NAGOYA UNIVERSITY

Graduate School of Law

Doctoral Dissertation

Development of Real Property Law in Mongolia: Toward a Uniform Foundation

The LL.D. (Comparative Law) Program in Law and Political Science (2018-2021)
Student Name: Bayarmaa Nyamdoo
Student ID Number: 431804073

Academic Advisor: Accos. professor FRANK BENNETT
Academic Sub-Advisor: Professor KURITA MASAHIRO
Academic Sub-Advisor: Professor MATSUO YO

Date of Submission: December 24, 2021

Acknowledgement

First and foremost, my high and respectful gratitude goes to my academic supervisor Accos. Professor, Frank Bennett. The completion of this study could not have been possible without his expertise, enormous support and kind understanding of the unpredictable situations resulted from Covid 19 pandemic. Also, I would like to express my deepest gratitude to Professor Kurita Masahiro, Professor Matsuo Yo for their support and expert instruction, scholastic comments on my research. Moreover, I would like to thank the ASCI team, affiliated with the Graduate School of Law, to the ASCI Director, Professor Fumio Isoda, staff member Ms. Yuko Odake, Izumi Tamura and all Staffs in ASCI Mongolia, especially Professor Gangabaatar Dashbalbar and Ms Todrol.

I would like to express my eternal appreciation towards my parents Ch.Nyamdoo and M.Sugar, my husband Kh.Ganbold and my lovely daughters G. Nomin, G. Egshiglen and G.Yesui who have always there for me, for all unconditional supports, patience and love. Moreover, I want to thank my dear friends and colleagues Honorable Judges J.Baigalmaa, T. Enkhtuya, especially my assistance, associate judge T.Zolzaya for always being professional advisors and for your immeasurable helps and supports.

In addition, my special thank must go to Mrs Adrienne Lipoma for her time and kindness that helped me to be better researcher. Thank you to everyone that has supported me over the last three years. I appreciate all of the support very much. I am forever grateful.

Table of Contents

Abstract

While property law development plays important role in growth of country's economy, certainty of the principles in real property transfer are a decisive factor for setting up strong property rules. Perhaps, land is the only common concept that constitutes a real property, regardless of a legal jurisdiction and a family of law in which the country belongs. Also, land may be the only property, a natural function of which to human life is unchangeable. Vast of contribution to a progress of real property law goes to settled lifestyle, which welcomed to the Mongolian society with its classic meaning more than a half century ago. In this regard, Mongolian government has burdened twice for the task to absorb property rules of market economy and to protect as it presented in urbanized states.

This research examined development of the real property law of Mongolia in focusing on dilemmas emerged from in compliance between state property law and private property law, specifically, land related regimes in both areas. While the Land Law is a main legal resource for state land relations, the Civil Code contains basic and specific norms for private property relations at same time. Types of land rights that created on the state land are formulated by the Land Law as a direct reflection of wordings in the Constitution, while the property rights in the Civil Code are formulated based on the theoretical concepts of the Germanic legal family. As it originally purported to be, the property rights in the Civil Code protect activities, and are directed towards recognized ends, whereas terminologies and content of land rights over state land, creation of the state land right recording system, lack of a theoretical approach to land right transfer or termination and consequences are the main failures of the Land Law.

Regardless of its flaws the Land Law is a main resource provided handful rules for land relation in Mongolia, on the other hand, the real property rights in the private property law have not been an optimal for this society because of the insufficient scale of privately-owned land, the constitutional approach to limit private land ownership, and the legal interpretation encouraging the tendency of viewing the land as a public property. The basic principle of the real property law

to foster private property is a concise reflection of a liberal concept of the Constitution of Mongolia. Yet, in addition to state dominancy of land ownership, stagnancy in development of state property law which doesn't recognize basic principles in real property transfer such as *superficies solo cedit*, a principle of publicity and a formal approach to real property transactions, has been fading a significance of protection provided by the private property law of Mongolia. The main findings of the research can be summarized in the notion that regardless of an ownership type, urban land development requires different legal treatment from rural land, being provided with equal protection for land related rights in both areas created on the private and state-owned land along with the crystal-clear restrictive rules by public law. Lack of a unified foundation for development of state and private land relation produced serious problems in real property market in Mongolia.

From a structural point of view, the thesis examines parallel regimes for public and private land from historical, comparative and typological perspectives in each six chapters, not including the introduction and the conclusion parts. The thesis performed its first task to identify the problems underlined parallel regimes for real properties of Mongolia by means of analyzing respective provisions in the Constitution and implementation of a land reform and a detailed examination on the most relevant two laws of the Land Law and the Civil Code by its initial three chapters. Next three chapters served for a general task to find a solution and suggesting alternatives on the basis of findings from comparative study on the selected jurisdictions' real property law and a uniqueness of Mongolia.

The thesis is the first work on the country level for considering the real property rights both in private and state land relation focusing on urban areas under the application of basic principles of property law. The previous works implemented by the local experts in property law area can be divided into two general sections as some focused on the specific categories such as the concepts of possession or hypothec individually from a private law perspective, while others concentrated on land as an administrative and an environmental law aspect such as land

management or as being scarce natural resource. Therefore, outcomes of the current research are significant to look at entire framework of the real property regime established so far under the new Constitution and may contribute to rebuild successful land reform in urban areas.

List of Abbreviations

BGB	Bürgerliches Gesetzbuch
FRG	Federal Republic of Germany
GBV	Regulation on Land Register of Germany
GDR	German Democratic Republic
GPCC	General Part of the Civil Code of Republic of Estonia
JCC	Japanese Civil Code
LTLOMC	Law on to Transfer Land to Ownership of Mongolian Citizen
MCC	Mongolian Civil Code
OO	Ownership (land), Ownership (building)
OPO	Ownership (land), Long term right to possess the plot of land, Ownership (building)
ORcoolO	Ownership (land), RCOOL, Ownership (building)
PO	Long term right to possess of the plot of state land, Ownership (building
RCOOL	Right to Construct on Other's Land)
RSFSR	Russian Soviet Federative Socialist Republic
WEG	Act on Ownership Apartments and the Permanent Residential Right of Federal Republic of Germany

Chapter I: Introduction

The transition of Mongolia to a free-market economy steered us to land reform. The reform started almost three decades ago and as a result, two different institutional and legal regimes concerning the most important real property, the land, has developed. In other words, although privatization of the land for citizens of Mongolia within certain restrictions was the main goal of the land reform initialized by the first democratic constitution in 1992, further legal developments of the land relations focused more on building the state land use system. Consequently, the institutional and legal rules regarding the state land use system became prominent and began to eliminate the role of private property law. Afterwards, conflicts concerning the interpretation and exercise of the fundamental principles of property law were raised.

1.1 The Problem

The inconsistency between the distinguished legal frameworks for private and state land has been creating theoretical and practical problems and serious dilemmas in legal areas, especially in dispute resolving areas, has emerged because of their exhaustive, not functional characteristic to human life as to regulatory purpose. Recent court statistics from the last five years show that land related disputes have been the largest number of cases resolved at the administrative court and number of cases related to land in civil court litigation has tended to increase constantly.[1]

With regard to private law, Mongolia has chosen the Germanic legal system which is based on the Romanistic family of law. Logically, necessary legal institutions such as the *numerus clausus* doctrine, the strong real property registration and a formal approach to the transfer of real property were developed in support of the rule of *superficies solo cedit* in relevant legislation.

[1] According to the Annual Reports on Judicial Process of Mongolia, land related disputes raised from 2015 to 2020 were the highest or the second ranking number of cases resolved at the Administrative courts; for further detail, see JUDICIAL GENERAL COUNCIL OF MONGOLIA, *Annual Report on Judicial Process of Mongolia,* (Ulaanbaatar, 2015-2020).

On the other hand, the Land Law, which focused on the creation of the modern state land use system adopted a rather different approach from private property law. Ambiguity in the Land Law for creation of rights to use state land and an unclear approach to transferring the state land rights from one to other, developed a distinctive model for the state land use system from the suggested model in the Civil Code. Because of the state land dominancy, most of the land related rights currently in commerce are created on state land under the Land Law. However, except for the disputes against the state administrative bodies who have the power to grant land rights, the land related disputes fall under the civil court jurisdiction in seeking property right protections under the Civil Code. From this point, theoretical contradictions between state and private property rules became practical problems, and an urgent need for coordination between the two laws has been recognized. This is not just an excessively complicated situation for the ones who have to solve the disputes, who have tools made by completely different methods in their hands, most dangerously, this circumstance generates high administrative and societal costs by hindering various types of business contract performances.

Another problem which is more hypothetical because of the limited scope of private land, however, that has the potential to be raised in the near future is the consequences of unfledged property rules in the Civil Code such as apartment ownership, the restricted number of property rights created for the purpose of developing urban land, and their insufficient content. Although the property rights created by the Civil Code are relatively comprehensive and functional compared to the Land Law, they have explicit shortcomings. For example, the concept of apartment ownership in the Civil Code and other relevant laws lacks the legal approach to explain the fact of its separation from the underlying land, while the number of potential rights to develop urban area is limited to one kind under the Civil Code.

Again, as mentioned above, this is not an empirical issue at the moment because of the immature private land market. However, if the present thesis aims at a unified property rule for the state and private land relation and finds that diversification of the types of property rights is

necessary, seeking a way to improve the current rule by studying corresponding jurisdictions is an important task of this research.

1.2 Research question

In recent years, two doctoral studies aimed at improving property law regimes were conducted. First, Yanjinkhorloo Dambadarjaa sought empirical and theoretical evidence of necessity to develop hypothec in promoting its accessor feature.[2] An aspect of pledge over a right of possession in state land was covered by one subsection of her dissertation and she concluded that it is necessary to treat the pledge over a right of possession as a hypothec under the Civil Code. Her work is the first doctoral research in the area of real property law since the constitutional declaration that Mongolia will follow a market economy. Second, Davharbayar Tsedevsuren suggested improving protections of possession by identifying its factual nature originating from the civil law system through her doctoral research in 2018.[3]

Although the studies were fundamentally significant for this thesis to achieve its main objective, the scope of these theses does not cover property rights in general from the perspective of analyzing the two major laws from their historical development. Most notably, there has been no prior research conducted that responds to the question of the consequences of urban land rights in light of the rule of *superficies solo cedit* principle and in terms of coordination between two main legal resources of the Civil Code and the Land Law.

