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THE LEGAL NATURE OF THE RIGHT TO A LONG-TERM LEASE

The right to a long-term lease was introduced in the Macedonian property law system for the first time by a subject-specific law - the Construction Land Act of 2001. Since then, the right to a long-term lease has remained a part of every Construction Land Act that followed up to the most recent one - the Construction Land Act of 2015. The regulation of the right to a long-term lease in the Construction Land Act is mostly based on the regulation of the so-called *right to build* found in the Slovenian Property Code and the Croatian Ownership and Other Real Rights Act. In the respective legal systems, the so-called right to build is undoubtedly regulated as a *right in rem* since it is found in property and ownership acts. However, In the Macedonian legal system, the right to a long-term lease was not incorporated in the Ownership and Other Real Rights Act of 2001. This raised the question of whether or not it could be considered a *right in rem*. By exploring the origins, the regulation pertaining to the right to a long-term lease, its characteristics, and the reasons for its incorporation in the Macedonian property law system, this paper aims to demonstrate that the right to a long-term lease is by nature a *right in rem*.

Keywords: property, ownership, rights in rem, long-term lease, real estate.

I. Introduction

In comparative law, the right to a long-term lease is known under the term *right to build.* This right enables its holder to erect a building or other structure above or beneath the surface of a parcel of land owned by another and consequently to acquire ownership over the erected building or other structure. As a result of the encumbrance of the land with the *right to build*, the landowner is obligated to refrain from any actions over the land that might infringe upon the rights of the holder of the *right to build*[1]. Some scholars tend to define the *right to build* as a limited *right in rem* that enables its holder to have ownership over a structure built on land owned by another, alluding that the holder of *the right to build* doesn't necessarily need to be the one to erect the structure[2]. Defining the *right to build* as

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[1] Р. Живковска, *Стварно право*, Европа 92, Скопје, 2005, 129.

[2] N. Gavella, et. al., *Stvarno parvo*, Svezak drugi, Svezak drugi, Il. izmijenjeno i dopunjeno izdanje, Narodne Novine d.d., Zagreb, 2007, 79. P. Simonetti, *Odlike prava građenja i superficijarnog prava*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 34, br. 1, 2013, 6 (3- 35). I. D. Romosan,

a right to own a structure, without owning the land it is built on, creates a wider opportunity for the landowner to suspend the effect of the *superficies solo cedit* principle[3]. This means that the landowner can break the legal unity between the land and the structure erected on that land, and transfer the ownership over the structure to another person by granting that person a *right to build*. It seems counterintuitive considering the term "*right to build*". However, as some scholars point out, the performance of the structure's construction is not intended to be an essential part of the *right to build*[4]. According to their opinion, the main function of the *right to build* is to allow its holder to acquire ownership over the structure without having to buy the land on which the structure is built.

In the Macedonian legal system, the right that enables a person to build and own a structure on a construction land owned by another is called a right to a long-term lease. Regardless of the difference in terminology, as the paper will demonstrate, the right to a long-term lease is by nature the same as the *right to build* found in comparative law. The right to a long-term lease is defined by the Construction Land Act[5] "as a right to erect a structure above or beneath a construction land owned by another, and to acquire ownership over the built structure" (Art. 21). By defining the right to a long-term lease as a right to build and consequently acquire ownership over the built structure, the Macedonian legislator has adopted a more restrictive approach regarding the suspension of the *superficies solo cedit* principle. According to the Macedonian Ownership and Other Real Rights Act of 2001 (Ownership Act)[6], everything sown or planted into the land becomes the landowner's ownership (Art. 126/1). The Construction Land Act states that the permanent structures built above or beneath the surface of the construction land are part of the land (Art. 10/1). From the provisions of the Ownership Act and the Construction Land Act, we can conclude that the *superficies solo cedit* principle is the main governing principle regarding the legal regime of the land and all things built, sown or planted over the land in the Macedonian property law system. Since according to Macedonian laws, the principle of *superficies solo cedit* applies from the moment that a permanent structure is built on a construction land, the landowner is not able to break the legal unity between the land and the structure if he or she is the person that built the structure over his or her land. However, the landowner can encumber his or her land with a right to a long-term lease. This allows the holder of the right to a long-term lease to build a structure over the encumbered construction land. As a result, the holder of the right to a long-term lease acquires ownership over the built structure for the duration of the right to a long-term lease. Consequently, the right to a long-term lease will suspend the *superficies solo principle* by preventing the establishment of a legal unity between the built structure and the construction land upon completion of the construction process. As we can see, in the Macedonian legal system, the right to a long-term lease is envisioned as a right with two essential and complementary components - the right

