235206.pdf [last viewed 31.10.2018]; Judgement of 30 May 2014 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-1208/2014. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/161961.pdf [last viewed 22.10.2018], para. 8.3.

[36] Diskusijas un jautājumi Civiltiesību sekcijā [Discussions and Questions in the Civil Law Section]. *Latvijas Republikas Augstākās tiesas biļetens*, No. 3, December 2011, p. 23.

[37] Compare with "Par valsts un pašvaldību dzīvojamo māju privatizāciju" [On Privatisation of State and Local Government Residential Houses]. *Ziņotājs*, No. 49/50, 19.12.1991, *Diena*, No. 242, 13.12.1991, section 54(2).

[38] Judgement of 9 January 2014 by the Constitutional Court of the Republic of Latvia in case No. 2013-08-01. *Latvijas Vēstnesis*, No. 8(5067). Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2013/04/2013-08-01_Spriedums_ENG.pdf [last viewed 15.06.2019], para. 13.

could be also the plaintiff and the defendant in a court, representing the numerous and changing community of apartment owners in any legal relationship. This person should have the right to represent the community, to assume obligations and to exercise rights on behalf of the community.[39]

The law should provide that the manager should be recognised as the community's representative, unless the community itself has decided otherwise and has appointed another representative. For comparison, it is defined in the Law on Collective Management of Copyright that the collective management organisation is entitled to represent even those holders of copyright and related rights who have not entered into a collective management agreement.[40]

In summary, it can be concluded that the procedure for unifying the separated ownership, provided for in the draft law "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings", in its general outline, is appropriate. However, the requirement to have a coordinated decision by the community of apartment owners and the right of each apartment owner to contest this decision makes it cumbersome and hard to implement. It is highly probable that only a small share of owners of residential buildings will exercise the buyout rights in accordance with this law.

2.2. Voluntary Buyout of Undivided Share of Land Plot (Model 2)

To establish the procedure for unifying the separated ownership, the draft "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings" uses the approach, which is based on the interpretation of section 1068 of the Civil Law, consolidated in the case law of the Supreme Court until 2016. Section 1068 of the Civil Law contains the prohibition to act with the subject-matter of the joint ownership, either as a whole or with respect to stated individual shares, without the consent of all the joint owners. Until recently it was recognised in the case law that this prohibition contains also the prohibition for one joint owner, without the consent of others, to receive lease fee for the undivided shares of the joint property.[41] The undivided share in the joint property is understood as the joint owner's rights with respect to the joint property; it is intangible property, it cannot be actually handled, *inter alia*, consumed.[42] Pursuant to section 2113 of the Civil Law, the subject-matter of lease may be all such tangible property, the alienation of which is not prohibited, as well as rights that can be transferred separately. In interpreting this legal provision, it was underscored in the

[39] AS "Latvenergo" 08.02.2009. atzinums "Par likumprojektu Dzīvojamo māju pārvaldīšanas likums" [Joint Stock Company "Latvenergo". Opinion "On the Draft Law on Management of Residential Buildings"]. Available: http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/d9a4e435aaab22a6c22575980021038c/$FILE/1438-Jur.pdf [last viewed 30.10.2018].

[40] Autortiesību kolektīvā pārvaldījuma likums [Law on Collective Management of Copyright]. *Latvijas Vēstnesis*, No. 106(5933), 31.05.2017. Available: https://likumi.lv/ta/en/en/id/291146-law-on-collective-management-of-copyright [last viewed 15.06.2019], sections 5(3), 3(2).

[41] Judgement of 15 September 2010 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-174/2010 (C04355106). Unpublished.

[42] Judgement of 14 September 2009 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. PAC-1734/2009 (C01173409). Available: http://www.zemesgramata.lv/likumi/lemumi/pac-1734.doc [last viewed 21.10.2018].

doctrine that an undivided share cannot be lent or given for storage, lease or rent, since the actual share of a property or the whole property can only be used.[43]

The arguments provided above often kept landowners from selling the undivided shares to apartment owners because the establishment of joint property of the land property and the landowner entering into the legal relationship of joint property with one or several apartment owners, theoretically, prohibited the landowner from receiving the lease fees from the other apartment owners without the consent of the joint owners.