This study argues that comprehensive real property rights are the central elements of real property markets of the countries that formed as a unified institution regardless of the ownership

---

[2] Yanjinkhorloo Dambadarjaa, Pledge over Immovable Property (Hypothec) and Its Contemporary Issues, (PhD Diss, Ulaanbaatar, 2016), (last accessed April 16, 2021), available at: http://data.stf.mn/Publication/Thesis/ThesisViewPublic.aspx?id=128997. Дамбадаржаагийн Янжинхорлоо, Үл хөдлөх эд хөрөнгийн барьцааны эрх зүйн зохицуулалтын тулгамдсан асуудал сэдэвт докторын диссертаци.

[3] Davharbayar Tsedevsuren, The Possession in Property Law and Its Protection Issues, PhD Diss, Ulaanbaatar, 2018), (last accessed April 16, 2021), available at: http://data.stf.mn/Scientist/ProfileViewPublic.aspx?id=1098956. Цэвээнсүрэнгийн Давхарбаяр, Эд юмсын эрх зүй дэх эзэмшил, түүний хамгаалалтын тулгамдсан асуудал сэдэвт докторын диссертаци.

type. Therefore, a unified property rule that recognized public law restrictions to a certain extent should be promoted. With this main assumption in mind, the current thesis sets out the following research questions:

1) Is neglecting the importance of private property theories and principles in state property relation consequential?
2) In respect to certainty and protection, what is suggested by the land related rights created by the Land Law?
3) With relevance to property transfer, should we follow the path carved by private property law or the current practice of divided approach?

Without proper consideration from the view of administrative law aspects such as urban land management, land planning, zoning, valuation and tax, the effectiveness of theoretical study of the land use system may not be sufficient; however, the proficiency of the author and the broadness of the subject of study effected the formulation of the research questions mainly from the property law angle. Thus, this research stresses the substantive issues of property law by believing that the certain and diverse property rights and the provision of private and administrative law protection to them may have a fundamental contribution to elaborate the effective urban land management.

1.3 Research map

This thesis consists of eight chapters. The first chapter is the introduction that aims to provide the main research question and the objective of the thesis, and the research map that helps to reach the conclusion. The purpose of the second chapter is to identify the cultural and historical uniqueness of Mongolians' view of land. Next main aim of this part is to explain how Mongolia develop a private land model in urban area with such limited experience of free-market economy because of almost 70 years history of socialist life that welcomed during the pure nomadic social life in the beginning of 1900s. This chapter's finding supports the author's idea of specific feature of the country and one of final conclusion of the thesis that the land not only requires private

property rules and protection, but it also falls under public law restrictions due to its fundamental ties of human life and the interest of the survival of the Mongolian nomadic lifestyle. Also, this chapter serve as a fundamental introduction to current land owners' constitutional environment in Mongolia. As the constitution is the basic affirmation of the Mongolian people's unity and provides the fundamental principle of the rule of law, a constitutional approach to the aspect in question is necessary to understand the uniqueness of the society's view towards the land.

The third chapter examines the initiation of the current land use system of Mongolia, highlighting in particular the acceptance of the concept of private land ownership for the first time in constitutional history in order to form a market economy promoting private property land. However, general policy of privatization has influenced the stagnation of land reform, or more precisely it has become a hindrance to the successful result of the land reform. In this chapter a basic distinguishment of Mongolian transition to market economy from other post socialist country, which later caused to establish unpleasant property law environment of the country will be studied. Next, the fourth chapter focuses on the legal environment of the current land use system with respect to the state and private land relations and this system is called "parallel system for land use" in general in this research. This part of the research serves as the main argument of the thesis recognizing that the current land use system of Mongolia has been suffering from a parallel characteristic of real property relation. Therefore, the chapter studies the present model for private and state land use system in detail. The initial four chapters of the thesis generally serve to discover the answers to the first two research questions.

The fifth chapter further analyzes how real property rights, especially in urban areas, have developed throughout the legal environment of real property area in the advanced jurisdictions of Japan and Germany. Unified basic rules for real property relation in these two countries, as well as the novel representatives of civil law family are of particular concern for the comparative study in the scope of this thesis. Moreover, the chapter demonstrates that while the purest version of the

superficies solo cedit rule in real property transfer developed in Germany, Japanese jurisdiction's approach to divided conveyancing is of equally significance to study.

As a successful transition country, real property law of the Estonian Republic is an excellent experience to be studied due to the country's effective conversion of socialist property rules into state asset and into private property regimes by keeping a unified concept of German law with regard to public and private property relation. Differences between Estonia and Mongolia may find frequently from the cultural and historical perspectives, however, since a special concern of this study towards real property law development in urban area and considering the dominant lifestyle in Mongolia is now settled, the nomadic roots of our culture would play less role within the scope of this research. As one of the winning countries in the transition race, Estonian privatization history and property law reform are relatively crucial for identifying Mongolia's own missteps. Therefore, from the methodological perspective, a property law reform of Estonia is analyzed through similar events and movements that occurred in Mongolia as well.

On the basis of the findings from the previous chapters, the sixth chapter summarizes main impacts of the current system and presents the recommendations of the thesis by highlighting the specific issue of real property transfer and possible alternatives that Mongolia may have. In the final chapter, the conclusions of the research are summarized.

Chapter II. Land Owners in Mongolia: Constitutional and Historical Perspectives

2.1. Traditional Mongolian Attitudes Toward Land

Many influential experts in history and land law of Mongolia agree that in Mongolian history the land has never been subject to private ownership. For example, the Russian scholar Ryazanovskii stated that Mongolians were unfamiliar with the concept of land ownership.[4] Dr. N. Lundendorj explained a reason why the land ownership concept did not develop in Mongolia. In his opinion, first, Mongolians had not yet discovered resource capacity of land as capital; second, they only needed to use land for pastoral livestock husbandry, limited by environmental and climate conditions, and the special features of the plants and the surface of the land.[5] More interestingly, he stressed the idea that Mongolians were restricted in their options to use land by their environment.[6] In other words the "purpose" and fertility of Mongol land is more convenient to serve for pastoral cattle breeding and livestock industry. It is a rationale for the land to remain under the state's dominium and for herders' utilization in Mongolia until end of the 20th century.

In other words, the geographical characteristics of Mongol land and subsoil would make any society, occupying this land, into a nomadic people. Historically, nomadic peoples have not been regarded as retaining property rights to land because their nomadic lifestyle was not considered as fulfilling the criterion of effective occupation of the land.[7]

The way of live for Mongols seems very simple on the one hand; however, on the other hand, it is fundamentally dependent on a nature and based on a deep understanding of natural phenomenon and the connection between the earth and the land. Without this profound knowledge

---

4 V. A. Ryazanovskii, *Great Rule of Chingis Khaan, Великая Яса Чингис Хана.*, 1933, 66.

5 N. Lundendorj, "Historical Debate on the Existence of Private Ownership of Land in Mongolia and Philosophical, Historical and Legal Analyses, Н. Лүндэндорж, Монголд Газрыг Хувьд Өмчлүүлж Байсан Эсэх Талаарх Түүхэн Маргаан, Түүнд Хийсэн Түүх, Философи, Эрх Зүйн Шинжилгээ, Газар, Удирдлага, Эрх Зүй Эмхтгэл.," *Land, Management and Law, Collection of the Conference Papers*, 2005, 56–80.

6 *Ibid*.

7 Ch. Dalai, *The Great Mongol Empire (1206-1260), Ч.Далай, Их Монгол Улс (1206-1260)*, vol. 2nd, n.d., 34–35.

of climate conditions, the nomadic culture of livestock husbandry would not survive until today. The metaphorical mindset of viewing the sky and land as mother and father and the recognition of the land as the root of the state was the common views of Mongols.[8] This way of thinking may affect the development of a strong idea that nature governs humans and people have to adapt to nature.

Therefore, in the early days of legislative development in Mongolia, considerably strict rules were used and applied to land relations. For example, in Article 34 of the well-known and historical legal resource "*Ikh zasag of Chingis Khaan*", "The [*ger*] shall be sentenced to death if one causes a fire on the pasture land and makes a hole in the land during the time after land becomes green."[9] Another important legal source between 1600-1639 "*Uisen deer bichsen 18 tsaaziin bichig*" has several sections on land use and the protection of land. For example, in accordance with this code "One shall be sentenced to ten times penalty of nine if one moves intentionally on others' land marked with a wooden stick. If one unintentionally moves to that land one horse must be taken."[10] Since the Great Mongol empire of 1206 through modern Mongolia of 2004, over 40 laws and regulations that relate to land have been enacted.[11]

---

[8] Since time immemorial, land has been considered the root for independence. The unwritten legend of Modun Shanu, a son of Tumen Shanu who was a founder of the Hunnu empire, the first state situated on the land of modern Mongolia is told among us until today. The story illustrates the belief of nomads and their special commitment to the land. According to the legend, Modun, who satisfied several desires of an eastern neighbor Donghu including sending him his most loved horse and a wife, reacted to Donghu's expression of desire to occupy a very small size of uninhabited and abandoned land that lay between two countries by attacking Donghu. The story helps to understand the mentality of Mongols regarding land as superior and valued more than anything.

[9] In general, "ger" refers to a traditional home for nomadic Mongolians, however, in this provision, the word substitutes as "all members of one family". See,N. Otgonchimeg, "Historical Comparison of Land Related Legislation of Mongolia," *Land, Management and Law Collection of Conference Papers*, 2005, 81–102; G. Saishaal, *Chingis Khaanii Tovchoon,* (Khukh hot, 1989). Н.Отгончимэг, Монгол Улсын газрын хууль тогтоомжийн түүхчилсэн харьцуулалт, *Газар, Удирдлага, Эрх зүй эмхтгэл*, Улаанбаатар, 2005, Г.Сайшаал, Чингис Хааны Товчоон.

[10] In the original text, the term of "penalty of nine" refers to a traditional type of sanction, imposing a duty to pay nine livestock composed of horses, camels, cows etc. A famous historical legal resource: *"Uisen Deer Bichsen 18 Tsaaziin Bichig", [18 Codes Written on Corkwood]*, 1600.

[11] N. Otgonchimeg, *supra* note 9, 81.