The Right of Superficies, Annales Universitatis Apulensis Series Jurisprudentia, 20, 2017, 62 (60-70). R. Vrendur, *Stavbna pravica, gradivo s posveta Nepremidnine,* Nebra, 2008, 6.

[3] Р. Живковска, *op.cit*, 159.

[4] P. Simonetti, *Odlike prava građenja i superficijarnog prava, op. cit.*, 7.

[5] Official Gazette of the Republic of Macedonia, number 15/2015.

[6] Official Gazette of the Republic of Macedonia, number 18/2001.

to build a structure on someone else's land and the right to acquire ownership over the structure once it is built.

When a *right to build/right to a long-term lease* has been established, the permanent structure built under that right becomes an accessory component of the right to a long-term lease, or in other words, the structure forms a legal unity with the right to a long-term lease and not with the land it is built on. Since the right to a long-term lease and the structure as its accessory component form a legal unity, the holder of the right to build transfers ownership over the structure with the transfer of the right to a long-term lease. The same applies if the right to a long-term lease has been encumbered with a mortgage. In that case, the mortgage will extend on the structure as well. It is important to note that the legal unity between the right to a long-term lease and the structure is temporary because the right to a long-term lease is time-limited. Once the right to a long-term lease is terminated, by law, the legal unity between the structure and the land it is built on will be established, and the landowner will automatically become the owner of the structure, as the principle of *superficies solo cedit* requires.

II. Emergence of the right to a long-term lease (the right to build)

The right to a long-term lease dates back to Roman Law. In Roman Law, this right was treated as a contractual obligation between the landowners and the leaseholder. Based on a long-term lease contract, the leaseholder was entitled to use the land and all things found on that land, including the built structures. Additionally, the landowner could allow the leaseholder to perform construction on his land. However, this was considered to be a form of use of the land and not an opportunity for the leaseholder to acquire ownership over the built structure, even though he was the one to build it. The leaseholder had the right to use the structure under a lease and was obligated to pay rent to the landowner. It is important to underline that in Roman law the legal unity between the structure and the land was never questioned since, at this time, there were no exceptions to the *superficies solo cedit* principle[7]. In the later development of Roman law, a new type of long-term lease contract was introduced where the main obligation of the leaseholder was to build on the land given to him under a lease. This "new" type of long-term lease contract was referred to as a lease contract for construction or a *superficiary lease*. By concluding a *superficiary lease* contract the leaseholder was taking on an obligation to build a structure on the leased land. Nevertheless, the structure that the leaseholder built always became ownership of the landowner. When comparing the two contracts, scholars underline that the main difference between the long-term lease contract and the *superficiary lease* contract lies in the main contractual obligation. In the long-term lease contract, the main contractual obligation was for the leaseholder to pay rent for the use of the land and everything found on that land,

[7] P. Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 33, br. 1, 2012, 7 (3- 35). Janos Jusztinger, *Economic Significance of the Ancient Roman Superficies*, Journal on European History of Law 8, no. 1, 2017, 98 (98-102).

while in the *superficiary lease* contract, the main obligation for the leaseholder was to build a structure on the leased land and then pay rent for using the built structure[8]. Neither of the two contracts enabled the leaseholder to acquire ownership over the structure built on the leased land. Even though these two contracts didn't allow the leaseholder to acquire ownership over the structure, scholars agree that they were the basis for developing the "*superficies*" as a separate type of *jura in re aliena* on lands[9].