The Constitutional Court, in examining the application of section 1068 of the Civil Law in cases when the land was jointly owned by a number of persons, recognised: "If [..] the so-called compulsory lease relations have been established, then the owner of the land plot shall have the right to request lease payment established by law proportionally to the undivided share of the land plot owned by him or her disregarding the fact whether a consent of other co-owners has or has not been received in respect to such request".[44] Following the interpretation of the legal provisions included in the Constitutional Court's judgement, the Supreme Court subsequently changed the case-law and proclaimed that section 1068 of the Civil Law was not an obstacle for satisfying a joint owner's claim regarding collection of the land lease fee proportionally to the undivided shares of the land plot in his ownership.[45] Whereas in the case of a dispute an individual landowner may bring a claim to establish the amount of the lease fee – this claim does not require the consent of other joint owners and the joint owners are not required to agree on the amount of the fee, i.e., each joint owner, proportionally to his undivided share, may receive lease fee that has been agreed on, voluntarily or via the court, with the user of the land.[46]

Hence, following the findings made by the Constitutional Court in the judgement in case No. 2010-01-01 and the current case law of the Supreme Court, legal obstacles no longer exist for each apartment owner to buy the undivided share of land, where the size of the undivided share is stipulated proportionally to the size of the apartment property. Entering into the joint ownership with any of the apartment owners no longer prohibits the landowner from receiving the lease fee from those apartment owners, who have not bought out the land.

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[43] *Grūtups, A., Kalniņš, E.* Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums [Commentaries on the Civil Law. Part Three. Rights *in Rem*. Property]. 2nd enlarged edition. Rīga: Tiesu namu aģentūra, 2002, pp. 267–268; *Torgāns, K.* (ed.). Latvijas Republikas Civillikuma komentāri. Saistību tiesības [Commentaries on the Civil Law of the Republic of Latvia. Obligations Law]. 2nd edition. Rīga: Mans Īpašums, 2000, pp. 471–472; *Torgāns, K.* Saistību tiesības. II daļa [Obligations Law. Part Two]. Rīga: Tiesu namu aģentūra, 2008, p. 98.

[44] Judgement of 25 October 2011 by the Constitutional Court of the Republic of Latvia in case No. 2011-01-01. *Latvijas Vēstnesis*, No. 171(4569), 2011. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2011/01/2011-01-01_Spriedums_ENG.pdf [last viewed 15.06.2019], para. 14.3.2.

[45] Judgement of 29 September 2010 by the Senate of the Supreme Court of the Republic of Latvia in case No. SKC-182/2010 (C30234305). Unpublished; Judgement of 30 May 2016 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-118/2016. Available: http://31.24.192.35/downloadlawfile/677 [last viewed 14.06.2018]; Judgement of 17 June 2016 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-252/2016 (C28135508). Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/270517.pdf [last viewed 14.06.2018].

[46] Judgement of 23 November 2016 by the Department of Civil Cases of the Supreme Court of the Republic of Latvia in case No. SKC-287/2016 (C20136206). Available: http://31.24.192.35/downloadlawfile/677 [last viewed 14.06.2018], para. 17.1.

The decision of the community of apartment owners on commencing the buyout procedure is no longer required to buy the land (or undivided shares of the land) in the aforementioned way; the unwillingness of one or several apartment owners to buy out the land or objective circumstances that prohibit this no longer will be an obstacle to buy the land for those apartment owners who wish to do so.

2.2.1. Collection of Lease Payments

Individual apartment owners already now may voluntarily agree with the landowner to buy the undivided shares of the land plot; however, deficiencies in the legal regulation keep them from entering into such agreements. Namely, there are no legal provisions that regulate specifically the landowner's right to receive the land lease fee if partial set-off or partial merge of the creditor and debtor into one person can be established. This applies to those cases, where the apartment owner owns undivided shares of the land property. Although as to the meaning and purpose, the apartment owner, who at the same time is the owner of the appropriate undivided shares of the land plot, should no longer pay the land lease fee, it does not directly follow from section 1071 of the Civil Law and section 13 of the law "On Residential Properties". It has been noted in the case law that section 1068, section 1069 and section 1071 of the Civil Law provides for the right of an apartment owner, who at the same time is also the joint owner of the land property, to receive the lease fee from other joint owners of the building, proportionally to the undivided share of the land in his ownership. Simultaneously this apartment owner has the obligation to pay the lease fee to the other joint owners of the land, proportionally to the undivided share of the building in his ownership (i.e. proportionally to the apartment size).[47]

To resolve the aforementioned problem, the law "On Administration of Residential Houses" should include an exemption from the general rule of section 1069 and section 1071 of the Civil Law. If an apartment owner is also the owner of undivided shares of the land plot, then the obligation to pay the lease and the amount of lease fee should be calculated as if an agreement had been reached by the joint owners regarding divided use of the land plot in joint ownership. Namely, it should be recognised that each apartment owner, who at the same time is also the owner of the land, uses the undivided share of the land property in his ownership, whereas those apartment owners, who are not landowners at the same time, use the undivided shares of the landowner, who is not at the same time an apartment owner, and pay him the lease fee.