Local pioneers in the arts of history and law are usually divided into two groups in regards to the question of whether the land has ever been in private ownership in Mongolia from a historical perspective: the first concept is that until the national revolution in 1921, the land was under feudal ownership, and soon after the revolution it transferred to the people's ownership (ulsiin umch); the second is that land has never been transferred to private, community or class ownership in history, but rather it has always been the property of the Mongol people.[12] S.Jalan-Aajav, one of the famous historians stated in asserting the first concept, "Land was owned in total by the feudal rulers", "…there is no doubt that feudal properties on the land were under legal protection."[13]

On the other hand, in some literature the idea that "only the great Khaan ("king" in English) shall be vested with the right to allocate the land to others, anyone other than the Khaan cannot transfer the land to other's possession" was found as one of the bases in political ethics and theory of feudalism. To clarify, having the power to divide or allocate the land does not mean the great Khaan has an ownership right over the entire land. About that, the well-known historian Ch. Dalai stated that "…at the end of the 12th century and at the beginning of the 13th century, livestock used to be individually owned; however, pastureland remained under the ownership of a clan and an aimag.[14]

Perhaps, a nomadic lifestyle on vast land and a customary law to share pastural land which satisfies their essential needs have never accompanied the idea of private ownership of a plot of land. This may explain why the land ownership concept is still the subject of argument until today. Analytical studies have been done in the above mentioned historical legal sources proved that the

---

[12] O. Amarkhuu, *Modern Ecology Law of Mongolia, О. Амархүү, Монголын Орчин Цагийн Экологийн Эрх Зүй*, 2nd ed. (Ulaanbaatar, 2009), 332.

[13] S. Jalan-Aajav, *The Khakh Juram Is the Ancient Legal Resource of Mongolia, С.Жалан-Аажав, Халх Журам Бол Монголын Хууль Цаазын Эртний Дурсгалт Бичиг.* (Ulaanbaatar, 1958), 84–85.

[14] Ch. Dalai, *supra* note 7, 35. An "*aimag*" originally meant tribe. Now it refers to an administrative subdivision

concept of land has been recognized as the root of life rather than as property; therefore, land relation has been a subject of public law than private law.[15]

From the middle of the 20th century, Mongols' economic, and legal ways of treating land has changed, and manufacturing industry besides livestock husbandry has started to develop, followed by the establishment of inhabited, settlement civilization.[16] This was a basic justification to allocate land to private ownership. As a result of democracy, the establishment of completely new systems for all directions of societal life was challenged in 1990. After several months of the discussion, the concept of owning only the surface of the land /ownership is not applicable to what is above and below the ground/ by a citizen is accepted in the new Constitution in 1991. However, it must be mentioned that the land ownership concept still lies on the intersection between an idea to protect the nomadic culture and the policy of liberal economy.

2.2. Land as Socialist Property (1924-1992)

2.2.1. Land as nation's property during the socialist period

During the socialist period, a concept of socialist property was developed, indeed, not the concept of state[17] property. Until the first amendment to the Civil Code after the democratic revolution in 1990, like other socialist countries, Mongolia recognized two main types of property forms for almost 50 years: socialist property and personal property.[18] Holding a significant amount of property in private ownership was critical at that time. In accordance with Article 60 of the Civil Code of 1963, the socialist property is composed of (1) the nation's property (улсын өмч-*ulsiin umch*), (2) cooperative property, (3) the trade-union's property, 4) other community organization's property. [19]

---

15 N. Otgonchimeg, *supra* note 9, 82.

16 N. Lundendorj, *supra* note 5, 80.

17 The word "state" has two meanings in Mongolian language: (1) a nation-*улс* (*uls*,) and (2) in an abstract sense, it means an ultimate governing body of a country-*төр* (*tur*). In this regard, the term "state" does not match with the term "government" that only refers to an executive branch of the state power.

18 "Civil Code of People's Republic of Mongolia 1963," in *Laws of People's Republic of Mongolia,* vol. 1 (Ulaanbaatar, 1980), 132–258.

19 Article 60 of the Civil Code of People's Republic of Mongolia in 1963.

Under the socialist regime, developing the concept of private land ownership was pointless and unnecessary because the socialist economy negates private ownership, and the functions of civil society and institutions of human rights are restricted individual interest and rights. Therefore, economic freedom and rights of humans are constrained by the concept of the nation and civil property. The explicit prohibitions against private land ownership were presented in the previous three Constitutions of Mongolia respectively 1924, 1940, and 1960.

In Article 3.1 of the first Constitution of the Republic of Mongolia of 1924:

> All land, mines, forests, water and wealth thereof have belonged to our people since long ago. Because this ideology is consistent with the present custom of the people, all these properties shall belong to the nation and the creation of private ownership shall be restricted.

In Article 5 of the Constitution of the Republic of Mongolia of 1940:

> All land, subsoil wealth, forest, water, wealth thereof, factories and industries, all mines, including ore mining and gold exploitation, railways, auto, water, and air transport, telecommunications, banks, stations with haying machinery, and state farms shall belong to national ownership and be property of all people. They shall not be owned privately.

In Article 10 of the Constitution of the Republic of Mongolia of 1960:

> All land, subsoil wealth, forest, river and water, wealth thereof, nation's factories, mines, power stations, railways, auto, water and air transport, roads, telecommunications, banks, the nation's agriculture farms, the nation's utility entities, nation's fund of apartments in cities and villages, the nation's commercial agencies, science and cultural institutions, and all properties of the nation's organizations shall belong to the nation's ownership, in other words shall be property of all people.

2.2.2. Property rights in the socialist property law

The socialist property theory has been developed further with two types of property rights along with the ownership right in property law regime, namely an economic management right (право хозяйственного ведения in Russian – *pravo hoziyastvennovo vedeniya*) and an operational management right (право оперативного упревления in Russian- *pravo operativnovo uprevleniya*).

Economic management rights and operational management rights emerged in the theory of domestic property law associated with the existence of a centrally planned and regulated economy,

which mirrored the scheme of the structure developed in the Soviet Union. In such an economy, the nation, as the owner on behalf of all people of almost all property, being unable to directly manage the objects belonging to it, and at the same time not wanting to lose the right of ownership to them was forced to issue objectively "independent" legal entities - enterprises and institutions, securing their own property with certain property rights. Indeed, theoretical views to identify new types of socialist property rights did not emerge randomly, it is certain there has been influence Russian theorists.

At that time, in the Civil Code of the RSFSR of 1964, these rights became known as the "right of operational management", and were divided into the broader concept of "right of full economic management", intended for manufacturing enterprises, and the narrower "right of operational management", intended for state budget and similar organizations.[20] Theoretically, the activities of holders of these rights also determined the differences in the content and scope of powers that their founders received from the owner of the property assigned to them in accordance with law. The right of economic management, held by the enterprise as a commercial organization, by virtue is wider than the right of operational management, which may belong to non-profit institutions by the nature of their activities.

The objects of these rights are property complexes fixed on the balance sheet of the respective legal entities (and the remaining property rights of their founders). Under the socialist property theory, it is understood that the results of the economic use of property under economic management or operational management in the form of fruits, products, and income, including property acquired by state-owned enterprises or institutions under contract or other reasons, respectively, enter into economic management or operational management of an enterprise or institution. In other words, this property becomes the object of the property right of the founders of

[20] E. A. Suhanov, *Grajdanskoye Pravo, (2008), Е. А. Суханов, Гражданское Право,* (Project of Institution of Economy and Law eBook, 2008), chap. 4, available at https://be5.biz/pravo/g016/index.html, last accessed April 19, 2021.

enterprises and institutions, and not of the legal entities themselves. After all, the material base for their existence is the property of the people as an owner-founder.

In accordance with the Constitutions of their respective periods and Article 63 of the Civil Code of 1963 of the Mongolian People's Republic, the land and its attachments belong to the ultimate owner, the nation. However, Article 94 of the Civil Code of 1963 stated that when the transferring ownership rights to house to others, the land use right underneath the house shall be transferred to the same.[21] Moreover, there were some rules and laws that provided perpetual free land use rights for the purpose of pasturage, hay, and agriculture to the state (uls-nation) farms and organizations. These rules and laws did not aim to create property rights and are more meant likely to serve administrative purposes.

2.3. Land as a State Property (1992-2020)

As mentioned above, in 1992 the Constitution originally provided that land, except that which is privately owned, is state property, and it was the first time the term 'state property' was officially entered in the Constitution along with an important concept of private ownership of land. Accordingly, in 1996 the Law on State (tur-төр) and Local Property was adopted. Under Article 5.2[22] of the Constitution Mongolia recognizes two fundamental forms of property: public and private. Further classifications and regulations on these types of properties are found in the Civil Code (2002) and in the Law on State and Local Property (1996).

Pursuant to the Civil Code, the public property shall have the following categories: state, local, religious, and community in accordance with Articles 3 and 4 of the Law on State and Local Property. "State property is further divided into two classes: property with a public purpose and property with the state's own purpose" recognizing land, except that given to the citizens for private ownership as state property with a public purpose. On May 24, 1996, during discussions of the draft

---

[21] Article 94, Civil Code of People's Republic of Mongolia 1963, *supra* note 18.

[22] Article 5.2 of the Constitution of Mongolia provides that:
5.2. The State recognizes all forms of public and private property and shall protect the rights of the owner by law.

law on State and Local Property in the State Great Khural (the parliament of Mongolia), a writer of the draft, a parliament member, and a former chief drafter of the Constitution (1991) B. Chimid states that:

> A definition must not be in "colloquial speak" and should be prescribed by a nominal word. There is a concept of "*частный собственность государсва*" (state private property in Russian). However, it is not appropriate to translate into Mongolian as state private property. … For example, the Government palace is not public property. It is a that property belongs to the state organization itself. But the land, underneath the palace is public property. … So that, the concepts of state public property and state own property are created for the first time here, and it [state owned property] is a preferable definition to "state private property".[23]

It was the first attempt to recognize the category of "public" in administrative law under the application of a democratic Constitution. In general, as a result of the Constitution and respective legislations state, the conclusion may be drawn that the state land is public property and consequently, today 99.94 percent of the land of Mongolia is public property. In this regard, it is doubtful that the concept of public property in the Constitution coincides with the theoretical concepts of commons and public things developed originally in western jurisdictions because the concept of public property includes the category of state property which is analytically similar to private property to a certain extent.

2.4. Land as "State Public Property" (2020 to present)

Amendment to Article 6.2 of the Constitution, which was approved in November 2019 and became effective on May 25, 2020 now reads:

> The land, except those given to the citizens of Mongolia for private possession, as well as the subsoil with its mineral wealth, forest, water resources and wildlife shall be **state public property.**
>
> In compliance with the country's long-term development policy, the State Natural Resource Exploitation Policy shall aim to ensure citizens' right to a healthy and safe environment and equitably distribute the benefit of subsoil wealth through the Sovereign Wealth Fund.
>
> The citizen shall have a right to know about the environmental impact of subsoil wealth exploitation within the scope of the right to live in a healthy and safe environment.

[23] The State Great Khural, *Minutes of IX Special Session of the State Great Khural, Улсын Их Хурлын Хэлэлцүүлгийн 9-р Тэмдэглэл,* vol. 35, May 24, 1996, 16.