Historical sources addressing the origins of the right to a long-term lease have shown that this right initially emerged as an obligation between the landowner and the leaseholder. This obligation enabled the leaseholder to use or build a structure on someone else's land with or without compensation (*solarium*)[10]. Later that obligation became a special type of *jura in re aliena* known as *superficies*[11]. However, neither the obligation nor the *superficies* right allowed the suspension of the *superficies solo cedit* principle[12]. The structure used under the long-term lease contract or the *superficies right* was never ownership of the holders of those rights, it always remained in ownership of the landowner.

III. The development of the right to a long-term lease (the right to build) in the contemporary legal systems

As scholars note, the *superficies* right dating from the period of Roman law hasn't been initially accepted by European civil law systems. The initial rejection of the *superficies* right was due to its inconsistency with the concept of ownership as a direct and exclusive right over things[13]. This individualistic concept that viewed the right of ownership as an exclusive right with no room for interference or limitation dominated in the XIX century, but was later abandoned in the XX century[14]. The social and economic changes that marked the XX century also affected how ownership rights were viewed. In this period scholars began to promote the idea of a socially responsible exercise of the right of ownership. Attributing a social function to the right of ownership meant that the right of ownership could be used not just for the benefit of individual owners, but also for the benefit of society as a whole. This new understanding of the importance and functions of the right of ownership in the civil law systems enabled the implementation of general restrictions on ownership and the possibility of having different encumbrances. All those changes motivated legislators to revisit the

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[8]P. Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja, op. cit.,* 8.

[9] P. Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja, op. cit.,* 8.

[10] P. Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja, op. cit.,* 13. M. Horvat, *Rimsko pravo*, Zagreb, 2002, 234. A. Romac, *Rimsko pravo*, Zagreb, 2002, 222.

[11] A. Belén, *La propiedad superficiaria en el derecho romano Justinianeo*, Revue internationale des droits de l'antiquite 51, 2004, (369-379). Janos Jusztinger, *op.cit.* 102.

[12] . Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja, op. cit.,* 13-14.

[13] N. Gavella, et. al., *Stvarno parvo, Svezak drugi, op. cit.*,76.

[14] N. Gavella, et. al., *Stvarno parvo, Svezak drugi, op. cit.*,76.

superficies right created by the Roman law. In the European legal systems, the reception of the *superfices* right took on two trajectories. In European countries with a predominant Roman law tradition, the *superficies* right as such was introduced, with some modifications to ensure its compatibility with contemporary civil law. The European countries that embraced the German legal tradition did not introduce the *superficies* right, instead, they took inspiration from the concept that the *superficies* right was based on and created a new type of *right in rem* called the *right to build.* Unlike the Roman *superficies* right, the *right to build* allowed the suspension of the *superficies solo cedit* principle[15]. The establishment of the *right to build* led to a breakage of the legal unity between the structure and the land it was built on, allowing the holder of the *right to build* to acquire ownership over the structure for the duration of the *right to build*.

Regardless of whether a particular legal system introduced the *superfices right* or the *right to build* the reasons for introducing these rights were mainly of a social and economic nature. The legislators strived to create conditions for cheaper contraction that would be beneficial for landowners, investors and people with low income looking to get affordable housing[16]. The benefit from the establishment of these rights for the landowners was in the free development of the land and the rent they get to charge the building owners, investors benefited from the low construction costs and homeowners benefited from the affordable housing they got to acquire.

The Macedonian legislator was also driven into introducing the right to a long-term lease out of similar social and economic reasons (low construction costs, affordable housing, land development etc.), however, there was also the additional reason of attracting foreign investors. Since, at the time when the right to a long-term lease was initially introduced in the Macedonian legal system foreigners were not allowed ownership over construction land, the right to a long-term lease was intended to provide foreign investors with the opportunity to invest in construction projects and engage in land development for profit, without needing to own the land.

