The Challenges and Opportunities in Law:
Ukrainian Case under the Conditions of War, pp. 757-785
https://doi.org/10.12797/9788381388887.11

Yurii Mytsa
Vilnius University, Faculty of Law
ukrtechnosfera@ukr.net

Chapter 11

Natural and Artificial Real Estate Concerning the Question of National Concepts of the Correlation of Rights

ABSTRACT

The *superficies solo cedit* principle experienced its natural golden age in the period of the Middle Ages in Europe, when land relations had little in common with the private legal sphere and were completely determined by the measure of public legal power arising from land rights. At the same time, this principle has taken root in the national tradition of private law in many European countries. Considering this, it finds strong supporters in the modern civil law doctrine and judicial practice of Ukraine.

The standpoint regarding the need to implement the *superficies solo cedit* principle consistently is becoming more and more widespread, and as a result, only land plots are declared real estate in a purely legal (namely, civil law) sense, while everything that is inseparably connected with the plots is proposed to be considered their constituent part that does not have an independent object existence (principle of the unity of the real estate object).

A moderate position is also expressed, which is based on the existence of two objects of law: a land plot and an artificial real estate built on it, and points to their inseparable factual (physical) connection with each other, which must be taken into account by establishing the same inseparable legal connection of these objects (the principle of the unity of the legal fate of the land plot and the immovable property located on it).

At the same time, the mentioned trends do not take into account the situation that has actually developed regarding this issue in Ukraine over the past 100 years where, both in fact and legally, land plots and buildings on them are different objects of law, in most cases they belong to different persons, and participate in economic turnover according to different rules. So active introduction of the *superficies solo cedit* principle into national legal life under such conditions raises serious doubts.

This article is devoted to an attempt to remove the presented contradiction and offer ways to solve this problem considering the specifics of national legal traditions and world trends in the development of real estate law.

Keywords: property, real estate, *superficies solo cedit* principle, land plots, buildings

1. Introduction

After Ukrainian civil law regained the category of real estate, which not only did not exist during almost the entire Soviet period of the evolution of civil law doctrine and legal practice, but was artificially split into a number of interconnected constructions, researchers and practitioners encounter a lot of complicated problems that are extremely important for legal theory and practice. And in view of the almost seventy-year break in the academic tradition regarding the study of the relevant issues, it is not surprising that difficulties arise here from the very beginning, that is, the very formulation of the content of the phenomenon under study. What is real estate: a plot of land and everything on it, only a plot of land, or a plot of land and the buildings located on it as separate objects? And if the latter is the case, how are the legal regimes of the land plot and artificial real estate built on it related?

The unnatural interruption of the evolutionary path of the development of domestic civil law by the events of 1917 and the subsequent stormy decades when Ukrainian lands fell into the spheres of different civil law systems, not all being systems of **private** law, put domestic civil law in both a vulnerable and an advantageous position at the same time. Vulnerable due to the lack of traditions of real estate law. Advantageous in view of the relative ease of forming of these traditions and truly adequate modern scientific and practical instruments in the field discussed.

The above, however, should not be understood as the author's denial of the importance of historical experience and the durability of the legal tradition. On the contrary, it is a careful study of such experiences in the modern conditions of the development of the domestic civil doctrine, the understanding of the ways of forming real estate concepts adopted in the modern law of the leading countries of the world, in combination with a good knowledge of the peculiarities of the national legal understanding of Ukrainians and the ways of integrating our state into the legal life of the world that are the real set of requirements without which it is impossible to create a theoretically and practically balanced concept of real estate in the national civil law of Ukraine.

It is the historical experience, including the life of Ukrainians in the conditions of most diverse legal systems, that allows us to form a broad panorama of ways to

resolve the issue of the legal regime of artificial real estate built on the land one does not own. This problem, as it turns out, appeared in all more or less developed legal orders.

2. Historical Overview: Ancient Rome

The level of development in Roman private law regarding the division of things into movable and immovable is variously assessed by modern researchers. In some cases, the academic and practical literature almost unconditionally emphasizes the existence of the classification of things into movable and immovable since the days of Roman law (Spasybo-Fateyeva, 2010, p. 53). Other authors belittle the achievements of the Roman private law doctrine in this matter, pointing out that the division of things into movable and immovable does not originate from Roman law at all (Belov, 2011, pp. 295-296). Still others deftly bypass this question with broad statements to the effect that Roman law in general did not attach special importance to this division, and smoothly moving to the traditional Roman classifications of things (Stepanov, 2004, pp. 7-11).

With all the imaginary theoretical nature of this question, it can hardly be left aside, given the pronounced Roman origin of not only the vast majority of civil law constructions, but also a significant number of doctrinal civil concepts, including those that form the core of the modern doctrine of immovable things.

If we turn to primary sources, even as late as Digests Justinian, a rather interesting picture emerges. Movable and immovable things, movable and immovable property are quite often mentioned in Digests.[1]

At the same time, there arise not just a terminological difference, but also the definition of the essential features of the regulation of the relevant relations in relation to movable and immovable things, in particular:

– different signs allowed to conclude the presence or absence of possession of movable and immovable things (D.41.2.3.13; D.41.2.47);
– there were significant features of determining the sequence of realization of pledged property depending on whether this property belonged to movable or immovable things (D.42.1.15.2);

[1] See, e.g.: D.3.3.63; D.5.1.38; D.6.1.1.1; D.6.1.8; D.21.1.1.pr.; D.32.79.1; D.33.2.32.9; D.33.10.2; D.39.5.35.pr.; D.41.2.3.13; D.41.2.30.4; D.41.2.47; D.42.1.15.2; D.43.16.19; D.46.3.48; D.47.2.21.6; D.48.17.5.1; D.50.16.66; D.50.16.93; D.50.16.222; etc.

- only movable property was subject to sale in the event of its being "sealed" when a person was summoned to court, i.e., in modern terminology, in the event of the seizure of the property in order to secure a claim (D.48.17.5.1);
- the concept of "goods" could only be applied to movable things (D.50.16.66);
- a claim for presentation of the thing could only be filed concerning movable things (D.5.1.38; D.6.1.23.6);
- possession in separate parts (pro diviso possession) was only possible concerning immovable things (D.6.1.8);
- only immovable things could be object of investment of money in special cases of the need to ensure their saving (D.26.7.3.2; D.26.7.49).

However, it should be noted that a unified terminology and conceptual apparatus of real estate law was absent in the Roman legal tradition.

Thus in some cases it speaks about *res mobiles* (D.5.1.38; D.50.16.66), and in other cases about *res moventes* (D.33.10.2; D.47.2.21.6), and sometimes these two terms are used together and in parallel, apparently denoting different categories (D.21.1.1.pr). It would seem that this contradiction should be resolved by a fragment from Celsus: "By the words 'movable property' and 'personal property' are meant the same thing, unless it appears that the deceased, by using the expression 'movable' property, only intended to refer to animals because they moved by themselves. This is correct" (D.50.16.93).[2] However, such identification of *res mobiles* and *res moventes* does not explain and does not remove another problem that in most cases in the Digests, *res mobiles* and *res moventes* are opposed not to *res immobiles*, but *soli* or *praedium*, i.e. *land* or *land plot* (D.6.1.1.1; D.7.1.7.pr; D.15.1.7.4; D.24.1.55; D.21.1.1.pr.; D.33.2.32.9; D.50.16.222).

Moreover, along with the generalizing category of "immovable thing" (*res immobiles*) in the Digests, not only the categories of *soli* and *praedium* are extremely often used to denote certain types of natural and artificial real estate or their complexes, but also other concepts, such as *aedes*, *opus*, *domus*, *villa*, *fundus*, *ager*, *locum*, *area*, etc. Furthermore, even Roman lawyers, judging by single fragments of the digests, sometimes had a rather vague idea of the specific content and scope of these concepts.[3]

---

[2] CELSUS *libro nono decimo digestorum: "Moventium", item "mobilium" appellatione idem significamus: si tamen apparet defunctum animalia dumtaxat, quia se ipsa moverent, moventia vocasse. Quod verum est.* [Latin texts in this article are quoted in their English version according to the translation by Samuel P. Scott (Cincinnati, 1932), see https://droitromain.univ-grenoble-alpes.fr/Anglica/digest_Scott.htm.]