2.2.2. Determining Land Plot for Buyout

To commence the buyout of the land if the initiative for buyout is taken by one or few apartment owners, a mandatory obligation to review the borders of the land plot that is functionally necessary for the building prior to that should be stipulated in the law. This would ensure that the borders and the area of the bought land plot will no longer change and that all apartment owners of the building will exercise the buyout rights with respect to the same land plot. All interested persons (addressees) should be informed about the administrative act, by which the competent state or local government institution determines the borders and the area of the land plot to be bought-out, as currently stipulated by section 85 of the law "On Privatisation

[47] Judgement of 15 February 2017 by the Riga City Vidzeme Suburb Court in case No. C30708816. Available: https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/304687.pdf [last viewed 18.08.2018].

of State and Local Government Residential Houses". After this administrative act has entered into force, the area of the functionally necessary land plot shall no longer be altered. This means that the first purchase agreement on the undivided shares of land may be concluded only after the functionally necessary land plot for maintaining the building has been permanently determined and reviewed.

2.2.3. Registration of Title to Property in Land Register

Successful implementation of Model 2 requires improvements to the legal regulation with regard to making entries into the Land Register. Currently, an apartment owner, upon acquiring ownership of undivided shares of the land, may register its ownership only in that division of the Land Register, in which the land property has been entered. Thus, the ownership of separate parts of the property is not unified. The ownership is unified only if the respective undivided shares of the land property are registered as part of the apartment property, amending the composition of the apartment property in the subdivision of the Land Register. The Land Register Law in force do not contain the regulation providing that the composition of the apartment property could be changed upon acquiring the undivided shares of land; however, exactly in this way, contrary to the grammatical wording of the law but in accordance with common sense, the undivided shares of land previously owned by the state are added to an apartment property that has been already privatised and entered into the Land Register, thus merging the ownership of the building (apartment) and the land.[48]

If apartment owners buy out the undivided shares of the land property, to unify the ownership of the property, the amount of undivided shares the landowner owns should be accordingly decreased in the division of the Land Register where the land is corroborated. However, the apartment owners' titles to the undivided shares of the land are to be registered in the building's division of the Land Register (the composition of both properties is to be amended), or both properties are to be registered in one Land Register division.[49] It should be emphasized that exactly by initial entering of the different parts (the land and buildings) of immovable property into separate divisions of Land Register, the dualistic system of immovable property was created.[50] Consequently, the title to undivided shares should be registered in the sub-division of the particular apartment, adding, accordingly, that the particular apartment property consists not only of the undivided share of the building in joint ownership but also of the undivided share of the particular land plot. Such registration of the title to property would also resolve the problem of collecting the lease fees for the land that has not been bought out – if the undivided shares of the land owned by the apartment owner are no longer corroborated in the land plot's division of the Land Register, the classical joint ownership in the meaning of section 1068 of the Civil Law no longer forms. This also prevents the fragmentation of the title to land property.

In summary, it can be concluded that it is possible and necessary to incorporate into the law a procedure that would allow full or partial unification of ownership

[48] Compare, e.g. division No. 100000209366 of the Land Register of Riga City – joint ownership established, and division No. 100000233353 of the Land Register of Venstpils City and sub-division No. 22787 of Riga City, where the undivided share of the land plot of the joint property has been added.

[49] Compare, e.g., division No. 100000233353 of the Land Register of Ventspils City.

[50] *Rozenfelds, J. Superficies solo cedit* Latvijas tiesībās [*Superficies solo cedit* in the Latvian Law]. *Latvijas Universitātes žurnāls. Juridiskā zinātne.* Vol. 3. Rīga: Latvijas Universitāte, 2012, p. 116.

on the basis of an agreement reached by a landowner and one or several apartment owners. For this purpose, amendments have to be introduced into the Land Register Law that would disallow fragmentation of the title to land property and would ensure gradual unification of ownership by voluntary buyout of the undivided shares of land property. The only drawback of this model is that either apartment owners or landowners might lack incentives to agree on the purchase of the undivided share of land. This causes an obstacle for voluntary buyout. A significant advantage of the model of voluntary buyout is that it does not require additional financial resources from the State.