IV. Comparative overlook on the regulation of the right to a long-term lease (the right to build) and the superficies right

As was previously stated, European countries took different approaches while introducing the right to a long-term lease (the *right to build*) or the *superficies right* into their legal systems depending on their legal traditions. Some countries have introduced the *superficies* right (Italy), others the *right to build* (Germany, Switzerland, Slovenia, Croatia and North Macedonia), and a third group of countries do not explicitly recognize either of these rights but allow for a person to own a building or other type of structure built on someone else's land.

- In Italy, the *superficies* right is regulated by the Italian Civil Code (Codice Civile Italiano[17]). According to its provisions, the *superficies* right allows the

[15] N. Gavella, et. al., *Stvarno parvo, Svezak drugi, op. cit.*, 76.
[16] N. Gavella, et. al., *Stvarno parvo, Svezak drugi, op. cit.*, 76-77. P. Simonetti, *Odlike prava građenja i superficijarnog prava, op. cit.*, 13.
[17] Available at: https://www.gazzettaufficiale.it/dettaglio/codici/codiceCivile.

landowner to entitle a third person to build or to maintain and own a structure on his or her land (Art. 952/1). When the *superficies* right is established, the ownership over the structure can be transferred independently from the ownership over the land (Art. 952/2). The *superficies* right can be established as a permanent or temporary right. If the *superficies* right is established as a temporary right, then, according to the Italian Civil Code, when the right is terminated the structure becomes the landowner's ownership (Art. 953). When the *superficies* right is established as a permanent right it cannot be terminated even if the structure is destroyed because the superficiarius can always rebuild the structure, unless the landowner and the superficiarius have agreed to the contrary (Art. 954/3). If the *superficies* right imposes an explicit duty for the superficiarius to build the structure on the land but he or she fails to do so then the *superficies* right is terminated after the expiration of a period of 20 years.

According to the Italian Civil Code, the rules governing *superficies* rights also apply to owning or maintaining a structure beneath the surface of the land owned by another (Art. 955). The Italian Civil Code excludes the possibility for a *superficies* right to be established over agricultural lands used as plantations (Art. 956).

- France is in the group of European countries that does not explicitly regulate the *superficies* right, or the *right to build* as a separate right. However, the French Civil Code (Code Civil[18]) does regulate the suspension of the *superficies solo cedit* principle under certain conditions. According to Article 553 of the Civil Code, all structures, plants and installations placed over or in the land are presumed to be placed there by the landowner or at the behest of the landowner and therefore belong to the landowner unless it is proven otherwise. However, this provision of the French Civil Code does not exclude the possibility for a third party to acquire ownership over an underground tunnel, a building, or a part of a building built on someone else's land by prescription. If we closely analyze this provision, we can conclude that the French Civil Code allows a person to own a structure built on someone else's land, which is in the essence of the *superficies* right. However, this is not based on a previously established right. It results from overthrowing the legal presumption derived from the *superficies solo cedit* principle that the landowner owns all things found on his or her land. The French Civil Code does not specify under which conditions a third party can overthrow this legal presumption. We can reasonably assume that a third party can overthrow the presumption by proving that he or she has built the structure, or planted the seeds at his or her expense with the landowner's consent, or that the conditions for prescription are fulfilled.

[18] Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/2021-09-17/.

- The Spanish Civil Code (Código Civil de España[19]), similar to the French Civil Code, does not explicitly regulate the *superficies* right or *right to build*. However, it allows a third party to own a building, plants or crops on someone else's land under specific conditions determined by the Civil Code (Art. 358). The conditions are not specified in the Code. We can conclude that they lead from the assumption that the third party may acquire ownership over a building, plants or crops on someone else's land based on a contract with the landowner. The landowner's consent must be considered as pivotal because the Code clearly states that the buildings, plants and crops are considered to be made by the landowner or at his behest until the contrary is proven (Art 359).