[3] In the literature, however, the opinion is also expressed that *aedes*, *villa*, *fundus*, *ager*, and *area* are designations of individual parts of the land as the only possible object of real estate under Roman law (Kapustin, 1880, p. 155).

We will give just two illustrative examples.

First, this is Javolen's position (D.50.16.115):

> There is a question as to what difference exists between the possession of a tract of land or of a field. A tract of land includes everything belonging to the soil; a field is a kind of a tract which is adapted to the use of man. Possession, in law, is distinct from the ownership of land; for we call possession everything which we hold, without the ownership of the property belonging to us, or where there is no possibility of its becoming ours. Therefore possession indicates use, and a field means the ownership of the property. A tract of land is the common name for both the things above mentioned; for a tract of land and possession are different forms of the same expression.
>
> *Quaestio est fundus a possessione vel agro vel praedio quid distet. Fundus est omne, quiquid solo tenetur. Ager est, si species fundi ad usum hominis comparatur. Possessio ab agro iuris proprietate distat: quiquid enim adprehendimus, cuius proprietas ad nos non pertinent aut nec potest pertinere, hoc possessionem appellamus: possessio ergo usus, ager proprietas loci est. Praedium utriusque supra scriptae generale nomen est: nam et ager et possessio huius appellationis species sunt.*

Second, let's refer to a somewhat clearer fragment of Florentin (D.50.16.211):

> By the term 'real property' all buildings and all land are understood; in speaking of buildings in a city, however, we usually call them *sedes*, and in the country *villas*. A site without a building in a city is called *area*, and in the country *ager*, and the latter, when a house is erected upon it, is styled *fundus*.
>
> *Fundi appellatione omne aedificium et omnis ager continetur. Sed in usu urbana aedificia "sedes", rustica "villae" dicuntur. Locus vero sine aedificio in urbe "area", rure autem "ager" appellatur. Idemque ager cum aedificio "fundus" dicitur.*

Thus, it is hardly justified to categorically deny the role of Roman law in the development and formation of the classification of things into movable and immovable, just as we have little grounds for another extreme judgment that in Roman law, this division was initially carried out with all thoroughness and completeness. Rather, it is the case that Roman jurisprudence laid the foundations for the development of the doctrine of movable and immovable things.

At the same time, practically until the last days of its existence within the socio-political system that gave rise to it, Roman private law quite clearly adhered to the ancient approach laid down in the Laws of the XII Tables, according to which the distinction is rather not between movable and immovable things as generalizing categories, but between land plots (which include, as parts, everything that is insepa-

rably connected with them) and all other things (Hvostov, 1907, p. 104; Franciosi, 2004, p. 302).

The *superficies solo cedit* principle ("what is placed on the land follows the land") really appears as a basic principle of classical Roman private law. Its dominant role can be illustrated by the large number of fragments of relevant sources.

The most relevant expression of this rule is to be found, perhaps, in the writings of famous Roman lawyers of the 2nd century AD Gaius and Sextus Pomponius:

– "Where one person erects a building on his own ground out of materials belonging to another, he is understood to be the owner of the building, because everything is accessory to the soil which is built upon it." *Cum in suo loco aliquis aliena material aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit* (Gaius D.41.1.7.10).
– "On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom the ground belongs. If he knew that the land was owned by another, he is understood to have lost the ownership of the materials voluntarily." *Ex diverso si quis in alieno solo sua material aedificaverit, illius fit aedificium, cuius et solum est et, si scit alienum solum esse, sua voluntate amisisse proprietatem materiae intellegitur* (Gaius D.41.1.7.12).
– "We say that houses form part of the surface of land where they have been erected under the terms of a lease; and the ownership of them, in accordance with both civil and natural law, is vested in the proprietor of the soil." *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, cuius et solum* (Gaius D.43.18.2).
– "Also, what anyone builds on our land, even if he builds it for himself, is by natural right ours, since the surface follows the land." *Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit* (Gaius I.2.73).
– "The building, however, is undoubtedly considered a part of the land." *Villa autem sine ulla dubutatione pars fundi habetur* (Pomponius D.33.7.15.2).

Some time later, Domitius Ulpianus and Julius Paulus generally supported the same position:

– ". . . irrespective of natural law, which declares that the surface belongs to the owner of the soil . . ." *…praeter naturali ius, quod superficies ad dominum soli pertinent…* (Ulpianus D.9.2.50).
– "A building can never be acquired by lapse of time separate from the ground on which it stands." *Nunquam superficies sine solo capi longo tempore potest* (Ulpianus D.41.3.26).

– “Contractors who build with their own materials immediately transfer the ownership of the same to those who own the land on which they erect the building.” *Redemptores, qui suis caementis aedificant, stacim caementa faciont eorum, in quorum solo aedificant* (Ulpianus D.6.1.39.pr).
– “. . . the right of the soil was held to follow the usufruct.” *…ius soli superficiem secutam videri* (Paulus D.20.1.29.2).
– “Likewise, if anyone, while delivering a tract of land, should say that he conveys the soil without the building upon it, this will not prevent the building, which by nature is attached to the soil, from passing with it.” *Sic et in tradendo si quis dixerit si solum sine superficie tradere, nihil proficit, quo minus et superficies transeat, quae natura solo cohaeret* (Paulus D.44.7.44.1).

These provisions are quite indicative, but still do not give grounds for asserting, as is sometimes done, that the *superficies solo cedit* rule was always in effect and without exception. In fact, such exceptions have taken place, and their nature and number do not allow to ignore them. These exclusions come to the following:
1) The same Domitius Ulpianus and Julius Paulus, in principle, allowed the emergence and existence of property rights and limited property rights (namely, servitude) separately for a plot of land and a building located on it:
– “. . . when the land belongs to one person, and the surface of it [in this particular case, it concerns a house] to another . . .” *…si solum sit alterius, superficies alterius…* (Ulpianus D.39.2.9.4).
– “Some servitudes are attached to the soil, others to the surface.” *Servitutes praediorum alie in solo, alie in superficie consistent* (Paulus D.8.1.3).
2) In one of the fragments, Julius Paulus directly admits the possibility of following the right to the land from the right to the building, although he rather contradictorily indicates the building as part of the land plot:
– “Where a house is given in pledge, the site also is liable, for it is a part of the house; and, on the other hand, the right to the soil follows the building.” *Domo pignori data et area eius tenebitur: est enim pars eius. Et contra ius soli sequetur aedificium* (Paulus D.13.7.21).
3) The same Domitius Ulpianus and Julius Paulus repeatedly pointed out also that in certain situations a plot of land can be considered part of a building, and not vice versa (as required by the *superficies solo cedit* principle). The same position can be found in the writings of the 1st-2nd century lawyer Publius Iuventius Celsus:
– “I am of the opinion that the land on which a house stands is a portion of the same; and not merely a support, as the sea is to ships.” *Solum partem esse aedium existimo nec alioquin subiacere uti mare navibus* (Celsus D.6.1.49.pr).

- "What would be the case, however, if the land was an accession to the house? Let us see whether, in this instance, the usufruct of the land would not also be extinguished, and we must hold the same opinion, namely, that it would not be extinguished." *Quod tamen si fundus villae fuit accessio? Videamus ne etiam fundi usus fructus extinguatur: et idem dicendum est, ut non extinguatur* (Ulpianus D.7.4.10. pr).
- "Where a building from which water drips from the roof is removed in order that another of the same shape and nature may be erected there, the public welfare requires that the latter should be understood to be the same structure; for, otherwise, if a strict interpretation is made, the building afterwards erected on the ground will be a different one; and therefore when the original building is removed the usufruct will be lost, even though the site of a building is a portion of the same." *Si sublatum sit aedificium, ex quo stillicidium cadit, ut eadem specie et qualitate reponatur, utilitas exigit, ut idem intellegatur: nam alioquin si quid strictius interpretetur, aliud est quod sequenti loco ponitur: et ideo sublato aedificio usus fructus interit, quamvis area pars est aedificii* (Paulus D.8.2.20.2).
- "for the land is a part of the house, and, indeed, the greater part of it…" *pars enim insulae area est et quidem maxima, cui etiam superficies cedit…* (Paulus D.46.3.98.8).