> The legal grounds to obtain a majority benefit of subsoil wealth by the people of Mongolia in compliance with the principle of permanent sovereignty over natural resources by exploitation of strategically important mineral deposit shall be affirmed in the Law.

The conception of the phrase "state public property" is at the heart of the academic debates among scholars. On June 06, 2019, 62 members of the State Great Khural of Mongolia recommended a draft amendment to the Constitution to the Parliament. The draft covered several chapters of the Constitution, though Article 6, a basic provision regarding ownership and use of land and other natural wealth was not a subject of the draft amendment initiated by parliament members. A month later, on July 16, 2019, the president of Mongolia recommended his version of a draft to the Constitution as well. In his draft, he suggested a change to Article 6.2 of the Constitution as follows:

> 6.2. The land, except that given to the citizens of Mongolia for private possession, as well as the subsoil with its mineral wealth, forest, water resources, and wildlife shall be public property. Ensuring equality, fairness, national security, and sustainable development shall be the principle for using natural wealth. In compliance with the principle provided in this Article, subsoil wealth may be exploited by a legal entity of Mongolia on the basis of a license granted from State of Mongolia. The cost of exploiting subsoil wealth with special significance jointly with the state shall be borne by an investor, and 51 percent of profit after tax shall belong to the state. The cost for an investor shall be definite. The state shall report to the public the investor's cost upon implementing surveillance. Income from joint exploitation of subsoil wealth with an investor shall be transferred to the Wealth Fund and disposed by it. Conditions for use of assets in the Wealth Fund and its structure and activity shall be subject to the Law.[24]

From the wording of a draft version of an amendment to Article 6 initiated by the president, it seems like the drafter was more concerned with what is under the land than the surface of land. This is also evidenced through three arguments developed by members of a working group who rejected the president's version: (1) If the Constitution declares subsoil mineral to be public property, it will be too general and become hard to apply accountability. (2) The countries that have a basic provision for natural wealth ownership in their constitutions have a tendency to avoid using the concept of "public property". Instead, it is common to use "state property". (3) To categorize

[24] Kh. Battulga, President of Mongolia, "A Draft Amendment to Article 6.2 of the Constitution," on June 16, 2019, Available at https://president.mn/10139/, (last accessed in April 2021).

the objects in Article 6.2 of the Constitution as "public" is not appropriate in accordance with further theoretical explanations and classifications concerning the properties under the jurisdiction of Mongolia.[25]

Ownership of subsoil wealth and its exploitation rights were at the center of the parliament debates concerning Article 6.2 of the Constitution. After several weeks' discussion, the parliament members who initiated the first version of the amendment and the president of Mongolia reached consensus on the formulation of Article 6.2 and swapped the term "public property" for the term "state public property". The main argument for negotiating the concept of "state public property" was stated by working group member N. Luvsanjav:

> "… state public property should not be under the sole discretion of the government. Without an answer from the parliament, which exercises the ultimate right of the people of Mongolia, a matter of state public property cannot be decided. In recognizing the need to restrict arbitrary behavior of the government and its organizations and the decisive power of the people of Mongolia in relation to matters that belong to them, the concept of state public property has newly emerged here."[26]

The constitutional affirmation of the right of the Mongolian people with regard to natural resources may be a good move from the view of political terms under the current circumstances of numerous mining and exploitation activities in which the state is involved, but this amendment is not an improvement with regards to encouraging the creation of an efficient system for the use of the land surface. The extremeness of looking at the land only as the root of the state is strengthened by this last change.

---

[25] O. Munkhsaikhan, "Concepts of Amendments to the Constitution: Principles to Exploit Subsoil Wealth, О. Мөнхсайхан, Үндсэн Хуульд Оруулсан Нэмэлт, Өөрчлөлтийн Үзэл Баримтлал: Газрын Хэвлийн Баялаг Ашиглахад Баримтлах Зарчмууд.," *Law* 3 (2020): 1–37.

[26] The State Great Khural, "Minutes of the Special Session of August 28th 2019, of State Great Khural /Wednesday/, 39-40, Монгол Улсын Их Хурлын 2019 оны ээлжит бус чуулганы 8 дугаар сарын 28-ны өдрийн /Лхагва гараг/ Нэгдсэн Хуралдааны Товч Тэмдэглэл," n.d.

2.5. Land as Private Property

The Constitution of Mongolia of 1992 provided basic rules in light of land allocation in private ownership for the first time. In 1991, during the lengthy discussions of *Ardiin Ikh Khural*[27] for 50 days of the provisions regarding private land ownership in the draft constitution, out of thousands of opinions and suggestions from citizens, only 23 people supported private land ownership, while 4,426 people backed the idea of a long term right of possession of land for citizens.[28] The survey conducted in 1991 in 4 provinces and Ulaanbaatar city by the "Academy of state and civil society study" shows that 15 of every 100 people endorsed the idea of private land ownership, while 56 voted for state ownership.[29] Therefore, we have to admit that accepting the concept of private land ownership in the Constitution was the best outcome under such negative circumstances.

Comparing to the 1990s, Mongolians' consciousness of private property rights for land has changed. The results of the survey conducted by the thesis author among 644 citizens suggest that Mongolians' way of looking at land has slightly changed from public to private property, and the notion that land is the most advantageous asset to hold is becoming particularly strong. (Please see appendix C of the thesis for further detail). The understanding of land ownership as an "absolute right entitling landowners to use freely, take profits from, and dispose of their land" is supported by the highest percentage of people, at 65.2 percent. This result shows that people have begun to understand the fact that land is naturally a different resource than mineral resources, forest, fauna or paleontology findings, and this different property is one that can be owned privately.

---

[27] *Ardiin Ikh Khural* means the People's Great Meeting, which was the leading organization of the legislative branch of the Mongolian People's Republic.

[28] Ardiin Ikh Khural, *Minutes of the Second Session of Ardiin Ikh Khural of MPR,* vol. 45, 1991, 1992.

[29] S.Nyamzagd, Thoughts on State of Mongolia: One Important Issue: *People's Right*, October 20, 1991, №88 (260). С. Нямзагд, Монгол төрийн ухааны нэгэн чухал асуудал, *Ардын эрх сонин.*

2.5.1. Concept of private ownership in modern Mongolian property law

The right of ownership is the most comprehensive right, giving the broadest legal power over property. As it is in the civil law system, ownership cannot be divided, and it is the only full real right. It allows its holder to exclusively determine the nature and use of the property and, in the process, confers complete economic dominion over the property. In Article 101.1 of the Civil Code, the legal capacity of an owner is described by using a triad of legal owners: possession, use, and disposal. Pursuant to Article 101.1, an owner is entitled to prevent violations of these rights. Accordingly, an owner has a remedy of a vindication action in addition to remedies of possession protection and a right to file an *actio negatoria*.

The *numerus clausus* doctrine in the Civil Code

Article 16 of the Constitution declares the right of citizens to fair acquisition, possession and inheritance of movable and immovable property and prohibits illegal confiscation and requisitioning. If the State and its bodies expropriate private property based on special state needs, they shall do so with due compensation and payment. Under Article 5 of the Constitution, an owner's rights shall be limited exclusively by grounds specified in the law. Given the *erga omnes* effect of absolute rights, the civil law has set certain limits, the so-called *numerus clausus* doctrine, which is at the heart of civilian property law systems.[30] Accordingly, Article 103 of the Civil Code affirms the principle of limiting ownership rights only by the grounds stated in the Law. Therefore, it can be considered that the Civil Code of Mongolia adopted a *numerus clausus* doctrine.

The doctrine has various aspects. Most importantly, the number and content of absolute rights are limited by mandatory law. Parties may choose between these types of property rights explicitly set out. But they may neither agree on new types, nor mix those provided for, as this would contradict the so called "definition of types" (*Typenfixierung*).[31] Because limited real rights

---

[30] Sjef Van Erp, *Comparative Property Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, 1054 (2006).

[31] NATIONAL REPORTS ON THE TRANSFERS OF MOVABLES IN EUROPE VOLUME 3: GERMANY, GREECE, LITHUANA, HUNGARY, 14 (Wolfgang Faber, & Brigitta Lurger eds., 2011).

usually arise independently from the will of the owner, the nature and content of these rights is determined by law, not by contract. Therefore, the law itself establishes all types of limited real rights and determines their scope and content. This results in the law fixing an exhaustive list, or *numerus clausus* of limited real rights.

2.5.2. Strength of private ownership rights of land in the constitution

Because, it is in a civil law system, under the property law of Mongolia ownership is the full and complete right of dominion over property. At its most extreme and absolute, it means the power to enjoy and dispose of things absolutely. However, in accordance with Article 6.3 of the Constitution citizens shall be prohibited from transferring the land under their ownership to foreign citizens and stateless persons through selling, bartering, donating or pledging as well as from transferring it to others for their "possession and use" without permission from competent State authorities.

In other words, a landowner may dispose of his/her land to anyone who is an eligible recipient without the consent of a competent authority, whereas he is not allowed to transfer his land anyone's possession for use (transer of a "right of possession" under current law), including citizens of Mongolia, if he hasn't obtained consent. The interesting thing about this Article is that in order to transfer land to a citizen under a right of possession, the owner is required to have the consent from a competent authority, while an owner has the ultimate right to dispose of his land ownership to a citizen of Mongolia by way of sale. If the recipient is a foreign body, the consent requirement would be understandable. However, the word "others" in the sentence of "citizens shall be prohibited …from transferring it to <u>others</u> for their possession and use without permission from competent State authorities" is clear and includes all entities outside of the owner himself.

Consequently, in accordance with Article 29.1 of the Law on Transfer of Land to Ownership to a Mongolian Citizen, in order to transfer the land to others' possession and use, an owner is required to have the consent from the relevant soum or district governor, no matter who

is the recipient.[32] Because of this provision, a private land owner cannot create limited rights on his land in accordance with the Civil Code without a consent of a governor. The requirement is not just for the limited rights, it applies to the contractual relations as well. In addition to land reform policy that limits private land ownership, it restricts free use of private land. Instead of this restriction, adequate public law restrictions should be developed such as exercising pre-emption rights by public authorities and establishing a comprehensive system for real property transactions in which notaries and land registration agencies or other stakeholders perform their roles well.

2.5.3. Constitutional limitation of private ownership right to land

In accordance with Article 6.2 of the Constitution, private ownership right does not apply to the land subsoil. Wealth under or on the surface of the land, such as subsoil, mineral resources is not subject to the right of private ownership. Therefore, only the surface of land remains possible for private ownership. Accordingly, it is difference between state land ownership and private land ownership.