2.3. Expropriation of Land Property to Transfer It for Privatisation (Model 3)

In May 2018, in accordance with the provisions of the first part of para. 131^3 of the *Saeima* Rules of Procedure, the *Saeima* of the Republic of Latvia received a citizens' collective application "The land beneath multi-apartment buildings should be owned only by the owners of these buildings". It contained the initiative that the title of land property should be transferred to the residents of the buildings, imposing an obligation on the State to disburse to the landowner the value of land, or to grant another, equivalent plot of land.[51]

This model of termination of separated ownership envisages expropriation of the land in favour of the State or the local government. Moreover, this would be mass-scale expropriation, which could be treated as nationalisation, thus violating the right to property enshrined in the *Satversme*. Subsequent privatisation of land plots could be done according to the procedure set in the privatisation laws since the provisions of the law "On Prevention of Squandering of the Financial Resources and Property of a Public Person" prohibits transferring the state-owned plots of land into the ownership of apartment owners free of charge.

2.3.1. Financing Required to Implement the Model

For state to buy out all land being part of properties with separated ownership, financing in the amount of the value of the land would be necessary. This amount currently has been calculated within the limits from 130 to 180 million euro up to even 300 million euro.[52] These are considerable sums, compared to the total costs for unifying separated ownership in Model 1, which in the period from 2021 to 2038 are estimated as amounting to 38 million euro.[53] However, Model 3 allows to attract financial recourses from outside the state budget, on the basis of public-private partnership. Envisaging these resources in the state budget would cause a deficit,

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[51] Available: https://manabalss.lv/zemei-jabut-maju-iedzivotaju-ipasuma [last viewed 18.12.2018].

[52] Ministru kabineta atbilde Nr. 18/TA-2000. Par Latvijas pilsoņu kolektīvo iesniegumu "Zemei zem daudzdzīvokļu mājām jābūt tikai šo māju iedzīvotāju īpašumā" [*The Cabinet of Ministers*. Reply No. 18/TA-2000. On the collective application by the citizens of Latvia "The land beneath multi-apartment buildings should be owned only by the owners of these buildings"]. Available: http://tap.mk.gov.lv/doc/2018_10/TMVest_221018_Dalita_izbeigsa.2000.docx [last viewed 19.11.2018].

[53] Latvijas Republikas Saeimas Valsts pārvaldes un pašvaldības komisija. Anotācija pie likumprojekta "Piespiedu dalītā īpašuma privatizētajās daudzdzīvokļu mājās izbeigšanas likums" (Nr. 1211/Lp12) [Public Administration and Local Government Committee of the *Saeima* of the Republic of Latvia, annotation to the draft law "Law on Terminating the Enforced Separated Ownership in the Privatised Multi-apartment Buildings" (No. 1211/Lp12)]. Available: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/5986C97B49BD24A3C225826D004B1314 [last viewed 30.07.2018].

which in turn would infringe the norms of the Stability and Growth Pact of the European Union.

2.3.2. Violation of Article 105 of the *Satversme*

The right to property is protected both by para. 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 105 of the *Satversme*. The European Court of Human Rights, in interpreting para. 1 of the First Protocol, has noted that the State has the right to control the use of property, *inter alia*, by legislation, which in certain cases allows compulsory transfer of property from one individual to another. The court concluded that the taking of property in pursuance of a policy calculated to enhance social justice within the community can be described as being "in the public interest".[54] These findings, which are often quoted in the context of unifying the separated ownership, were included in a judgement, which examined the right of tenants to purchase compulsorily the 'freehold' of the property. Namely, this legislation provided occupying tenants of 'houses' let on long leases in England and Wales with the right to acquire the freehold of the house. The basic principle of a contested reform was that leaseholders are 'morally entitled' to the ownership of the building which they have put on and maintained. This finding, possibly, can be applied also to the legal regulation that provides for buyout rights of apartment owners against the landowner's will; however, it does not give grounds for the assumption that the Convention would allow expropriation of all land properties with buildings on them.