4) One should also not ignore the prescriptions regarding the construction of a cabin (*casa*) on the sea coast, because in this case also the right to land followed the right to a building, although this was explained by the special legal regime of such lands:

- "This right exists to such an extent that those who build there actually become the owners of the land, but only as long as the building stands; otherwise, if it falls down, the place reverts to its former condition by the law of postliminium, so to speak, and if another party builds a house in the same place, the soil becomes his." *In tantum ut et soli domini constituantur qui ibi aedificant, sed quamdui aedificium manet: alioquin aedificio dilapso quasi uire postliminii revertitur locus in pristinam causam, et si alius in eodem loco aedificaverit, eius fiet* (Marcianus D.1.8.6.pr).
- "Whatever anyone builds upon the shore of the sea will belong to him; for the shores of the sea are not public like the property which forms part of the patrimony of the people, but resembles that which was formed in the first place by Nature, and has not yet been subjected to the ownership of anyone. For their condition is not dissimilar to that of fish and wild animals, which, as soon as they are taken, undoubtedly become the property of him under whose control they have been brought." *Quod in litore quis aedificaverit, eius erit: nam litore publica non ita sunt, u tea, quae in patrimonio sunt populi, sed u tea, quae primum a natura prodita sunt et in nullius adhunc dominium pervenerunt: nec dissimilis condicio*

eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fuint (Neratius D.41.1.14.pr).

Finally, one should also take into account the fact that the *superficies solo cedit* principle was not characteristic of Greek (and, in general, Eastern) law, which allowed for the existence of two independent ("horizontal") property rights: the right of the owner of the land and the right of the owner of everything that is on its surface (buildings, plantations, etc.) (Medvedev, 1989, pp. 223-224). In this aspect, the biblical instructions are indicative, according to which it is attributed: "And in all the land of your possession you shall grant redemption of the land" (Leviticus 25.24).

The given examples, of course, cannot refute the fundamental nature of the *superficies solo cedit* principle in Roman private law. Nonetheless, they convincingly prove that its meaning should not be absolutized even in relation to the legal realities of that time, which, by the way, was recognized by researchers of Roman law even in the 19th century (Dernburg, 1860, p. 220).

3. Historical Overview: The Middle Ages up to the Mid-20th Century

The collapse of the Roman Empire and the consequent return of the population to predominantly rural forms of coexistence with the decline of cities suspended the development of civil engineering in Europe for a long time.

However, the gradual development of cities in medieval Europe made lawyers face issues of property rights broadly similar to those of ancient Rome. These issues were solved somewhat differently, though, closer to purely practical needs, although the scale of construction is incomparable with that of the Roman times.

Distinctive is the approach introduced by German law of the Middle Ages, which did not recognize the principle *superficies solo cedit*, allowing the ownership of different persons to the building and land on which the building was located. In general, the building could have a legal life separate from the land in medieval Germany, which was facilitated by the extraordinary branching of the system of property rights of ancient German law (Kasso, 1905, pp. 9-13). In particular, the builder's ownership of the building he built was a specific feature of the ancient Germanic institution of *Erbleihe*, in contrast to the Roman construction of *superficies* (Mitilino, 1914, p. 19).

A similar approach was followed in France, where for the North and Flanders, the law of customs recognized the division of things into movable and immovable (Beaumanoire, *Coutumes de Beauvaisis*, chapter XXIII), but introduced a third kind of things: *catuex*, which also included buildings that were not part of the manor, and according to some customs, all buildings in general (Kasso, 1905, pp. 14-16).

Further romanization of European jurisprudence starting approximately from the 16th century had surprisingly little impact on the question of rights to buildings erected on the land owned by someone else. Thus, the Prussian Landrecht of 1794 (I.9 §§ 327, 329, 331, 332) provided that the building became the property of the owner of the land if it was built without his consent. But if the landowner knew about the construction and did not resist it, then the right was still united, but the *accession* took place in the opposite direction: the land could go to the developer for a fee. A similar rule was established in § 281 of the Code of the Swiss Canton of Lucerne. At last, the German Civil Code (BGB) prohibited the existence of special rights to essential constituent parts of a thing (§ 93 BGB). This idea is very vividly expressed in the Materials for the preparation of the BGB:

"The division of things is predetermined by nature. Only land plots are immovable. Other things are movable. Definitions such as: a thing is movable or immovable depending on whether it can be moved from one place to another without damage to its substance (Prussian Landrecht I.2 § 6, Bavarian Landrecht II.1 § 8, ABGB § 293), cause only various kinds of contradictions" (Mugdan, 1979, p. 22, transl. mine).

It is significant, however, that according to § 95 BGB, an exception was made for buildings in the aspect under consideration:

> Section 95 Merely temporary purpose
> (1) The parts of a plot of land do not include things that are connected with the land only for a temporary purpose. The same applies to a building or other structure that is connected with a plot of land belonging to another by a person exercising a right over that land.

Strangely enough, the key scholarly debate regarding buildings on the land owned by another party was about their belonging to the category of movables or immovables. Most of the German lawyers of the turn of the 20th century (for example, Eck, Endemann, Gierke, Wolff) speak in favor of attributing this kind of buildings to movables. Others, on the contrary, consider buildings on the land owned by someone else to be classic immovable property (Tobias), and some of the supporters of this approach even pointed out the need to recognize the builder's ownership right not only to the building, but also to the land directly under the building (Oertmann) (Kasso, 1905, pp. 20-22[4]).

French law recognized land and buildings on it as immovable property. This approach was based on the provisions of Art. 553 of the French Civil Code, which limits the effect of the *superficies solo cedit* principle, when the existence of a sepa-

[4] https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0284.

rate right to a thing is proven. It is significant, however, that in general, the French doctrine denied the right of ownership of the lessee to the buildings erected by him on the leased plot of land (this position was followed, in particular, by Demolombe, Marcadé, and Guillouard). Some researchers, such as Laurent, allowed the establishment of the lessee's ownership of such buildings, but only as movable things.

However, since the mid-19th century, the Court of Cassation considered the lessee of the land plot to be the owner of the buildings built by him on this plot precisely as real estate for the entire term of the contract, as well as beyond this term, if the lessor refused to increase his property (plot), even if silently. In 1870-80, French courts finally adopted the practice according to which a building cannot be considered a movable thing because it does not lose its essential properties even if it stands on someone else's land. However, here too, only temporary ownership was recognized, determined by the content of the contract; after its expiration, the building turns into a movable thing that is subject to demolition, if there is no reservation in favor of the owner of the land (Kasso, 1905, pp. 27-29).

4. Historical Overview: Ukraine before the 1990s

The features of the regulation of the considered issue in the Ukrainian legal order have long been determined by the problem of political integration of ethnic Ukrainian lands due to the belonging of their individual parts to different states at different times: Poland (including the Polish-Lithuanian Commonwealth), Austria, Russia, and others. Therefore, the problem of the correlation of rights to land and buildings on it was solved in the past to the extent that was allowed in a particular period by the law of the state which governed the relevant territories.

Among the significant historical laws in this aspect, attention may be drawn to the provisions of § 30, section 3 of the Lithuanian Statute of 1588, according to which, in the event of voluntary or forced abandonment by a nobleman of the estate granted to him, he must ". . . go away . . . with all wealth, property and everything acquired by him and expenses and buildings . . .," ". . . with all his possessions and buildings built at his own expense, he will have to go wherever he wants."[5]

In Russian law, a certain tendency to preserve buildings during the redemption of estates (*votchins*) appeared quite early: the one who redeems them must separately

---

[5] Translation mine based on Статути Великого князівства Литовського: У 3 т. — Том III. Статут Великого князівства Литовського 1588 року: У 2 кн.— Кн. 1 / За ред. С. Ківалова, П. Музиченка, А. Панькова. — Одеса: Юридична література, 2004. — 672 с.

pay for the buildings additionally erected on the land (Article 27 of Chapter XVII of Conventional Code, 1649).