Because of the limitation on private land ownership from the vertical approach of ownership, in a *ger* district area most people are confronted with difficulties in using land even for their essential household needs. In accordance with the Constitution private land ownership applies only to surface of the land, and subsoil remains under state ownership perpetually. The Law on Land Subsoil affirms this concept, which also affected further formulation of limited property rights. In fact, the properties that exist under or above ground are not cannot be constructed without using areas under the surface of the land to certain extent.

Moreover, surface right of the state land for a mining purpose lacks regulation in mineral resource industry. Currently, there is no evidence that mineral resources are explored on private land. Majority of the land disputes at the administrative court in one year were derived from

[32] Article 29.1 of Law on to Transfer Land Ownership to Mongolian citizen as follows:
29.1. A citizen may transfer his/her possession and use right of land to others in accordance with its purpose and term with a consent of a Governor of relevant district and a soum.

conflicting decisions of the mineral resource agency and the governor of the soum on the same land plots. In fact, this specific type of right to use state land for a mining purpose has not been created by law, yet. In both cases, a private mining right for state land or a state mining right to private land, a land surface right for mining purpose needs to be created.

2.6. Conclusion

Within considerably restricted constitutional environment, Mongolia has been creating its land use system for last thirty years. Although the constitutional framework for private ownership of land has strict limitations from various perspectives, accepting the private ownership of land in the constitution was the best result that can be expected at that moment. The constitutional restrictions to private land ownership are rooted on three main categories: 1) land purpose, 2) subjects to own land and 3) creation of additional restrictive elements for the private ownership of land. In the first category, following three categories of land cannot be privately owned: a) pastural land. b) land for public need, c) land for state special need, while the subjective approach of restriction brought the consequences of limited scope of subjects who can own the plot of land: a) state, b) citizen of Mongolia. As for the last category, the Constitution creates some additional elements for private ownership right in land case that does not apply to other properties than the plot of land, for instance, there are some requirements for transferring land to others use and ownership right and non-extension of ownership right to subsoil etc.

Private land ownership has always been considered the hottest topic. Recent amendment to the constitution that turned the “state land” into the “state public land” shows that restrictive approach to private ownership of land in the Constitution may exist longer, although there might be slight change in social understanding of land as the most advantageous asset and the land ownership as an “absolute right entitling landowners to use freely, take profits from, and dispose of their land.” However, on the other hand, there is still strong influence of public mindset to view land from the only perspective as a root of sovereignty and geographical, cultural, social uniqueness of the country to formulate land regulations.

Such restrictive approach to private ownership of land in the constitution has contributed seriously to implementation of the land reform which developed more limitations and almost make the reform to be stagnated.

Chapter III: Land Reform in Mongolia

3.1. Introduction

In this chapter, land reform executed in accordance with specific laws such as the Law on Privatization (1991), the Law on to Transfer Land to Ownership of Mongolian Citizen of 2002 will be specifically analyzed. Primary task of this reform is to capitalize citizens of Mongolia, therefore, the provisions with regards to private land rights that never been used before were about to become alive. During the past 30 years, after a transitional period Mongolia has been challenging political, social, and legal issues in order to become a democratic country with a market economy and to build a private ownership structure as its basis.

Up until 1998, the unified directive document or principal guideline concerning legal reform in Mongolia following the new Constitution in 1992 has been lacking and the legal reform has been implemented unsystematically. Together with the adoption of the Constitution on January 16, 1992, the Appendix Law of the Constitution, which provided basic legal regimes for how to proceed with the transition to a new legal era was enacted. In accordance with Articles 5.1, 5.2, and 5.4 of the Appendix Law, in general, a reformation of the legal framework of the country must be done before 1996, and the Laws specifically required by the Constitution must be passed through the parliament by 1993, and until then the current laws that are not in conflict with this Constitution were to remain in effect.

In January 1998, the "Program for legal reform of Mongolia",[33] which is the first document providing general guidelines for measures to be taken in five directions, including economic relations of the country with two appendixes of a list of laws necessary to be enacted by 2000, and a summary of a plan to implement the program was adopted by the State Great Khural. In this document, the Civil Code, the Law on Land Privatization, and the Law on Land in Private Ownership were listed as basic legislative acts necessary for economic reform. However, none of

[33] The State Great Khural, the "Program for Legal Reform of Mongolia," 18 Resolution § (January 22, 1998), Available at https://www.legalinfo.mn/law/details/6881. last accessed April 19, 2021.

the above three laws were adopted until 2002. Even then, the Law on Land in Private Ownership has yet to be drafted, instead of these two planned laws concerning private land relations, only the Law on Transfer of Land Ownership to Mongolian Citizen ("LTLOMC"), which serves as a mere mechanical rule for transfers was passed through the parliament in May 2002.

According to the LTLOMC, the only duty of the parliament regarding private land relations is to adopt a state policy on private land ownership, but it has never been submitted to the parliament for discussion. As a consequence, not only has the aim of land reform of Mongolia been seriously lacking in policy guidelines, the aim itself has been undefined until today. In addition to the forgotten circumstances of private land, the issues raised from state land, which covers 99.96 percent of the total land of Mongolia are becoming more problematic.[34] Because of a constitutional restriction on the transfer of pasture land, land under state special use and land under public utilization into private ownership, only land in agricultural and some land in urban areas retain the potential to be privatized.[35] However, the absence of a state policy to encourage private ownership has also affected the limited extent of urban land distribution to private ownership, resulting in the majority of urban land being used in accordance with the legal rules created for the state land use system.

To sum up, in urban areas, as result of the land reform, two types of ownership rights were concretely created over land: (1) state ownership and (2) private ownership. While the Civil Code (2002) applies to land under private ownership, the Land Law (2002) applies to land under state ownership. The land under private ownership is potential to be used by property rights and contractual rights created by the Civil Code on the one hand, the land under state ownership has

---

[34] According to the Report prepared by the Ministry of Urban Development of Mongolia, the land transferred to the private ownership is 0,04 percent out of total land, to the 19 percent of the total citizens of Mongolia. Government Agency for Land Administration and Management, Geodesy, Cartography, "Unified Annual Report on Land Fund 2019, Газрын нэгдмэл сангийн улсын нэгдсэн тайлан 2019" (Ulaanbaatar, 2020), https://www.gazar.gov.mn/report/gnst/gazryn-negdmel-sangijn-2019-ony-ulsyn-negdsen-tajlan. (last accessed April 19, 2021)

[35] According to the Report the total pasture land is 71 percent out of total land of Mongolia, while the land under state special use is 16,2 percent, agricultural land is 3 percent and the urban land is no more than 1 percent out of the total land of Mongolia.

been used by the special rights created by the Land Law on the other hand, namely (1) a long term right to possess (ezemshih erh-эзэмших эрх)[36] and (2) a use right (ashiglah erh-ашиглах эрх). Basically, this was the moment at that the parallel land use system was created in Mongolia. The numbers illustrated below cover all areas of the country's land, including agricultural and pastural area, however, it may aid in understanding the current situation of legal framework of the state and private land use system and concrete result of the land reform that started in 2002 in aiming to privatize the state land to Mongolian citizens:

Table 1. The land status (property rights) in accordance with size ratio[37]

	Ownership	Size, out of total land	Land rights (property right)	Size
Land of Mongolia	State land	99.94 %	Land not used	96 %
			Land under a long term right	3.8 %
			Land under a use right	0.2 %
	Private land	0.06 %	Land in owner's use	57.2 %
			Land in others' use	42.8 %

3.1. The Land Reform

3.1.1. Privatization after the democratic revolution

Under the new Constitution (1992), the initial idea of land reform was introduced, which basically accepted private ownership of land subject to certain limits. Although the drafters of the Constitution believed that private ownership of land would become a basic factor in contributing to the efficiency of property use and development in the country,[38] the actual implementation of

[36] If the name of this right translated into English word by word the translation should be "right to possess" (*ezemshih erh*-эзэмших эрх). However, the meaning of the term is different from the common concept of right to possess in Civil law family, it is rather one type of proprietary right to use state land.

[37] The table elaborates on the data provided by the Unified Annual Report of 2019 on the Land Fund of Mongolia.

[38] In the minutes of session of *Ardiin Ikh Khural* regarding the provisions of private land ownership in the Constitution, speeches and recommendations of deputies who supported the idea of private ownership can be summarized as follows: (1) historical evidence from foreign countries and common perspectives of countries that follow market economies encourage the idea, (2) to expedite economic development by supporting foreign investment, and (3) to support citizens to capitalize on land and to have owners who are responsible for it. Minutes of *Ardiin Ikh Khural*, *supra* note 43.

land reform was delayed. Land reform started in May 2003 with the enforcement of the LTLOMC (2002), twelve years after the adoption of the new Constitution.

General privatization in Mongolia officially started in 1994 pursuant to the Law on Privatization of the Mongolian People's Republic, which was adopted in May 1991. However, land was not subject to this law because it applied only to office and factory buildings owned by the state separately from the land underneath them. The Law on Privatization of Property of the Mongolian People's Republic, which mainly dealt with privatization within the scope of 20 Articles declared two main principles: (1) employees at factories have pre-emptive rights in the privatization of the factory assets, and (2) privatization could be carried out transparently under the public control. However, the privatization carried out under this law has been one of the most criticized topics ever in our post-socialist history because of its ambiguousness and the uneven accessibility to information.

Whereas some post-soviet countries[39] started privatization with the land, Mongolia started privatization with commercial buildings, residential apartments, and movable assets such as livestock, machinery and equipment, but most of the physical land remained under state ownership. This decision had a major influence on the attitude of Mongolians to recognize buildings and residential apartments as core immovable properties, and to understand the rights of possession and use (of land) as attached to a building, persisting for as long as the building exists. In conclusion, the land reform initiated with the constitutional acceptance of private land ownership has been confronted by a second challenge derived from the factual separation of land rights and its essential parts, after the first challenge of constitutional restrictions.

3.1.2. Size of the land that potential to be transferred into private ownership

Article 16 of the Constitution declares the right of citizens to fair acquisition, possession and inheritance of movable and immovable property and prohibits illegal confiscation and

[39] In this regard, countries such as Republic of Estonia and the German Democratic Republic are studied in the fifth and sixth chapters of this thesis.

requisitioning and the Civil Code provides legal norms on acquisition, possession, inheritance, and protection of property. However, in accordance with Article 6.3 of the Constitution private land ownership cannot be created with regard to (1) land for pasturage and (2) land under public utilization and (3) land for special use of state. More clearly, transferring these three types of land into private ownership is not allowed by the Constitution. Moreover, pursuant to Article 6.1.1 of the LTLOMC, forest land, land with water area and land for road and network are prohibited to be transferred into private ownership. Therefore, from the basic five categories[40] of unified land fund of Mongolia only certain percent of the land for city and village settled area and land for rural economy legally is available for private ownership.