The Constitutional Court of the Republic of Latvia in its cases has repeatedly emphasised the criteria for expropriation referred to in the third sentence of article 105 of the *Satversme*. The Constitutional Court has pointed out that coercive expropriation of property shall be allowed only: 1) on the basis of a specific law; 2) for public needs; 3) in an exceptional cases, 4) for fair compensation.[55] Section 3 of the law "On Expropriation of Immovable Property for the Needs of the State or for Public Needs" provides that a special law is adopted on the expropriation of each immovable property, if the state or the local government is unable to obtain the respective immovable property by agreeing with the owner. In this procedure, each owner has the right to be heard.

The Constitutional Court has, in particular, underscored that coercive expropriation of real estate cannot become a usual practice for meeting the needs of the State. The legislature must be convinced that there are no other solutions for ensuring the public needs and that each property expropriation should be regarded as an exceptional case.[56] These criteria are not met in the case of separated ownership because, even if it could be assumed that expropriation of the land properties, which the apartment owners do not want to buy out, are expropriated for a public need, this measure would not be appropriate – encumbering the society in general (the state budget) to ensure to a part of the owners of apartment buildings

[54] Judgement of 21 February 1986 by the European Court of Human Rights in case *James and Others vs. the United Kingdom*, appl. No. 8793/79. Available: http://hudoc.echr.coe.int/eng?i=001-57507 [last viewed 17.11.2018], § 39, 41, 45.

[55] Judgement of 21 October 2009 by the Constitutional Court of the Republic of Latvia in case No. 2009-01-01. *Latvijas Vēstnesis*, No. 170(4156), 2009. Available: http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/01/2009-01-01_Spriedums_ENG.pdf [last viewed 15.06.2019], para. 10.

[56] Ibid., para. 13.3.

the possibility to acquire in their ownership the land beneath these buildings. The State's primary task is to ensure appropriate regulation for situation when the apartment owners want to buy out the land property, rather than to expropriate all these properties.

In summing up, it can be concluded that Model 3, containing rules for the State to expropriate all land properties so that apartment owners could privatise these later, only *prima facie* seems to be a relatively simple way for unifying the separated ownership. If the State were to choose this approach, it would be unlawful and, definitely, would not stand the test of constitutionality.

Investing the budget resources into buyout of the land would also jeopardise compliance with the limits of budget deficit set by the European Commission. Implementation of the mass-scale expropriation model, referred to above, would be unacceptable in a democratic state governed by the rule of law; rather, the willingness of the house owners and landowners to agree on voluntary buyout should be promoted by creating an appropriate legal mechanism for it, the basic principles of which are presented in the description of Model 2.

3. The Amount of Land Lease Fee and Lease Collection During Buyout Process

Irrespectively of the model that the legislature will choose for unifying the separated ownership, until the completion of buyout, between the landowners and the apartment owners there will be the legal relationship of compulsory land lease. Since unification of ownership is preferred from the public policy perspective, it should be taken into account that the apartment owner's decision on buying out the land plot is the direct result from their previous experience with land lease payments. Usually, apartment owners show interest in buyout only after the landowner has begun lease fee collection as the title to the land under the building does not give to the apartment owner almost any advantages compared to the lease.

The larger the amount of the land lease fee, the more frequently apartment owners express interest in buying out the land in order to not pay the lease. Whereas in properties, where the lease fee is insignificant or the landowner, for various reasons, has been unable to collect it altogether, the interest in buying-out the land is minimal.[57] The apartment owner retains the interest in buying the land only if he has the possibility to decrease his expenses; i.e., the expected buyout price, which would be paid gradually, is lower than the lease fee. Landowners usually take a more pragmatic approach to selling of land, and they usually have doubts regarding the fair price.[58]

Therefore, one of the most appropriate and legally valid ways to promote the unifying of the separated ownership is to provide incentives for apartment owners to buy out voluntarily the land plots beneath the buildings. This can be done by providing the possibility to buy out the land on favourable terms, at the same time eliminating the restrictions on the amount of land lease fee and simplifying the procedure for collecting lease payments. To achieve this aim, it should be financially more advantageous for the apartment owners to obtain the title to property rather

[57] An interview with A. Brečs, co-chairman of the association "Land Reform Committee", uniting landowners, 07.07.2018.