Hereinafter, the civil law that was in force on Ukrainian lands was largely romanized, which is also evident in the norms relevant to the issue under consideration. Thus, § 297 of the Austrian Common Civil Code (ABGB) stated quite clearly: "§ 297. In the same way, those things belong to immovable that are placed on the ground with the intention that they will remain on it permanently, that is: houses and other buildings. . ."[6]

Regarding rights to land and buildings erected on it. § 418 ABGB accepts the decision introduced by the Prussian Landrecht: the building becomes the property of the owner of the land if it is built without his consent; but if the landowner knew about the construction and did not resist it, then the right was still united, but the *accession* took place in the opposite direction: the land could go to the developer for a fee. With the reform of the Austrian land registration,[7] an immovable thing necessarily had to include a certain space of land, which made it impossible to recognize any above-ground or underground building as an independent object.

We can find a somewhat similar approach (but only once, and as an extraordinary power intervention in civil law relations) in Russian imperial law: § 11 of Chapter VIII, §§ 15, 16, 18, 20 of Chapter XXV of the Border Instruction of May 25, 1766 provided that the builder became the owner of the land on which the construction was carried out, but was obliged to pay the value of this land to its owner. However, for the future, the *superficies solo cedit* principle was preferred and it was finally enshrined in Part I, Volume X, "Civil Laws" of the Code of Laws of the Russian Empire, according to which various buildings were recognized as immovable property (Article 384), but at the same time, appeared as ownership of "inhabited lands" (Article 386).

But although the indicated approach of the legislator, which tends towards the consistent implementation of the *superficies solo cedit* principle in real estate law, is conceptually incompatible with the idea of ownership of a building constructed on someone else's land, considerations of elementary justice (as well as economic expediency) quite quickly led to the recognition of persons who built buildings on someone else's land as owners of these buildings, if only the construction was carried out by virtue of some right to this land. Therefore, alienation by the owner of such a building simultaneously caused the transfer to the acquirer of the corresponding right to the land plot, and regardless of the will of the landowner.

---

6 Tranlsation mine based on https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622.

7 In accordance with the General Regulations on Land Registers dated 25 July 1871.

This position was formed in the judicial practice of the Senate in 1870-80, despite its clear contradiction to the literal meaning of the provisions of Articles 384, 386 of Part I, Volume X, "Civil Laws" of the Code of Laws of the Russian Empire. Gradually, the same idea penetrated into some legislative acts of the empire—for example, notes to articles 193 (as amended in 1893) and 243 (as amended in 1903) of the Statute on imposts—but mainly in relation to the western provinces. At last, this approach was also supported in the civil law doctrine of that time (Yeliaschevich, 1916, pp. 64-90) and was clearly enshrined in Article 35 of the draft Civil Code of the Russian Empire (Tyutryumov, 2007, pp. 96-97), which, however, given the events of 1917, never appeared as a source of valid civil law.

The very first political and economic measures of the newly installed Soviet government were aimed at destroying the "economic base of the bourgeois-landlord system," which was understood not only as the destruction of landlord land ownership and private ownership of land in general, but also the elimination of private ownership of most buildings in cities. Thus, the decree of December 14, 1917 prohibited transactions with real estate in cities ("in view of the upcoming socialization of urban land"). And by the decree of August 20, 1918 "On the abolition of the right of private ownership of real estate in cities," buildings in cities were nationalized and municipalized (except for the smallest towns, with a population of up to 30,000 people).

The subsequent complete removal of land from civil turnover and the principled abolition by the law of the very division of things into movable and immovable (note to Article 21 of the Civil Code of the Ukrainian SSR of 1922) did not eliminate the turnover of buildings and structures, but significantly limited it. The academic literature of those times clearly emphasized the inextricable connection between the rights to the building and the land plot on which the building is located, because these objects "make a certain unity," due to which the alienation of the building simultaneously entails the transfer of the alienator's rights to the corresponding land plot to the buyer (Braude, 1954, pp. 14-18). Therefore, it is not surprising that although the sale of land was prohibited in the USSR, it actually took place. Because of this, it was even suggested in the literature that when a building is sold, the question of the right to the land plot under it should be decided by the executive committees of local councils in each specific case individually (Alekseev, 1962, p. 221).

But in general, the doctrine of Soviet civil law led to a clear and unambiguous separation of land plots and buildings located on them as independent (albeit interconnected) objects of civil rights, even when both these objects belonged to the same owner: the state.

5. Ukrainian Law at the Time of Independence: The Development of the Idea

The radical reform of property relations in the early 1990s, in particular, the privatization of buildings and structures as part of integral property complexes of state-owned enterprises, had a stunning effect: in a short time, a huge number of owners of individual buildings (primarily in cities) arose due to the ambiguity of the legal regime of land plots these buildings were placed on.

This was supplemented by pendulum-like swings in the establishment of certain approaches to determining the interdependence of land plots and buildings on them at the legislative level. The latter was probably not accidental as it turned out to be not so easy to get rid quickly and completely of the seventy-year-old mentality regarding the inadmissibility of establishing private ownership of land due to slogans like "land is a special kind of property." This obviously affected not only the relevant legislation, but also doctrinal approaches to the issue and the position of judicial practice.

5.1. The Evolution of the Relevant Legislation

The Law of Ukraine "On Property" established only general rules that the object of private property rights may include land plots (Part 1 of Article 13), citizens have the right to acquire land plots or acquire ownership rights to them (Part 2 of Article 15), as well as regarding the right of collective (Article 21) and state (Article 32) land ownership, and protection of land ownership rights (Articles 51, 52).

The issue of the correlation of rights to the land plot and the building on it was regulated by the prescriptions of Art. 28 of the Land Code (LC) of Ukraine of 1990 (entered into force on February 15, 1991), according to which, when the ownership of a building and construction is transferred, the right of ownership or the right to use the land without changing its purpose is transferred along with these objects. That is, the transfer of property right to the land plot to the buyer of artificial real estate located on it has not been discussed at all.

A year later, according to the Law of Ukraine dated March 13, 1992 № 2196-XII (entered into force on May 5, 1992) the Land Code of Ukraine was revised in a new version. The relevant issue was regulated by Article 30, according to which, when the ownership of a building and construction is transferred, the ownership or the right to use the land plot is transferred along with these objects without changing its purpose, unless otherwise stipulated by the contract. At the same time, the right to the land plot was subject to certification by the relevant state act, but the trans-

fer of the right to the land plot to the buyer of the buildings located on it occurred automatically.

Such legal regime of land plots and buildings located on them was in effect until January 1, 2002, when the new Land Code of Ukraine of 2001 entered into force. According to its Article 120 the automatic transfer of the right to a land plot in the case of acquiring ownership of real estate located on it no longer occurred. For this to happen, it was necessary to conclude a separate contract or provide for such a transition in the contract on alienation of the building.

Shortly afterwards, on January 1, 2004, the Civil Code (CC) of Ukraine of 2003 entered into force. According to the original version of its Article 377 (transl. mine):

> Article 377. The right to a land plot upon acquisition of a residential building, building or structure located on it
> 1. Is transferred to the person who purchased a residential building, building or structure ownership of the land plot on which they are located, without changing its purpose, in the size established by the contract.
>   If the contract on the alienation of a residential building, building or structure does not specify the size of the land plot, ownership of the part of the land plot that is occupied by the residential building, building or structure and the part of the land plot that is necessary for their maintenance is transferred to the buyer.
> 2. If a residential building, building or structure is located on a land plot provided for use, in case of their alienation, the right to use the part of the land plot on which they are located and the part of the plot necessary for their maintenance shall be transferred to the purchaser.

Therefore, the principle of "automatic" transfer of rights to the land plot to the buyer of the building (structure) located on this plot was restored. However, at the same time, the problem of the correlation between the norms of the CC of Ukraine of 2003 and the LC of Ukraine of 2001 became extremely acute, because changes to Article 120 of the latter, which brought it into line with the provisions of Article 377 of the CC of Ukraine, were introduced only by the Law of Ukraine dated April 27, 2007 № 997-V, which entered into force on June 20, 2007.