According to the data of unified land fund of Mongolia of 2019, pasturage land which belongs to the category of rural land for economy is equal to 70.6 percent of the total land of Mongolia, while land under public utilization which includes in the category of settled land for city and village is 0.1 percent of the total land fund of Mongolia. Other three categories of land fund that are 1) Forest land, 2) Land with water area, 3) land for state special need are 26.4 percent of the total land of Mongolia. Therefore, from this statistical data, the conclusion that only 2.9 percent of the total land of Mongolia remains potential to be privatized under the land reform is drawn.

Most of land that falls within the scope of land reform is in the category of city and village settled land. As for size of the land, the land used for urban development may be considerably minor (size of this area covers only 0.2 percent of the total land of Mongolia); however, the number of stakeholders involved in land relations or whose legal interests are interfered with is significant considering the ratio of the city's population to the total population of the country. For example, the capital city of Mongolia, Ulaanbaatar is the home for over half of the total population of Mongolia. In 1950, the population of Ulaanbaatar was 169,951.[41] The growth of the city population

[40] Five basic categories of the land fund of Mongolia are (1) Land for rural economy, (2) Land for city and village settled area, (3) Land for road and network, (3) Forest land, (4) Land for water area, (5) Land for state special need.

[41] The number is estimated from the data, according to which the total population of Mongolia in 1954 was 845,000 and the urban population at that time was 20 percent of the total population of Mongolia

has been unusually rapid. The city covers over 1,800 square miles (4,662 square km) and has a population density of 704 people per square mile.[42] These estimates represent the urban agglomeration of Ulaanbaatar, which typically includes Ulaanbaatar's population in addition to adjacent suburban areas.

3.1.3. Procedural rules for transferring land into private ownership

With regards to land reform, the Constitution provides principles and legislative grounds on which to own land privately, whereas the LTLOMC stipulates rather procedural regulations to transfer land into private ownership, and with relevance to property rights protection and other substantial matters of property law did not suggest much to highlight.

The Constitution affirmed the concept of private ownership of land, but the different notion of "purpose of owning land" developed with LTLOMC and the Land Law. Though the Constitution classifies land, it does not recognize the concept of the "purpose of owning land." To clarify, The Constitution did not declare any provisions restricting private ownership for the broad and logically different notion of the "purpose of owning land."

According to the LTLOMC, a citizen may own land for the purposes of (1) family need, such as growing vegetables for household need, and erecting a house or ger to live, and (2) commercial reasons, such as business and husbandry purposes. Under the first purpose land may be given for free with certain conditions only to a Mongolian citizen. The size of the land which can be privatized for free varies from 0.07 to 0.5 hectares depending on the location of that the plot of land. The transference of land to private ownership for a commercial reason is handled as a land distribution under a market method. /See table 2/. If a citizen wants to own land for commercial reason such as husbandry, he/she has to buy the land.

---

provided in the sources of: S. Chuluun, Ts. Tserendorj, G. Myagmarsambuu, B. Natsagdorj, Ts. Turbat, Kh. Nyamdulam, *History of Mongolia* (Ulaanbaatar, 2016), available at: https://mongoltoli.mn/history/h/712 (last accessed April 19, 2021); and United Nations, Ulaanbaatar Population 2021, (last accessed April 19, 2021), https://worldpopulationreview.com/world-cities/ulaanbaatar-population.

[42] United Nations, Ulaanbaatar Population 2021, available at https://worldpopulationreview.com/world-cities/ulaanbaatar-population, (last accessed April 19, 2021).

Another important rule is that land privatization is carried out on the basis of pre-emptive rights. For example, in the case of household needs, a citizen who applies for land ownership, which is already in his long term right to possess, has a pre-emptive right to own that plot of land for free. In the case of a business purpose other than husbandry, a citizen who owns the building which exists on the land and has a long term right to possess of that plot of land is entitled to buy that plot of land through the pre-emptive right. If a citizen already has a long term right to possess a plot of land for husbandry purposes, he/she also has a right to obtain that land through the pre-emptive right in return for appropriate value.

Table 2: Purpose, size and means to own land

Purpose			size	means
Family need	in the capital city		up to 0.07 ha	for free
	In the center of an aimag		up to 0.35 ha	for free
	in s village or center of a soum		up to 0.5 ha	for free
Business purpose	husbandry	if land is already in his long term right to possess	Equal in size to the land in his long term right to possess	to buy at an appropriate price through pre-emption rights.
		no previous land right	no size limit	to buy through auction
	other than husbandry	If land is already in his long term right to possess	equal in size to the land in his long term right to possess	to buy at an appropriate price through pre-emption rights.
		no previous land right	no size limit	to buy through auction.

Because of this notion of "purpose to own land" created by the LTLOMC and the Land Law, urban development based on the private land is almost impossible. The citizens only allowed to create private ownership over the land just for the purpose of household need and once the ownership of land is labelled with this purpose, it is useless for the business purpose. Therefore, the state, only stakeholder who can change the purpose of the land still remains as "an ultimate owner" of the land.

Even requests by citizens to change an ownership right to land into a long term right to possess are frequent cases in Mongolian land relations. Although their land included an appropriate area in accordance with city planning, because the concept of "purpose of owning" such as a household purpose, citizens are restricted in their land use for commercial purpose. Therefore,

people tend to prefer land to convert their ownership right into a long term right to possess. Another reason for not implementing the right to have land in private ownership is the fact that if the land is under a long term right to possess, it is tradeable to legal entities who can invest in land development projects, and therefore it is more attractable for commerce.

The terminology "purpose to own land" that created by the LTLOMC is additional restriction on the private ownership of land irrelevant to the restrictions in the Constitution. Because of this term, a scheme of the private land circulation that is sketched by the Civil Code in 2002 became impossible in reality and stays only on the paper. The rule supported by the LTLOMC that state land can be transferred into private ownership for the household need made all real property rights created by the Civil Code such as a right to construct on other's land (similar to superficies), usufruct or other contractual rights are useless in practice. It was certainly not a forward movement to the market economy and a major drawback of this land reform.

3.2. Implementation and result of the Land Reform

3.2.1. Implementation of the land reform

In the first years of the implementation of land privatization, the Government planned to transfer up to 0.9 percent of the total land of Mongolia to citizens' ownership within five years after the adoption of the LTLOMC.[43] The land privatization process has been extended five times, three of which were five years of extensions, and the process has only reached approximately 4.4 percent of the first goal within 17 years. Privatization has been proceeding extremely slowly.

As it is presented by a competent official of the government in 2005, the government has been using certain criteria to evaluate the implementation of land privatization: (1) the number of citizens who had ownership in their land for free within the time period; (2) the scale of economic

[43] Though it has not been shown in any official decisions of competent state organizations that were available for this study, the number of 0.9 per cent is mentioned in the paper presented at the conference held in 2005 by Sh. Batsukh, who was a chairman of the State Agency for Land, Geodesy and Mapping. Sh. Batsukh, "Current Situation and Further Development of the Land Reform of Mongolia, Монгол Улсын Газрын Харилцааны Шинэтгэлийн Өнөөгийн Байдал, Цаашдын Чиг Хандлага," (Land, Management and Law, Ulaanbaatar, 2005), 5–14.

efficiency of ownership rights, for example, using private land rights in commerce as an object of a mortgage or by selling; (3) variation in the market price of land before and after land privatization; and (4) the presence of fraud and social disorder related to land ownership.[44] As to these four criteria, the response given in this thesis is "insufficient".

Excessive interpretation of the other laws about constitutional approach to private land ownership had a major contribution to the slow progress of implementation of the land reform. As for some of the criteria, when comparing the real number of owners of plots of land, the ratio of the commerciality of private land ownership might seem relatively positive. Yet, the considerably limited number of landowners, at 19 percent of the total population, mostly with a plot of land for purposes of household needs are not sufficient to create in efficient private land market. Even, if they decide to rent land with its purpose, for that small an amount of revenue not many people want to waste time on the lengthy process to get permission from the authorities. The questionnaire /Appendix C/ results shows that only 27 percent out of the total number of participants (644) have privatized land, among them only 4 percent (out of total 644 participants) has land now used by others, while 13 percent have not used the plot of land owned by them at all in any manner.

Another important reason for unsuccessful land reform may be linked to incomplete information asymmetries. No matter what the LTLOMC declares, people still are urged to exercise their right to privatize land. The constitution declares that the procedure to transfer land into private ownership in Mongolia shall be transparent and under state control. Yet, the most important document, which has a decisive impact on the implementation of land reform, determines the size and location of the total land that will be privatized in accordance with LTLOMC in every year and is not transparent or certain. Therefore, people are not aware of whether land in their long term right to possess, or a plot of land they are interested in owning is included in the above decision.

[44] *Ibid* 7.

The government cannot perform its main function providing reliable information associated with decisions relating to land markets.

According to Article 9.1.2 of the LTLOMC, the government is responsible for determining the size, purpose and location of the land that will be transferred to citizens of Mongolia yearly. On May 13, 2020, the government enacted resolution number 170, according to which 936.14 hectares of land is to be transferred to private ownership.[45] However, the resolution does not illustrate the actual location and purposes of the land. In this regard, question three of the questionnaire may provide empirical evidence proving that people still desire to own land but agree that the procedure to privatize plots of land is not clear enough, and the location of the land to be privatized is not clear and nor where they expected (67 percent of total). (Appendix C)

3.2.2. The Constitutional court decision and the land reform

On March 09 of 1995, the Constitutional Court (Tsets) of Mongolia issued its historical decision number 3, which highly effected to implementation and result of the land reform of Mongolia. In the petition to the Constitutional Court, D. Lhamjav stated that "The State Great Khural violates its constitutional duty to enact the laws that safeguard and support the private ownership of land, by not enacting the necessary laws on private land ownership. The Land Law (1994) does not protect private land ownership and it violates the Constitution."[46] On the other hand, the representatives of the parliament who were members of parliament at that time defended their position and noted that "Forcefully demanding enactment of certain laws by the State Great Khural presents ill-mannered and legally uneducated behavior. Thus, it should cease immediately. Although it is true that some laws are required by the Constitution, but with regard to private land

[45] Size in the government resolution is not illustrated by any measurement. Therefore, it is presumable that the measurement in the Government resolution is illustrated by hectare. Mongolian Government, "Size, Location, Purpose to Transfer for Private Ownership of Mongolian Citizens in 2020, Иргэнд 2020 Онд Өмчлүүлэх Газрын Нийт Хэмжээ, Байршил, Зориулалтыг Тогтоох Тухай," 170 Resolution § (May 13, 2020), https://www.legalinfo.mn/annex/details/11039?lawid=15377. (last accessed on April 19, 2021).