- In the German Civil Code (Bürgerliches Gesetzbuch[20]), a specific right to build has been regulated, and it is called the *inheritable right to build* (Art. 1012-1017)[21]. The provisions regulating the *inheritable right to build* are abrogated in the current text of the German Civil Code. Instead, the *inheritable right to build* is regulated with a subject-specific law – the Inheritable Right to Build Act (Gesetz über das Erbbaurecht)[22]. In this subject-specific law, the *inheritable right to build* is defined as an encumbrance on land in favour of a specific person who can acquire ownership over a building above or beneath the surface of the land owned by another. This right is transferable and inheritable (§ 1/1). The *inheritable right to build* is acquired by contract between the landowner and the holder of the right. Once acquired, the *inheritable right to build* is registered in a land registry in a separate sheet explicitly created for that purpose (§ 14). According to this subject-specific law, the *inheritable right to build* is not subject to limitation by resolutive conditions (§ 1/4). The law also states that all contract clauses that obligate the holder of the *inheritable right to build* to forfeit his or her right under specific conditions are null and void (§ 1/4). However, it is permitted for the contract to contain a clause that obligates the holder of the *inheritable right to build* to transfer the right back to the landowner under specific conditions (§ 2).

- The Swiss Civil Code (Schweizerisches Zivilgesetzbuch[23]) regulates the *right to build*, more accurately the *right to a building,* as a personal servitude. According to the Swiss Civil Code, the land may be encumbered with a servitude that entitles a third party to build or maintain a structure on, or beneath, the land's surface (Art. 779/1). The *right to build/the right to a building* may be transferred and inherited unless the landowner and the right holder have agreed to the contrary (Art. 779/2). This right is registered in the land registry if it is a permanent right by nature (Art. 779/3). The Swiss Civil Code does not specify how the *right to build* can become a permanent right by nature. It can be assumed that the permanent nature of the right is determined by the contract between the landowner and the

[19]Available at> BOE-A-1889-4763 Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil.

[20] Available at> BGB - nichtamtliches Inhaltsverzeichnis

[21] P. Simonetti, *Evolucija ustanove superficijarnog prava i usporedba s pravom građenja, op. cit.,* 22-23

[22] Available at> https://www.gesetze-im-internet.de/erbbauv/.

[23] Available at> SR 210 - Swiss Civil Code of 10 December 1907 | Fedlex

right holder depending on the duration of the right. The *right to build* can be established for a maximum of 100 years and then re-established for another maximum of 100 years (Art. 779*l*). Upon termination of the *right to build*, the structure becomes the landowner's ownership and an integral part of the land it was built on (Art. 779*c*).

- In the Slovenian Property Code (Stvarnopravni zakonik[24]), the *right to build* is determined as a right that enables a person to own a building built on someone else's land (Art. 256/1). The *right to build* can be established by contract as a temporary or permanent right (Art. 256/2, 257). The contract that is the base for the establishment of the *right to build* can't have resolutive conditions (Art. 257/3). If the building owned under the *right to build* is a condominium, then all condominium owners are co-holders of a share of the *right to build* (Art. 258). The *right to build* can be transferred or mortgaged (Art. 256/3, 264). In case of transfer or mortgaging of the *right to build,* the rules for transfer or mortgaging of real estate apply (Art. 256/3). When the *right to build* is terminated, the building becomes the landowner's ownership. In that case, the landowner is due to pay the holder of the *right to build* compensation for the increased value of the real estate, unless the parties have agreed otherwise, or if something else is determined by a subject-specific law (Art. 263).

- The Croatian Ownership and Other Real Rights Act (Zakon o vlasništvu i drugim stvarnim pravima[25]) regulates the *right to build* in a very similar way to the Slovenian Property Code. According to the Croatian Ownership Act the *right to build* entitles its holder to own a building above or beneath the surface of someone else's land, and the landowner is obligated to tolerate it (Art. 280/1). The Croatian Ownership Act also specifies that the *right to build* falls under the legal regime of real estate, and the building built under the *right to build* is attached to the right as if the right were real estate (Art. 280/2,3). According to the Croatian Ownership Act, the *right to build* is established by contract or a court decision (Art. 286/1). This right can be transferred, encumbered and inherited under the same rules that apply to real estate unless it is otherwise determined by law (Art. 285). Since the building built under the *right to build* is attached to the right, the ownership over the building is transferred, encumbered and inherited along with the *right to build* (Art. 285). If the *right to build* is terminated, the building becomes an attachment of the land it is built on and consequently becomes the landowner's ownership. The landowner must compensate the holder of the *right to build* in the amount of the increased value of the real estate (Art. 295/3). No exceptions of the duty for compensation are permitted.