Because of this, it was generally assumed that the automatic transfer of rights to the land plot to the purchaser of the building (structure) located on this plot did not take place until June 20, 2007, because the provisions of the Civil Code of Ukraine are special in relation to the norms of the CC of Ukraine (Grigor'eva, Pavlovska, 2014, pp. 48-52).

This approach is based to some extent on the provisions of the CC of Ukraine itself. According to its Part 1 of Article 9, its provisions are applied to the regulation of relations that arise in the spheres of the use of natural resources and environmental

protection, as well as to labor and family relations, if they are not regulated by other acts of legislation. Thus, since land is one of the types of natural resources, the norms of the LC of Ukraine should prevail. However, this position is fundamentally wrong.

First of all, it should be noted that Article 9 of the Civil Code of Ukraine enshrines the rule of differentiation, i.e., the principle of *lex specialis derogat generali* (a special law cancels the effect of a general one), which requires an analysis of the normative array and the selection of the norm to be applied according to the rules on the ratio of general and special norms. At the same time, it is important to emphasize that this rule refers to the ratio of norms, and in no case, to normative legal acts (Zvik, Petryshyn, 2009, p. 232), because a normative legal act can contain hundreds and even thousands of norms, each of which can be in one or another relationship with the norm of another normative legal act.

General norms of law are norms that apply to a certain type of relationship, and special ones apply to a class of relationship within a type with the aim of specifying legal regulation in view of the specifics of this class of relationship. Therefore, the concept of general and special norms appears as a reflection of the ratio of two separate, isolated from all others, norms of law, whose subject of regulation is correlated as a whole (for general norms) and a part (for special norms). From the above, it follows, in particular, that in the case of complete identity of the subject area of application of legal norms (which is exactly what we observe on the example of the original editions of Part 1, 2 of Article 377 of the Civil Code of Ukraine of 2003 and Parts 1, 2 of Article 120 of the Land Code of Ukraine of 2001), the ratio of these norms as general and special cannot be discussed at all.

Instead, we should refer to the rule of hierarchy, which is based on the well-known Roman postulate *lex superior derogat legi inferiori* (a higher [in terms of legal force] law cancels the effect of a lower one). The essence of this rule is that normative legal acts containing civil law norms should be applied depending on their legal force, which is determined by the place in the system of acts of civil legislation.

Of course, both the Civil Code of Ukraine and the Land Code of Ukraine are codified legal acts that have the force of the law of Ukraine. However, it does not follow that their legal force is equal.

The Civil Code of Ukraine as a codified law is recognized in its Article 4 as the main act of civil legislation. The essence of this recognition is manifested in the fact that it is due to the main provisions of the CC, established in its section I (Articles 1-23), that the general orderliness of all civil legislation is achieved, and the unity of regulatory principles in its sphere of action is ensured (Sibilyov, 2001, pp. 106-116).

Therefore, the existence of a hierarchy between the Civil Code of Ukraine as a codified law and other laws regulating civil relations should be recognized. This hierarchy is based on the recognition of the Civil Code of Ukraine as the main act

of civil legislation (the horizontal dimension of the hierarchy). In other words, if the norm of the Civil Code of Ukraine and the norm of another law (albeit a codified one) are characterized by the complete identity of the subject area of their application, then the norm of the Civil Code of Ukraine prevails. This approach was reflected in the decision of the Constitutional Court of Ukraine in the case of the constitutional appeal of the citizen Zinaida Hryhorivna Galkina regarding the official interpretation of the provisions of the fourth part of Article 3 of the Law of Ukraine "On preventing the influence of the global financial crisis on the development of the construction industry and housing construction" (the case on the prohibition of termination of contracts investment in housing construction), dated March 13, 2012 № 5-рп/2012.

Taking into account the above, it should be concluded that the rule on the automatic transfer of rights to a land plot to the purchaser of a building (structure) located on this plot was restored in the legislation of Ukraine precisely with the entry into force of the Civil Code of Ukraine of Ukraine, i.e., from January, 1, 2004, and not with the introduction of changes to the original revision of Article 120 of the Land Code of Ukraine, which entered into force on June 20, 2007.

During the next seventeen years, that is, until the second half of 2021, the Ukrainian legislator did not pay great attention to the regulation of the ratio of rights to a land plot and artificial real estate on it. Changes to the key norms of civil legislation regarding this issue (and above all, Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine) were frequent, but at the same time not conceptual, as they had the character of partial modifications and clarifications:

1) By the Law of Ukraine dated November 5, 2009 № 1702-VI, which entered into force on December 10, 2009, Article 377 of the Civil Code of Ukraine was put in a new edition:

   Article 377. The right to a plot of land in case of acquisition of ownership of a residential building, building or structure located on it

   1. Transfers to a person who has acquired the right of ownership of a residential building (except for an apartment building), building or structure, the right of ownership, the right of use of the land plot on which they are located, without changing its purpose in the scope and on the conditions established for the previous landowner (land user).
   2. The size and cadastral number of the land plot, the right to which is transferred in connection with the transfer of ownership of a residential building, building or structure, are essential terms of the contract that provides for the acquisition of ownership of these objects (except apartment buildings).

2) As usual, with some delay, Article 120 of the Land Code of Ukraine was brought into line with the current wording of Article 377 of the Civil Code of Ukraine (Law of Ukraine dated May 11, 2009 № 1702-VI, which in this part entered into force on January 1, 2010). Article 120 of the Civil Code of Ukraine was also presented in a new edition and contained a certain specification of the relevant norms of the Civil Code of Ukraine regarding the termination of the rights of the previous landowner (land user), regarding joint ownership, regarding the need to divide the plot, etc.
3) By the Law of Ukraine № 2269-VIII dated January 18, 2018, which entered into force on March 7, 2018, Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine were supplemented with an exception from the general rule on the need to indicate in the contract on the alienation of buildings and the construction cadastre number of the corresponding land plots in cases where it is about the sale of state-owned objects through privatization.

However, from July-August 2021, a real legislative hurricane will arise in the sphere of the ratio of rights to a land plot and artificial real estate. Initially, by the Law of Ukraine dated July 15, 2021 № 1657-IX, which entered into force on August 20, 2021, Part 2 of Article 120 of the Land Code of Ukraine was supplemented by a very voluminous second paragraph, whose verbosity was reduced to specifying the provisions of the first paragraph of this Part 2 of Article 120 LC: regarding the transfer of any right to use a land plot to the acquirer, regarding the irrelevance of the landowner's will for such a transfer, regarding the specifics of the transfer of rights to land and the case of acquiring a share in the ownership of a building (structure).

The next (by the date of entry into force) decision of the legislator (Law of Ukraine dated February 2, 2021 № 1174-IX, which entered into force on October 28, 2021) was much more extensive:

1) The long-suffering Article 377 of the Civil Code of Ukraine was again set out in a new version:

> Article 377. Transfer of the right to a land plot in case of acquisition of ownership of an object of immovable property (residential building (except apartment building), other building or construction), an object of unfinished construction located on it
>
> 1. The right of private ownership is simultaneously transferred to a person who has acquired the right of ownership of an object of immovable property (a residential building (except for an apartment building), another building or structure), an object of unfinished construction, the ownership of which is registered in accordance with the procedure established by law, as well as the right to use a plot of land on which an object of immovable property is located (a residential building (except for an apartment building), another building or structure), an object of unfinished construction, without changing its purpose in the scope and on

> the conditions established for the previous owner of such object of immovable property, in the manner and under the conditions specified by the Land Code of Ukraine.

2) No less long-suffering Article 120 of the Land Code of Ukraine was also rewritten in a new version, having, instead of the former six parts of a rather modest volume, thirteen (!) extremely extensive parts, whose essence may actually be reduced to the following:

a) Clarification of the procedure and conditions for the transfer of ownership of a land plot to the buyer of artificial real estate located on it.
b) Clarification of the procedure and conditions for the transfer of the right to use a land plot to the buyer of artificial real estate located on it.
c) Establishing the inadmissibility of the transfer of the right to permanent use of a land plot to persons who, according to the law, cannot acquire it.
d) Detailing the procedure and conditions for the acquisition of land rights by the buyer of artificial real estate located on a plot of state or communal property, with the simultaneous establishment of a privilege for state and communal property in the form of removing them from the scope of the provisions of the Civil Code and the Land Code regarding the following of the right to land the right to a building while maintaining this rule for privately owned lands.