[46] *D.Lhamjav vs State Great Khural,* (The Constitutional Court March 09, 1995). available at https://www.legalinfo.mn/law/details/1015?lawid=1015 (last accessed in April 2021). Үндсэн хуулийн цэцийн 3 дугаар дүгнэлт, 1995 оны 03 дугаар сарын 09-ний өдөр.

ownership, it is not a compulsory duty of the State Great Khural. The Constitution stipulated that private ownership of land may be created by the state."[47]

Finally, the Constitutional Court had drawn its conclusion in stating that:

> In Article 6.3 of the Constitution, the land, except pastural land, land under public use, and state special use, may be owned privately. … The law concerning private ownership of land is neither on the list of the laws in 1993, nor in the Constitution. Only the Land Law was on the list. Therefore, it is irrational to reach the conclusion that the State Great Khural has violated its duty or that it has negated private land ownership.[48]

With regard to the aim of developing a market economy, the decision was a backward movement from the constitutional achievement of 1992. However, based on various assessments on the impact and procedure of general privatization, the society of Mongolia, who was not wealthy and experienced with market economy yet, and stressed with the sudden transitions, may have been unready and in vulnerable position for the commencement of land reform. Regardless of the justification of the Constitutional Court, the certain fact is that the land reform of Mongolia clearly lacked policy support from its commencement.

3.3. Conclusion

A main objective of the land reform is to capitalize citizens of Mongolia within the limitations of the Constitution. However, the reform is not successful. After 17 years of long process, out of total land of Mongolia only 0.06 percent, or out of total land that is potential to be transferred into private ownership 2.2 percent is given to the private ownership at19 percent of the total population of Mongolia. Even some people, who have already owned their plots of land have been applying requests for convert his land ownership into other types of land rights such as long term right to possess. Besides constitutional restriction on private land ownership, lack of policy support, extended limited approach of private ownership restriction by other laws contributed to insufficient result of the land reform, therefore, it encouraged to develop parallel system of land use in which the private land is dominated by the state land use system.

---

[47] *Ibid.*
[48] *Ibid.*

Chapter IV. Parallel System for Land Use in Mongolia

4.1. State Land Use System

4.1.1. Introduction

The court statistics from the past five years show that land related disputes have been the highest number of cases resolved at the administrative court and land related disputes at the civil court tend to be increased.[49] Also, the statistics illustrate that the next most common claim resolved at the administrative court is disputes concerning immovable property registration. In urban areas, land disputes are mostly attributed to use of state land. Therefore, common land disputes raised before the administrative court are mostly related administrative process to transfer a plot of state land to other's usage, while the land related disputes at the civil court are conflicts between land related right holders.

Transitional regimes following the Constitution in 1992 were formulated through the wide scope of reforms in the main legal areas of Mongolia. To implement the principles in the Constitution, the revised versions of the Civil Code and the Land Law were taken into effect in 2002. Basically, the Civil Code applies to the private land, whereas the state land circulation is subject to the Land Law. In the case of land relations, the Civil Code accepted an application of a separate law on the state land use system in accordance with Article 102.5.[50]

Although redrafting these two main laws happened at the same time, the concepts of these two Laws were not consolidated. While the Civil Code in 2002 has made a major change in property law area and suggested important and strong principles such as *superficies solo cedit*, *numerus clauses* doctrine, and the ideas of full and restricted property rights such as ownership, a right to

---

[49] According to the Annual Reports on Judicial Process of Mongolia, land related disputes raised from 2015 to 2020 were the highest or the second highest ranking number of cases resolved at the Administrative courts; for further detail, see JUDICIAL GENERAL COUNCIL OF MONGOLIA, *Annual Report on Judicial Process of Mongolia,* (Ulaanbaatar, 2015-2020).

[50] Article 102.5 of the Civil Code provides that:
102.5. Relations regarding privatization, possession and use of State-owned land shall be regulated by law.

construct on other's land (inherited building right), usufruct, servitude, and hypothec in property law, the Land Law (2002) does not identify the new concepts in the Civil Code. This was starting point to fledge parallel property systems in Mongolia: (1) the system for state land use (the system developed by the Land Law), and (2) the system for private land use (the system developed by the Civil Code).

Because the lack of unified property law development, the Land Law (2002) that literally interpreted Articles 6.3[51] and 6.5[52] of the Constitution and that applies to majority part of the land market could not establish a proper system for land use which protects real rights and private ownership. It was the result of abandoning an important topic on the elaboration and development of other types of real property rights apart from private ownership out of observation during and after the parliament discussions of provisions on private land ownership in the Constitution. After constitutional recognition of such a limited scope of private land ownership, and unsuccessful land reform, the formulation of the state land use system would logically become prominent.

4.1.2. Constitutional Concept for Creation of State Land Use System

Pursuant to Article 6.5 of the Constitution "The State may allow foreign citizens, legal persons and stateless persons to use land for a specified period of time under conditions and procedures as provided for by law". Unfortunately, the concept of "use the land" is misinterpreted by the other Laws, in particularly by the Land Law. On the basis of this Article of Constitution, the Land Law created two major types of land rights: 1) *ashiglah erh* (ашиглах эрх) and 2) *ezemshih*

[51] Article 6.3 of Constitution provides as follows:
6.3. The State may give for private ownership plots of land, except pasturage and land under public utilization and special use, only to the citizens of Mongolia. This provision shall not apply to the ownership of the subsoil thereof. Citizens shall be prohibited to transfer the land in their ownership to foreign citizens and stateless persons by way of selling, bartering, donating or pledging as well as from transferring it to others for their possession and use without permission from competent State authorities.

[52] Article 6.5 of Constitution provides as follows:
6.5. A state may allow foreign citizens, legal persons and stateless persons to use land for a specified period of time under conditions and procedures as provided for by law.

erh (эзэмших эрх). From the linguistic perspective, the word "*ashiglah*" means "to use", while the word "*ezemshih*" indicates meaning "to possess".

Consequently, the Land Law formed these rights on the grounds of that (1) *ezemshih erh* is for a citizen, as well as legal entities with national investments in Mongolia, and (2) *ashiglah erh* is for foreign citizens, legal persons, and stateless persons. Theoretically, the rights of "use" and "possession"! may be studied distinctly, but practically, in most circumstances, the two rights are inseparable, as ordinarily one cannot be exercised without the other.

Indeed, the following interpretation by the chief drafter B.Chimid shows that the word "use" in the Article 6.5 of the Constitution has broader meaning, at least equal to 'lease or rent':

> "... Let's try to clarify 'independency' issues. First, since the citizens of Mongolia are lords of this territory, a piece of land should be owned by them, thus, the 'public' and 'free' items would be owned by someone and therefore the defense and protection would be improved. Second, restricting the private land ownership right only to the citizens of Mongolia is just for the sake of independency. Since there is a restriction, it means that selling, bartering and donating a plot of land, in legal terms, an absolute right of 'disposing' shall belong to the citizens of Mongolia, therefore, foreign elements cannot be involved in this relationship. By the way, since we want foreign investment and the development of joint ventures and factories, foreign citizens and stateless persons may have a right to lease, use, and possess a plot of land within a reasonable time period and with mutually effective terms and conditions under the surveillance of the state. Indeed, it is in the draft as well. It does not constitute selling and owning. …"[53]

4.1.3. Concept of *Ezemshih Erh* and *Ashiglah Erh* in the Land Law

To ensure the security of property rights and to realize the benefits therefrom, governments need to perform the following three functions that build on each other: (1) provide clear definitions and enforcement of property rights; (2) provide reliable information to reduce the transaction cost associated with decisions relating to land markets; and (3) provide cost effective management of land related externalities.[54]As has been evidenced before, the rights created on the state land are the main instruments in real property market because of state land dominancy. However, the definitions

---

[53] Chimid Byaraa, *Concept of the Constitution, Бяраагийн Чимид, Үндсэн Хуулийн Үзэл Баримтлал.*, 2nd ed. (Ulaanbaatar, 2017), 37.

[54] Deininger Klaus, and Feder Gershon, "Land Registration, Governance, and Development: Evidence and Implications for Policy.," *World Bank Research Observer.* 24 (2009): 235, available at: 10.1093/wbro/lkp007.

of the land rights (*ezemshih erh* and *ashiglah erh*) created by the Land Law seem to be problematic as regards with the first function.

According to Article 3.1.3 of the Land Law "land *ezemshih*" means to be in legitimate control of land in accordance with the purpose of its use and the terms and conditions specified in contracts within the scope of the Law. Although the linguistic meaning of this word is "possession (*ezemshil*)" and the Civil Code recognized a concept of "possession" as a mere fact, the Land Law has a significantly different approach. The actual legal meaning of the concept of "possession" in the private property law of the Civil Code does not play any role in the Land Law. To clarify, it is actually a state land related entitlement for a certain category of people to use land with a slightly longer term and the possibilities of mortgage and inheritance. Therefore, in this work "*ezemshih erh*" in the Land Law refers as a "long-term right to possess" or "right of possession."

Moreover, Article 3.1.4 of the Land Law provides a definition of a "*ashiglah erh*", which is a right to use a plot of land by undertaking legitimate and concrete activity in accordance with a contract entered into between a land user and a landowner within the scope of the law. The feature to identify the substance of the "*ashiglah erh*" is provided in the main body of the Land Law and has the primary purpose of inventing a tool for foreigners to use state land. Similar to the long term right to possess the Land Law does not follow the actual meaning of the word of "use/*ashiglah*". The Law paid no attention to a broader substance of the word "use". In reality, "using property with or without possession" is a definite fact. Therefore, regardless of what the Land Law states, foreigners can have actual possession of a plot of state land once they are granted a use right/*ashiglah erh*, because no one is able to build a house or cultivate vegetables without actual possession of land.

Several years after transferring state land into other's usage under the long term right of possession or use, one of the common disputes which arose in the land market is whether the property law protections of possession (in the Civil Code sense) are applicable to use right holders. Certainly, all land holders under rights of use do possess land in fact. In many cases the Supreme

Court found that the holder of a right of use was also entitled to possess the land, equally of holders of a right of possession. Therefore, holders of a right of use are free to enjoy protection of possession (in the Civil Code sense) under private property law.