[58] *Bērtule, A*. Atbalsta piespiedu dalītā īpašuma izbeigšanu [Support for the Termination of Enforced Separated Ownership]. *Lsm.lv*, 28.02.2018. Available: https://www.lsm.lv/raksts/zinas/ekonomika/atbalsta-piespiedu-dalita-ipasuma-izbeigsanu.a269729/ kilnieki [last viewed 20.10.2018].

than continue leasing it. The State, without infringing the principles of a state governed by the rule of law, may provide incentives to encourage private persons to take certain actions, envisaging the onset of comparatively more adverse financial consequences if the person fails to act. For example, the legislature has promoted timely registration of ownership rights by determining that the state fee for registering ownership rights in the Land Register shall be determined by applying ratio of 1.5, if more than 6 months have passed, counting from the day of signing the document that confirms the rights to be registered.[59]

The amendments adopted in the summer of 2017 to section 54 "On Privatisation of State and Local Government Residential Houses" and to section 12 of the law "On Land Reform in Cities of the Republic of Latvia", essentially, came in conflict with the declared public policy to unify the separated ownership since it diminished the apartment owners' economic interest in buyout of the land. Due to the provision in the law stipulating that land lease payment would decrease and it shall not be higher, respectively, than 5% in 2018, 4% in 2019 and not higher than 3% in 2020 of the cadastral value of land, the apartment owners are no longer interested in buying the land since the expected buyout price exceeds the land lease fee. At the same time, as also found by the Constitutional Court, the fundamental right of landowners to receive appropriate revenue was unfoundedly and disproportionally restricted. In addition, the possibility to collect the lease fees through the court was encumbered, since the law no longer sets the particular amount of the lease fee in case when an agreement was not reached between landowner and apartment owners.[60]

Taking into consideration the aim of public policy to promote the unifying of separated ownership, the legislature should abandon the attempts to legislate for an unfoundedly low amount of the lease fee. The lease fee should correspond to normal revenue from property; moreover, the rate of return (profitability) should be such to recover the value of property within 10–15 years.[61] Having regard to the landowners' obligation to pay the real estate tax and to pay the personal income tax at least in the amount of 10% of the received lease payments, the current (cadastral) value of the property can be recovered within 13–17 years, if the annual land lease fee constitutes 8–10% of the cadastral value, whereas with the lease fee in the amount of 3% of the cadastral value of the land, the (current cadastral) value of the property can be recovered in approximately 85 years (see table below).

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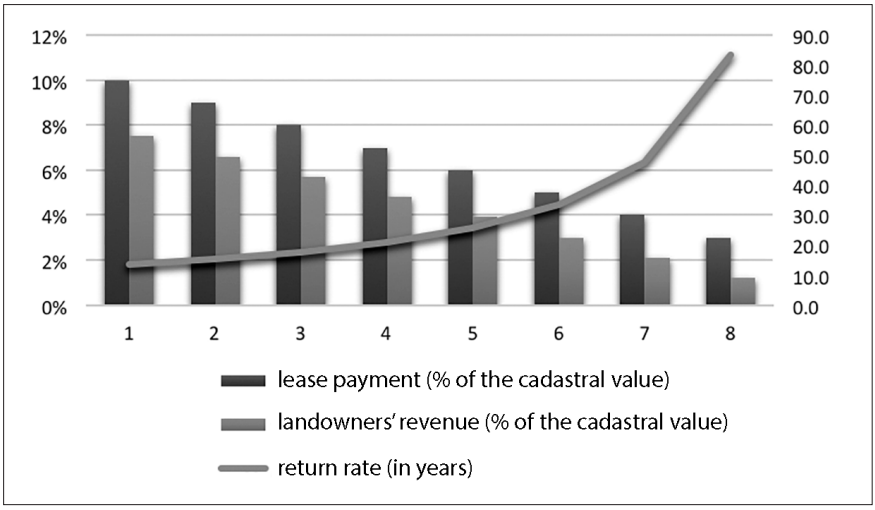
[59] Grozījumi Ministru kabineta 2009. gada 27. oktobra noteikumos Nr. 1250 "Noteikumi par valsts nodevu par īpašuma tiesību un ķīlas tiesību nostiprināšanu zemesgrāmatā" [Amendments to the Cabinet Regulation of 27 October 2009 No. 1250 "Regulation Regarding State Fee for Registering Ownership Rights and Pledge Rights in the Land Register"]. *Latvijas Vēstnesis*, No. 230(5036), 25.11.2013. OP No. 2013/230.3. Available: https://likumi.lv/ta/en/en/id/200087-regulation-regarding-state-fee-for-registering-ownership-rights-and-pledge-rights-in-the-land-register [last viewed 15.06.2019].