As we can see, as a result of such legislative changes, the role of Article 377 of the Civil Code of Ukraine has actually been reduced to a more or less simple reference norm.

With the above, however, the stormy weather in the matter of legal regulation of rights to land and the things built on it did not abate.

According to the Law of Ukraine dated September 8, 2021 № 1720-IX, which entered into force on December 10, 2021, both Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine were again set forth in new versions. Article 377 of the Civil Code of Ukraine slightly increased in scope, mainly due to the expansion of the rules on the succession of the right to land to the right to a building, and to the acquisition of a share in the right of joint ownership of a building, as well as the establishment of the condition for the simultaneous transfer of ownership of a land plot as a legally essential condition of the contract on alienation of artificial real estate located on such a plot of land.

In turn, the changes in Article 120 of the Land Code of Ukraine, which became even more verbose and swelled to 16 mostly huge parts, are much more extensive. Having generally confirmed the conceptual decisions laid down by the Law of Ukraine dated February 2, 2021 № 1174-IX, the new version of Article 120 of the Land Code of Ukraine additionally regulated *expressis verbis* the issues related to

the transfer of rights to a land plot if a person acquires a building located on this plot not on property rights, and on the right of economic management or operational management,[8] and also expanded and deepened the previously established privilege of public (state and communal) property, even introducing some advantages of state property over communal property.

Finally, the latest (at least for the time being) changes in the legal regulation of relations related to rights to land and artificial real estate placed on it were introduced into Part 9 of Article 120 of the Land Code of Ukraine by the Law of Ukraine dated August 15, 2022 № 2518-X "On guaranteeing property rights to real estate objects that will be built in the future." According to these changes, the regime of following the right to a land plot to the right to a building is also extended to the cases of acquiring a building on the basis of a *special property right*, whose somewhat unclear construction was introduced into the civil law of Ukraine by the aforementioned Law of Ukraine dated August 15, 2022 № 2518-IX.

5.2. Doctrine and Judicial Practice. Prospects

In the civil law doctrine, there has long been a rather heated debate about what exactly should be considered an immovable thing and, accordingly, how the property rights to a land plot and the artificial real estate erected on it are related.

In one of the works published not so long ago on this topic, an attempt is made to generalize the approaches that are used to solve this question conceptually. In particular, it is claimed that two main models of the organization of real estate turnover and structuring of real estate objects are theoretically conceivable. The first is a conventionally "European" approach, which assumes that the immovable property is a land plot, and the building is considered as a component of a land plot or a real right to it. According to the second approach (that may be called "Asian"), the land does not take part in civil turnover at all, because it is all public, and the immovable thing is the building, which is the subject of deeds; as a consequence, the limited property right to the land plot is a feature of the building and follows it. At the same time, the legal regime of real estate in the aspect of establishing rights to a land plot and artificial real estate erected on it, which is rather aptly called "dupli-

[8] It is not an appropriate place to touch upon the question of the legal nature of these rights and the justification of the preservation of these Soviet categories in the law of modern Ukraine. We will only note, therefore, that they are alien to the very concept of the Civil Code of Ukraine, as a result of which they are difficult to include even in the construction of limited property rights.

cation of real estate," is declared a "uniquely Russian" regime of real estate turnover "that has no analogues" (Bevzenko, 2017, pp. 16-18).

Let's ignore the ignorance of the author of the indicated attempt about the fact that such "duplicity" is also clearly established in Ukrainian civil law. After all, for various reasons, in this particular case, this statement can hardly be considered a manifestation of a wounded imperial pride. However, in any case, even a brief historical review of the problem convincingly proves that the consistent implementation of the "European" (according to the terminology of Bevzenko) real estate turnover model is hardly feasible without excessive number of exceptions.

Nevertheless, such an approach, which flourished in the Middle Ages in Europe when the problems of land relations, being entirely and completely determined by the extent of public legal power arising from rights to land, had little in common with the private legal sphere (Yeliaschevich, 2007, pp. 296-303), finds consistent supporters in modern civil law doctrine. In particular, the opinion regarding the need to consistently implement the *superficies solo cedit* principle is becoming more and more common, and only land plots are declared real estate in a purely legal (namely, civil law) sense, while everything that is inseparably connected with them is proposed to be considered as constituent parts of land plots that do not have an independent object existence. This approach was called **the principle of the unity of the real estate object**, according to which, the land plot and everything built on it is considered as one indivisible object of law: an immovable thing as such (Sukhanov, 2008, pp. 6-16; Bevzenko, 2017, pp. 1-80; Khodyko, 2021, pp. 41-61).

Some voice a slightly more moderate opinion which is called **the principle of the unity of the legal fate** of the land plot and the immovable property located on it. This approach fundamentally differs from the principle of the unity of the real estate object, because it is based on the existence of two objects of law: the land plot and the artificial real estate built on it, and points to their inseparable actual (physical) connection with each other, which should be taken into account by establishing the same inseparable legal connection of these objects (Miroshnychenko, Marusenko, 2013, p. 314).

In view of the above, it is not surprising that the same trend is reflected in judicial practice. Even the Grand Chamber of the Supreme Court has managed to confuse these theoretical approaches.

Thus, at the end of 2018, the Grand Chamber of the Supreme Court formulated the legal position according to which the current land and civil legislation of Ukraine imperatively provides for the transfer of the right to a land plot in the event of acquiring ownership of a real estate object, which reflects the principle of the unity of the legal fate of the land plot and the located on it of a building or structure, which, although not directly and generally fixed in the law, nevertheless finds its expression

in the rules of Article 120 of the Land Code of Ukraine, Article 377 of the Civil Code of Ukraine, and other provisions of the legislation.[9]

However, already the following year, the Grand Chamber of the Supreme Court, confirming the specified legal position, noted additionally that Article 381 of the Civil Code of Ukraine provides for the principle of integrity of the real estate object with the land plot on which it is located.[10] How the principle of the unity of the legal fate of two real estate objects correlates with the principle of the unity of a certain real estate object was not explained by the decision of the Grand Chamber of the Supreme Court, unfortunately.

Almost a year later, the Grand Chamber of the Supreme Court finally confused the doctrinal principles of its legal position on the issue under consideration, noting in one of the resolutions that in the absence of a separate civil law agreement regarding the land plot, when the ownership of the real estate object is transferred, as in the case which is being revised, it should be taken into account that the specified norm [in this particular case, it concerned Article 120 of the Land Code of Ukraine] establishes the general principle of the unity of a real estate object built on a land plot with such a plot (the principle of the unity of the legal fate of the land plot and houses and structures located on it). According to this norm, the determination of the legal regime of the land plot was directly dependent on the ownership of the building and structure, and a separate mechanism of legal regulation by the norms of civil legislation of property relations that arose during the conclusion of deeds related to the acquisition of ownership of real estate built on the land plot, and legal regulation of relations with the transfer of rights to a land plot by the norms of land and civil legislation in the event of acquisition of the right of ownership of the specified real estate. Taking into account the principle of the unity of the legal fate of the land plot and the houses and structures located on it, it should be concluded that the land plot follows the immovable property that a person acquires, if another way of transfer of rights to the land plot is not determined by the terms of the contract or the provisions of the law.[11]

Against this background, the subsequent identification by the Grand Chamber of the Supreme Court of the principle of the unity of legal fate with the ancient Roman maxim *superficies solo cedit*, which in fact embodies the principle of the unity

[9] Resolution of the Grand Chamber of the Supreme Court dated 04.12.2018 in case № 910/18560/16.

[10] Resolution of the Grand Chamber of the Supreme Court dated 16.10.2019 in case № 164/409/17.

[11] Resolution of the Grand Chamber of the Supreme Court dated 16.06.2020 in case № 689/26/17.

of the real estate object, is no longer surprising,[12] although it is unfortunate, because such a fundamentally incorrect view persists and is increasingly rooted in judicial practice.[13]

To what extent is the stated trend of doctrine and judicial practice (leaving aside certain errors of the latter's conceptual apparatus) justified in view of the needs of the development of civil turnover?