[24] Available at> Stvarnopravni zakonik (SPZ) (PISRS)

[25] Available at> https://www.zakon.hr/z/241/Zakon-o-vlasni%C5%A1tvu-i-drugim-stvarnim-pravima

- In the Macedonian legal system, the right to a long-term lease is regulated by the Construction Land Act as a *right in rem* that entitles the holder of the right to erect a structure on a construction land owned by another and the landowner is obligated to tolerate it (Art. 21). The holder of the right to a long term-lease acquires ownership over the erect structure for the time of duration of the right of long-term lease which can't be more than 99 years (Art. 22). According to the Construction Land Act, the right of to a long-term lease is established based on a contract between the land owner and the holder of the right. In exceptional cases, the right to a long-term lease may be established by a court decision during the proceedings for division of assets, inheritance or other circumstances determined by law (Art. 30). The right to a long-term lease can also be transferred and encumbered as if it is real estate. Since the erected structure is attached to the right to a long-term lease, any transfer or encumbrance of the right also includes the transfer or encumbrance of the ownership over the structure. Once the right to a long-term lease is terminated, the *superficies solo cedit* principle is re-established, meaning that the structure forms a legal unity with the land it is built on and, by law, becomes the landowner's ownership. Unlike other legal systems, according to Macedonian law, the landowner is not obligated to compensate the holder of the right to a long-term lease for the increased value of the land.

The comparative analysis demonstrates that the right to a long-term lease regulated in the Macedonian legal system has similar characteristics as the *right to build* regulated by the Croatian Property and Other Real Rights Act, and the Slovenian Property Code. On such bases, we can conclude that there are only terminological differences between the right to a long-term lease and the *right to build,* while in nature those rights are completely identical.

V. Characteristics of the right to a long-term lease

As a *right in rem,* the right to a long-term lease possesses characteristics typical for rights of such nature. In addition, the right to a long-term lease has some specific characteristics that differentiate it from other *rights in rem*.

The characteristics typical for *right in rem* that can also be found in the right to a long-term lease are immediacy, *erga omnes* effect, legal determination, specificity, publicity and priority.

- The immediacy of the right to a long-term lease is evident in the ability of its holder to take immediate possession of the construction land encumbered by the right to a long-term lease and to exercise the acquired right without the assistance on the part of the landowner or a third party.

- All third parties (including the landowner) are obligated to refrain from all actions that might impede the holder of the right to a long-term lease from exercising the right due to the *erga omnes* effect attributed to it.

- The content of the right to a long-term lease is determined by the Construction Land Act (Art. 21/32). It needs to be pointed out that the legal

determination of the content of the right to a long-term lease extends only to its two basic powers – the power to erect a structure on the encumbered construction land and the power to acquire ownership over the erected structure. Specific rights and duties between the landowner and the holder of the right to a long-term lease are contractually determined. The right to a long-term lease must be established as an encumbrance on a particular parcel of construction land due to the need for specificity.

- Publicity regarding the right to a long-term lease is provided by the registration of the right in the Real Estate Cadaster, which is a public record for rights on real estate.

- The right to a long-term lease has priority over rights arising from obligations that affect the use of the encumbered construction land. Regarding other *rights in rem,* the priority is determined by the moment other *rights in rem* have been established over the same construction land. The right to a long-term lease has priority vis-à-vis other later established *rights in rem*. It needs to be pointed out that the priority is relevant between the right to a long-term lease and the *rights in rem* that are competitive to it, such as servitudes. Since servitudes, the same as the right to a long-term lease, are directed towards the use of the encumbered land, the servitudes established on the land after the right to a long-term lease can be exercised only if they do not restrict or infringe upon the right to a long-term lease[26].