[60] Judgement of 12 April 2018 by the Constitutional Court of the Republic of Latvia in the case No. 2017-17-01. *Latvijas Vēstnesis*, No. 74(6160), 2018. Available in English: http://www.satv.tiesa.gov.lv/en/press-release/the-norms-which-as-of-1-january-2018-decrease-the-amount-of-compulsory-land-lease-are-incompatible-with-the-satversme/ [last viewed 15.06.2019].

[61] Standard & Poor's 500 average capitalisation rates of investments.



The legislature has various measures at its disposal for promoting the apartment owners' interest in buying out of the land. This includes state aid for setting decreased interest rates for mortgage loans for buyout, as well as real estate tax reliefs for those apartment owners, who buy the land. In this way, an apartment owner, by paying the amount which corresponds, for example, to 6% annually of the cadastral value of the property, would be able to fully buy out the undivided share of the land property within 15–20 years.

At the same time, the legislature must take reasonable steps to make the collection of lease fees easier and to facilitate the awareness among apartment owners that paying the lease is their statutory duty. For example, it could be provided in the law that the calculation, which the landowner has made in accordance with the laws, is a sufficient proof and legal grounds for the claim that has been brought to the court, while the duty to rise any objections should be transferred to the defendant.[62] The recovery of lease fees should be as simple as the recovery of the real estate tax. This would ensure the landowners' right to gain revenue from their property and would facilitate the apartment owners' interest in buying the land.

Summary

1. Separated ownership of property exists and currently remains a legal reality in Latvia, as are the compulsory land lease and challenges of collecting the lease fees. Some members of Parliament have argued in favour of compulsory unification of the ownership of these properties. However, the legislature has a choice. A radical solution would be expropriation, but such a solution would infringe upon the human rights enshrined in the *Satversme*. On the other hand, it can adapt legislation that would allow apartment owners to buy out the land. Thus, the State should work towards a public policy encouraging persons to voluntarily agree to buy out the land. This option or Model 2, examined in

[62] Compare, "Par nekustamā īpašuma nodokli" [On Immovable Property Tax]. *Latvijas Vēstnesis*, No. 145, 17.06.1997, *Ziņotājs*, No. 13, 03.07.1997. Available: https://likumi.lv/ta/en/en/id/43913-on-immovable-property-tax [last viewed 15.06.2019], section 10.

the article, would be the solution that takes into consideration the fundamental rights guaranteed in the *Satversme* pertaining to all the involved parties.

2. The State has the obligation to ensure that those owners of land and buildings, who are already willing to agree on land purchase conditions, could buy out the land and register their title to the property in a way that unifies the separated ownership. It is in the hands of the legislature to amend some of the provisions regulating corroboration of immovable properties to ensure that unification of ownership is possible when apartment owners buy the undivided shares of the land plot that the apartment is entitled to.
3. To promote the buyout process, some financial incentives are required for the apartment owners to use their buyout rights. This can be achieved, if the price of land is the same or even below the land lease fee. Legislative amendments that are aimed at decreasing the lease fee do not serve this purpose, since low lease fee shall not encourage the apartment owners to buy out the land.
4. Simultaneously, the issues related to the collection of land lease fees are to be resolved. Collection procedure should become simple and effective, granting the landowner the right to choose, whether the matters of lease should be dealt with through the manager of the building or by bringing a claim against the separate apartment owners. In the absence of an agreement the law should set the amount of the lease fee, so that the courts would not have to decide on disputes regarding it. The criteria for calculating the land lease fee should be clearly defined, imposing the obligation to contest the calculation on the defendant.
5. The legal capacity and capacity of being a party to court proceedings of the community of apartment owners should be stipulated in the law. The law should also contain provisions on representation of the community of apartment owners. This would facilitate and accelerate the examination of claims that have been brought against the community of apartment owners. The law should provide that a community of the apartment owners is represented in court by the manager. The law should also define the scope of the powers of the manager, stipulating that it has the rights and obligations to conduct cases, exercise rights and assume obligations instead and on behalf of the community of apartment owners, unless the apartment owners have agreed on authorising another representative with the aforementioned scope of the powers.

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