Of course, the temptation to build an internally consistent legal structure that corresponds to classical Roman approaches and understanding of the essence of real estate in countries where civil law is built on the pandect principle (Germany, Switzerland) is extremely great. However, it should not be forgotten that no civil law construction is a thing in itself: the development of economic turnover, including its material component, necessarily entails the transformation of established ideas about the content of certain legal categories, and the category of real estate is not an exception.

One can, of course, claim that the separation of the legal fate of buildings and the land on which they are built, as well as the change of the legal fate of the buildings to the fate of the land plot to the diametrically opposite, is a legacy of the Soviet period of the development of domestic civil law, which is characterized not so much by a dominance, as by the exclusivity of state property rights to land (Sukhanov, 2008, p. 12; Stepanov, 2004, pp. 17-19). It can be argued that such "reverse" (relative to the so called "European" model) follow-up is characteristic of the so called "Asian" model, when the legal order does not recognize a land plot as the object of any civil rights at all (if all the land belongs to the Crown, the state or is considered family hereditary inalienable property of the ruling family, etc.) (Bevzenko, 2017, p. 14). However, one cannot fail to recognize that it was the needs of civil turnover (even in the grotesque form it acquired as a result of the practical fulfillment of its characteristics as socialist turnover) that caused the fact that the actual turnover of real estate did not disappear, even if this property was not called "real estate."

All the more reason to doubt the viability of the classical approach of the exclusivity of a land plot as real estate in modern conditions, when objects that have traditionally been integral parts of land plots (buildings), and even parts of such parts (residential and non-residential premises) are increasingly involved in turnover as independent values. In such a situation, the civil law doctrine is called upon to form

[12] See: Resolutions of the Grand Chamber of the Supreme Court dated 16.02.2021 in case № 910/2861/18, dated 22.06.2021 in case № 200/606/18, dated 31.08.2021 in case № 903/ 1030 /19.

[13] See from the latest resolutions of the Grand Chamber of the Supreme Court: paragraph 34 of the resolution dated 20.07.2022 in case № 923/196/20 and paragraphs 57, 60 of the resolution dated 20.07.2022 in case № 910/5201/19.

constructions that are not only characterized by doctrinal continuity, but are also fully adequate to the needs of modern civil turnover.

Indeed, the Grand Chamber of the Supreme Court is right in that it explains the prevailing gap in Ukraine between the ownership of land plots and the ownership of buildings located on them as a legacy of Soviet times:

> 38. The Grand Chamber of the Supreme Court draws attention to the fact that the principle of the unity of the legal fate of a land plot and a building or structure located on it has been known since the time of ancient Rome (Lat. *superficies solo cedit* – the thing built follows to the ground). This principle has a fundamental and deep meaning, it is dictated both by the needs of turnover and, in general, by the very nature of things, the inseparability of the real estate object from the land plot on which it is located. Normal economic use of a land plot without the use of real estate objects located on is impossible, as well as the reverse situation: any use of real estate objects is simultaneously the use of the land plot on which these objects are located. Therefore, the real estate object and the land plot on which this object is located should, as a general rule, be considered as a single object of ownership.
> 39. The artificial legal separation of real estate objects from the land plots on which they are located took place during Soviet times for ideological reasons. Under the influence of the ideology of the time, the idea prevailed that individuals can have ownership rights to real estate objects, but not to the land plots on which they are located. Thus, the Constitution of the Ukrainian SSR of 1978 (part two of Article 11) provided that land is the exclusive property of the state.
> 40. As a result of this approach, there is a significant number of real estate objects that are owned by private persons, located on state and communal land, and the land plots under these objects may be unformed. At the same time, the legislator's intention to overcome this artificial legal separation of real estate objects from the land is beyond doubt. Therefore, if the ownership of the real estate object and the land plot on which this object is located belong to the same person, the subsequent alienation of the real estate object separately from the land plot, as well as the land plot separately from the real estate object is not allowed.[14]

However, should we once again try to build an "ideal legal structure" that should make everyone "happy" regardless of their wishes? Isn't it better to leave the existing realities and allow the participants of the civil turnover to decide for themselves whether they want to combine or separate the building and the corresponding land plot in one object? Isn't it more correct to limit ourselves to preventive measures that would preclude the formation of a kind of "neo-feudalism" of public land owners

---

[14] Resolution of the Grand Chamber of the Supreme Court dated 22.06.2021 in case № 200/606/18, transl. mine.

(actually, state authorities and local self-government bodies), and otherwise rely on the private regulatory potential of real estate market participants? We think that the above presentation regarding the actual content of the *superficies solo cedit* principle in Roman private law will contribute to a balanced approach to further reforms in the relevant sphere of legal and economic life of Ukraine.

Unfortunately, at present, there are serious doubts as to the determination in carrying out the relevant reforms as well as to the real intention of the legislator "to overcome this artificial legal separation of real estate objects from the land" (as indicated by the Supreme Court in the above-mentioned resolution dated June 22, 2021 in case №200/606/18) taking into account the principle of equality of all participants in civil relations, which is fundamental for private law. Suffice it to point out the introduction in October 2021 in Article 120 of the Land Code of Ukraine of an unjustified privilege for state and communal lands in the form of removing them from the scope of the provisions of the Civil Code and Land Code of Ukraine regarding the following of the right to land to the right to a building, while simultaneously preserving this rule for of privately owned land. As the famous British writer George Orwell wrote, "all animals are equal, but some animals are more equal than others…"

In fact, it is unlikely that such a privilege of state ownership will have a future in judicial practice (if only the courts will really adhere to the principle of the rule of law enshrined in Article 8 of the Constitution of Ukraine). There are at least two reasons for this:

– First of all, it is quite obvious that such a privilege does not correspond to the principles of justice, good faith and reasonableness (clause 6 of article 3 of the Civil Code of Ukraine), which, according to the already established practice of the Supreme Court, are norms of direct action and "have a fundamental character and other sources of legal regulation . . . must correspond to the content of the general principles."[15]
– No less obvious is the contradiction of this privileged legal regime to the prescriptions of Part 4 of Article 13 of the Constitution of Ukraine regarding the equality of all subjects of the right to property before the law, because the very essence of such equality lies in the fact that all subjects must be able to exercise their right without granting of any advantage to any of them (Tatsyi (ed.), 2011, p. 104).

For the above reasons, the construction of "duplication of real estate" that has historically developed in Ukraine is not at all a "catastrophe," as sometimes indi-

[15] Resolutions of the Supreme Court dated 25.01.2021 in case № 758/10761/13-ц, dated 18.04.2022 in case №520/1185/16-ц.

cated in the literature (Bevzenko, 2017, p. 18), and one should not try to eliminate it at any cost by correcting the current legislation and judicial practice in such a way as this is done today. On the contrary, the "duplication of real estate" gives modern Ukraine a unique chance: a chance to create and put into practice a flexible concept of the relationship of rights to a land plot and the artificial real estate erected on it, according to which the legal fate of the land plot and the building on it will be determined by the free will of the owners, and not by an ideological (in any sense) the decision of the legislator. The positive consequences of such an approach in the form of removing another barrier on the path of economic initiative of private individuals can hardly be overestimated—provided, of course, that the legislator will form the appropriate system of rights in such a way that it will allow them to be properly strengthened while simultaneously avoiding abuses, and will also respect the rule that in private legal relations, the state is equal with private persons, not the first among equals.

REFERENCES

Legal acts

Ukrainian legal acts

Конституція України (1996). Офіційний вісник України, 2598.
Цивільний кодекс України (2003). Офіційний вісник України, 461.
Земельний кодекс України (2001). Офіційний вісник України, 2038.
Закон України «Про власність» (1991). Голос України, 79.
Закон України «Про гарантування речових прав на об'єкти нерухомого майна, які будуть споруджені в майбутньому» (2022). Голос України, 186.

Foreign legal acts

Allgemeines bürgerliches Gesetzbuch (1811).
Bürgerliches Gesetzbuch (1896).
Code Civil (1804).