- Permanence, a characteristic reflected in other rights *in rem*, especially in the right of ownership, is not reflected in the right to a long-term lease since it is a time-limited right. It can last from 5 to 99 years.

As pointed out, the right to a long-term lease also possesses specific characteristics due to its particular nature such as connectivity, indivisibility and transferability.

- The connectivity of the right to a long-term lease is manifested in two directions – towards the encumbered construction land and toward the erected structure (Art. 24, 25/3). By establishing the right to a long-term lease as an encumbrance over a particular parcel of construction land, the right becomes connected to the land in a sense that the encumbrance persists regardless of the transfer of the right of ownership over the land from one person to another. Regarding the erected structure, the connectivity leads to the structure being treated as an attachment to the right to a long-term lease, as a result, any transfer or encumbrance of the right to a long-term lease includes the structure as well.

- As a result of the connectivity, there is also indivisibility of the right to a long-term lease regarding the encumbered construction land. Due to the indivisibility of the right to a long-term lease, any division of the construction land does not affect the right itself. If the construction land is divided into smaller parcels, the right to a long-term lease will be considered as established on all the newly formed parcels. The indivisibility does not apply to the right to a long-term lease regarding the erected structure. If the structure is divided into separate units,

[26] Personal servitudes such as the usufruct and usus cannot be established over the land after the land has already been encumbered with the right to a long-term lease because the holder of the right to a long-term lese has the authority to fully use the encumbered land.

the owners of those building units will share the right to a long-term lease as its co-holders.

- The transferability of the right to a long-term lease is determined by the Construction Land Act (Art. 25). According to the law, the right to a long-term lease can be transferred from one person to another for the time of its duration. The right to a long-term lease can also be inherited. Any transfer of the right to a long-term lease includes also the transfer of the right of ownership over the erected structure.

VI. Summary

The right to a long-term lease, or as it is known in comparative law - a *right to build,* enables its holder to erect a building or other structure above or beneath the surface of a parcel of land owned by another and consequently acquire ownership over the building or other structure.

This right dates back to Roman Law, which treated it as a contractual obligation between the landowners and the leaseholder. Based on a long-term lease contract, the leaseholder was entitled to use the land and all things found on that land, including the built structures. Later that obligation became a special type of *jura in re aliena* known as *superficies.*

In contemporary European legal systems, the reception of the *superfices right* took on two trajectories. The European countries with a predominant Roman law tradition introduced the *superficies right* with some modifications to ensure its compatibility with contemporary civil law, while European countries embracing the German legal tradition created a new type of *right in rem* called the *right to build* inspired by the concept of the *superficies right*. The *superficies right* is introduced in Italy. Germany, Switzerland, Slovenia, and Croatia introduced the *right to build.* North Macedonia introduced the right to a long-term lease that is essentially the same as the *right to build*. In France and Spain, neither of these rights is explicitly regulated, although it is allowed for a person to own a building or other type of structure built on someone else's land.

European countries introduced these rights for social and economic reasons – land development and cheaper construction leading to affordable housing. The Macedonian legislators introduced the right to a long-term lease driven by similar social and economic reasons (low construction costs, affordable housing, land development etc.), but also to attract foreign investors.

The right to a long-term lease (*right to build*) is a *right in rem* by nature. As a *right in rem,* the right to a long-term lease possesses characteristics typical for rights of such nature (immediacy, *erga omnes* effect, legal determination, specificity, publicity and priority). In addition, the right to a long-term lease has some specific characteristics that differentiate it from other *rights in rem* such as connectivity, indivisibility and transferability. The connectivity of the right to a long-term lease is manifested in two directions – towards the encumbered construction land and toward the erected structure. There is also indivisibility of the right to a long-term lease regarding the encumbered construction land, due to which any division of the construction land does not affect the right itself. The right to a long-term lease can also be transferred from one person to another or inherited.

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