Void legal acts

Декрет «Об отмене права частной собственности на недвижимость в городах» (1918).
Digesta Iustiniani (533).
Земельний кодекс України (1990).
Литовський Статут (1588).
Межевая инструкция (1766).
Свод законов Российской Империи. Том X. Часть 1. Законы гражданские (1833).
Соборное уложение (1649).

Цивільний кодекс Української РСР (1922).
Цивільний кодекс Української РСР (1963).

Special literature

Alekseev, S. (1962). *Graždanskoe pravo v period razvernutogo stroitel'stva kommunizma*. Moskva [Алексеев, С. *Гражданское право в период развернутого строительства коммунизма*. Москва].

Belov, V. (2011). *Graždanskoe pravo: Obŝaâ čast'*. Tom II: *Lica, Blaga, Fakti*. Moskva [Белов, В. Гражданское право: Общая часть. *Том* II: Лица, Блага, Факты. Москва].

Bevzenko, R. (2017). *Zemel'nыj učastok s postrojkami na nem: vvedenie v rossijskoe pravo nedvižimosti*. Moskva [Бевзенко, Р. Земельный участок с постройками на нем: введение в российское право недвижимости. Москва].

Braude, I. (1954). *Pravo na stroenie i sdelki po stroeniâm*. Moskva [Брауде, И. Право на строение и сделки по строениям. Москва].

Cvìk, M., Petrìšin, O. (2009). *Zagal'na teorìâ deržavi ì prava: pìdručnik*. Harkìv [Цвік, М., Петрішин, О. Загальна теорія держави і права: підручник. Харків].

Dernburg, H. (1860). *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts. Band I*. Leipzig.

El′âševič, V. (1916). Prodaža stroenij na čužoj zemle. *Vestnik graždanskogo prava* [Ельяшевич, В. Продажа строений на чужой земле. Вестник гражданского права], 1, pp. 64-90.

El′âševič, V. (2007). *Očerk razvitiâ form pozemel'nogo oborota na Zapade. Izbrannыe trudы o ûridičeskih licah, obъektah graždanskih pravootnošenij i organizacii ih oborota. V 2 tt*. Tom 2. Moskva [Ельяшевич, В. Очерк развития форм поземельного оборота на Западе. Избранные труды о юридических лицах, объектах гражданских правоотношений и организации их оборота. В *2* тт. *Том* 2. Москва].

Franciosi, D. (2004). *Institucional'nыj kurs rimskogo prava*. Moskva [Франчози, Дж. Институциональный курс римского права. Москва].

Grigor’eva, L., Pavlovska, S. (2014). *Zastosuvannâ sudami zakonodavstva pro pravo vlasnostì pri rozglâdì civìl'nih sprav: naukovo-praktičnij komentar. Praktika Verhovnogo Sudu Ukraïni z pitan' zahistu prava vlasnostì*. Kiïv [Григор’єва, Л., Павловська, С. Застосування судами законодавства про право власності при розгляді цивільних справ: науково-практичний коментар. Практика Верховного Суду України з питань захисту права власності. Київ].

Hodiko, Û. (2021). Princip «êdinoï ûridičnoï dolì» u sferì prava na neruhomìst′: doktrina, zakonodavstvo, sudova praktika. In: I. Spasybo-Fateyeva (ed.). *Pravo neruhomostì: krìz' prizmu sudovoï praktiki: monografìâ*. Harkìv [Ходико, Ю. Принцип «єдиної юридичної долі» у сфері права на нерухомість: доктрина, законодавство, судова практика. В: *І. Спасибо-Фатєєва* (*ред.*). Право нерухомості: крізь призму судової практики: монографія. Харків].

Hvostov, V. (1907). *Istoriâ rimskogo prava*. Moskva [Хвостов, В. История римского права. Москва].

Kapustin, M. (1880). *Institucii rimskogo prava*. Moskva [Капустин, М. Институции римского права. Москва].

Kasso, L. (1905). *Zdaniâ na čužoj zemle*. Moskva [Кассо, Л. Здания на чужой земле. Москва].

Medvedev, I. (1989). Razvitie pravovoj nauki. In: Z. Udal′cova, G. Litavrin (eds), *Kul'tura Vizantii. Vtoraâ polovina VII–HÌÌ vv.* Moskva [Медведев, И. Развитие правовой науки. В: *З. Удальцова*, Г. *Литаврин* (*ред.*), Культура Византии. Вторая половина *VII*–XII вв. Москва].

Mìrošničenko, A., Marusenko, R. (2013). *Naukovo-praktičnij komentar Zemel'nogo kodeksu Ukraïni. 5 vidannâ*. Kiïv [Мірошниченко, А., Марусенко, Р. Науково-практичний коментар Земельного кодексу України. *5 видання*. Київ].

Mitilino, M. (1914). *Pravo zastrojki*. Kiev [Митилино, М. Право застройки. Киев].

Mugdan, B. (1979). *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, herausgegeben und bearbeitet. 5 Bände und Sachenregister sowie Ergänzungsband. Band 3. Sachenrecht. Neudruck der Ausgabe Berlin 1899*. Berlin.

Sìbìl′ov, M. (2001). Ponâttâ pravovogo režimu privatnogo prava. *Vìsnik Akademìï pravovih nauk Ukraïni* [Сібільов, М. Поняття правового режиму приватного права. Вісник Академії правових наук України], 4, pp. 106-116.

Spasybo-Fateyeva, I. (ed.) (2010). *Civìl'nij kodeks Ukraïni: naukovo-praktičnij komentar*. T. 5: *Ob'êkti. Pravočini. Predstavnictvo. Stroki*. Harkìv [Спасибо-Фатєєва, І. (ред.). Цивільний кодекс України*:* науково-практичний коментар. *Т.* 5: Об'єкти. Правочини. Представництво. Строки. Харків].

Stepanov, S. (2004). *Nedvižimoe imuŝestvo v graždanskom prave*. Moskva [Степанов, С. Недвижимое имущество в гражданском праве. Москва].

Suhanov, E. (2008). O ponâtii nedvižimosti i ego vliânii na inыe graždansko-pravovыe kategorii. *Vestnik graždanskogo prava* [Суханов, Е. О понятии недвижимости и его влиянии на иные гражданско-правовые категории. Вестник гражданского права], 4, pp. 6-16.

Tacìj, V. (red.) (2011). *Konstitucìâ Ukraïni: naukovo-praktičnij komentar*. Harkìv [Тацій, В. (ред.) Конституція України: науково-практичний коментар. Харків].

Tûtrûmov, I. (red.) (2007). *Graždanskoe uloženie. Kniga 1. Položeniâ obŝie: Proekt Vыsočajše učreždennoj Redakcionnoj komissii po sostavleniû Graždanskogo uloženiâ (s obъâsneniâmi, izvlečennыmi iz trudov Redakcionnoj komissii)*. Moskva [Тютрюмов, И. (ред.). Гражданское уложение. Книга *1.* Положения общие*:* Проект Высочайше учрежденной Редакционной комиссии по составлению Гражданского уложения (с объяснениями, извлеченными из трудов Редакционной комиссии). Москва].

Case law

Конституційний Суд України, рішення від 13 березня 2012. Урядовий кур'єр.

Постанова Великої Палати Верховного Суду від 04.12.2018, Господарська справа №910/18560/16.

Постанова Великої Палати Верховного Суду від 16.10.2019, Цивільна справа №164/409/17.
Постанова Великої Палати Верховного Суду від 16.06.2020, Цивільна справа №689/26/17.
Постанова Касаційного цивільного суду у складі Верховного Суду від 25.01.2021, Цивільна справа № 758/10761/13-ц.
Постанова Великої Палати Верховного Суду від 16.02.2021, Господарська справа №910/2861/18.
Постанова Великої Палати Верховного Суду від 22.06.2021, Цивільна справа №200/606/18.
Постанова Великої Палати Верховного Суду від 31.08.2021, Господарська справа №903/1030/19.
Постанова Касаційного цивільного суду у складі Верховного Суду від 18.04.2022, Цивільна справа № 520/1185/16-ц.
Постанова Великої Палати Верховного Суду від 20.07.2022, Господарська справа №923/196/20.
Постанова Великої Палати Верховного Суду від 20.07.2022, Господарська справа №910/5201/19.