The distinction between "possessing" land if one is a Mongolian citizen "using" land if one is a foreigner may have originated from the land reform in Russia after the 1990s. The private ownership of land was introduced in 1990 by the Constitution of the Russian Socialist Federation of Soviet Republics, beginning a gradual liquidation of the state monopoly on land ownership.[55] The 1990's laws "Regarding Peasant Small holdings" and "Regarding Land Reform" permitted citizens to hold in private ownership plots of land for use as small holdings for horticultural purposes, the construction of houses and other personal uses.[56] The terminology of these laws included "the right of the use of land," "life-long possession with the right to pass on as an inheritance," and "rent".

The only difference between Russia and Mongolia is the degree of providing consistency between land related rights created by separate laws and the respective provisions of the Civil Code. Russia provided compliance between these two fields and created a land use system that does not contradict the private real property market in recognizing land rights in its Civil Code, while Mongolia developed parallel systems and regulations for state and private land.

4.1.4. Comparative Analyses of Long-Term Right to Possess and Use Right in the Land Law

Right holders

One of the critical points of the Land Law should address to the terminology for subjects, who can be granted state land right. The law uses the following terms with regards to land right holders: (1) citizens, (2) foreign citizens, (3) stateless persons, (4) organizations, (5) business entities, (6) associations of apartment owners, (7) foreign invested business entities, (8)

[55] Leonid Limonov, "Land Reform and Property Markets in Russia," *Land Lines*, no. second quarter (April 2002), available at: https://www.lincolninst.edu/publications/articles/land-reform-property-markets-russia.

[56] *Ibid.*

international organizations, (9) foreign states, (10) foreign legal entities, (11) the consulates of foreign states, (12) representative offices of foreign states, 13) representative offices of international organizations. Neither specific definitions nor any general classifications of these bodies are provided by the Land Law.

In the Mongolian legal context, general classifications used to establish legal norms in any area in both public and private law are individuals (a citizen, a stateless person, or a foreign citizen), bodies without legal active capacity, and legal entities. Individuals are treated separately with their nationality in the Land Law because of the constitutional grounds. Regarding legal entities, the various terms such as organization, business entity, foreign invested entity are often used in manipulative ways in practice.

In accordance with the Land Law, while a citizen of Mongolia and national invested legal entities are allowed to obtain a long term right to possess for all purposes stated in the Law. In contrast, use rights to state land mostly for foreigners and foreign invested entities. However, there are two exceptions in granting a use right. First, the state land, underneath the condominium buildings is considered to granted as a use right to an association of apartment owners. Second, the state land, that is in the state special protection is granted under the use right irrespective of the fact that who is a holder.

In case of foreign investment companies, the purpose and time period for the use of land are subject to the government discretion. Regardless of investment originality, most of businesses use the land in order to build, construct or cultivate crops. Therefore, in reality, the purposes for obtaining land rights are mostly same both for national and foreign invested companies. The justification behind the rule of defining their rights by the government is again very ambiguous. Five years of time period of use right for foreign entities is a critical.

In accordance with Article 17.1.2 of the Land Law foreign states, international organizations and foreign legal entities may possess a plot of land under lease or by concession on the grounds of parliament decision. On the other hand, pursuant to the Land Law, the consulate and

representative offices of foreign states can have a plot of land through use rights under terms and conditions maintained by the international treaties into which Mongolia has entered.

The Law does not provide for what types of entities constitute "organizations", though in fact, they are usually public entities or non-profit organizations under private law. The consequences of classifying national entities into organizations and business entities are uncertain. Instead of using various terms, it would be more effective if the law established legal norms for identifying the difference between private and public entities and diversifying property rights or contractual rights to use land.

Table 3: Holders of a long term right to possess and a use right of the plot of state land

			Long Term Right to Possess	Use Right	Lease and Concession
1	Citizen of Mongolia		Yes	Not clear	
2	Organization		Yes	Not clear	
3	Business entity	National	Yes	Not clear	
		Foreign investment	No	Yes	
4	Foreign citizen		No	Yes	
5	Stateless person		No	Yes	
6	Foreign state		No	Not clear	Yes
7	Consulate or representative of a foreign state and an international organization			Yes	
8	International organization		No	Not clear	Yes
9	Foreign legal entity		No	Not clear	Yes
10	Association of apartment owners		No	Yes	

Time period

Under the Land Law a long term right to possess can only be obtained for 15 to 60 years and these terms may be extended up to 40 years each, whereas the time period to use land under use rights is up to 5 years with the possibility of extension of up to 5 years each in case of foreign citizens, stateless persons. In case of a consulates and representative offices of foreign states, international organizations and foreign investment companies, the time period to use land is not

established in the law. Instead, the period for use land of foreign investment companies under a use right has been determined by the government. In practice, the use rights are given to foreign investment companies with a term of 5 to 60 years. This circumstance proves that use rights with relatively short terms are against the essential needs of a real property market and introduce obstacles to the market development.

As for foreign states and international organizations, foreign legal entities the parliament will determine whether land will be given to them or not. In this case the Land Law has followed a different approach to use through contractual rights. For only these three subjects, lease and concession agreements can be used. The time and other important terms and conditions of the contract should be determined by the Parliament, yet the Land Law also states that the boundary of a plot of land and other regulations are subject to government power.

Another exceptional case is the extension of time periods for land use right of apartment associations. The use right is granted to an apartment association for 15 years term initially, and the right can be extended as many times as is required with 15 years terms each time.

Table 4: Time period of a long term right to possess and a use right

			Long Term Right to Possess	Use Right	Lease and Concession
1	Citizen of Mongolia		(15 to 60 years) + up to 40 years	Not clear	
2	Organization	Organizations other than association of apartment owners	(15 to 60 years) + up to 40 years	Not clear	
		Association of apartment owners	-	15+limitless extension (each for 15 years)	
3	Business entity	National	up to 60+40 years	Not clear	
		Foreign invested	-	Government determines	
4	Foreign citizen		-	up to 5+5 years	
5	Stateless person		-	up to 5+5 years	
6	Consulate and representative of foreign state and international organization		-	International treaties in which Mongolia entered shall apply	
7	Foreign legal entities				Parliament determines
8	International organization		-		Parliament determines

9	Foreign state			Parliament determines

Needs and purposes

In the Land Law, terminations of the "need to acquire land rights" and the "purpose to acquire land rights" are often found. However, these are the most twisted, unclear terms. Pursuant to the Land Law (Article 28.1 of the Law), the needs to acquire land rights are categorized into three parts: (1) common household needs, (2) state organization needs, (3) business entities and organizations' needs. The significance of this classification emerges only in the case reflected in Article 33.1.1 of the Law, that states as "organizations financed by state budgets shall use state land directly". It may be the only provision relevant to the land rights of public entities in this law.

The "purpose to acquire land rights" varies depending on the type of land rights and it is more specific term than the "need to acquire land right", containing concrete objectives to use a plot of land. The concept of "purpose" does not function to distinguish land rights as they are in private property law, such as superficies usually being for building purposes while usufructs are for profit taking.

After carefully picking up the provisions that use the term "purpose", land rights are given for the following purposes unrelatedly to the type of the rights or the right holders according to the Land Law: (1) to have one's ger and fence; (2) to cultivate vegetables, berries and fodder plants for one's household need; (3) to cultivate crops; (4) to cultivate potatoes and vegetables; (5) for industrial and servicing purposes (6) for special purposes (only in case of a foreign investment entity); and (7) for other purposes. (Table 5).

In the Land Law, the term "purposes to acquire land right" are used in an hectic way without having logical connection to either the type of holders or the type of property rights. Regardless of a holder's status, every living individual having personal needs to use land for the purposes of building a house or cultivating vegetables and no matter the holder's equity characteristic companies have a business need to construct on the land. While the term "industrial and servicing

purpose" is too broad in indicating all types of business purposes including to erect construction of residential buildings to industrial facilities, the term "special purpose" is indefinite, which is possible to be interpreted with broader or narrower meaning than the "industrial and servicing purpose". Unsystematic use of the term "purpose" in the law cannot enhance the legal certainty. The practical significance of creating clear property right is to provide fair protection to the right holders.

In *Mongolian Property Development v.Seruuleg Construction*,[57] the foreign investment company Mongolian Property Development, which only had a right to use the land for five years built 25 floor building for office purpose in central area of the city and the company "Seruuleg Construction" filed a claim demanding that the office tower be torn down because its under-ground floor crossed the boundary of land that the plaintiff company held under a right of possession. Foreign investment companies only have a chance to obtain land through a right of use, and in most cases such rights are not granted for more than five years. Foreign investment companies obtaining a right of use rights with only the hope of a future extension face a risk of non-renewal. Obviously, everyone can assume that a building with 25 floors will exist for more than five years. During the court procedures the term of the right may expire since it is frequent that court proceedings require more than three years. In order to solve the problem as quickly as possible before having to go through court proceeding companies often resort to extra-legal measures.

To sum up, in addition to the fact that unclear definitions and classifications of the holders of land rights in the Land Law and ill-defined terminology of "purpose" has resulted in serious erosion of the land related norms and, therefore has violated the principle of legal certainty. The types of rights and the types of holders do not have any impact on defining land purpose. Therefore, the aim of determining various "purposes" in the Land Law is not clear.

Table 6: Purpose of a long term right to possess /LTRP/ and a right to use state land

[57] Decisions of the courts available on the http://new.shuukh.mn/admin/irgen1/100993/edit, (last accessed April 2021)

			To have a ger and fence	To cultivate vegetables, fruits, and plants	To cultivate crops	To cultivate potatoes and vegetables	Industrial and servicing purposes	Undefined purposes	Special purposes
1	Citizen of Mongolia		LTRP	LTRP		LTRP	LTRP		
2	Organization	Organizations			LTRP	LTRP	LTRP		
		Association of apartment owners						Use right	
3	Business entity	National			LTRP	LTRP	LTRP		
		Foreign invested			Not clear	Not clear	Not clear		Use right
4	Foreign citizen		Use right	Use right	Not clear	Not clear	Not clear		
5	Stateless person		Use right	Use right	Not clear	Not clear	Not clear		
6	Foreign state				Not clear	Not clear	Not clear	Lease concession	
7	Consulate or representative of foreign state							use right	
8	Foreign legal entity				Not clear	Not clear	Not clear	Lease concession	
9	International organization				Not clear	Not clear	Not clear	Lease concession	

Methods to acquire rights on the state land

In the Land Law there is no provision dedicated specifically to the methods grant state land rights. After carefully searching the Land Law, the logical conclusion is there are three main methods for granting land rights: 1) by direct decision: for (a) the purpose having ger and fence and cultivating vegetables of for (b) husbandry purposes based on pre-emptive rights; 2) by auction, and 3) by selective tender.

Where a plot of land is possessed by a citizen under the long term right to possess directly for household needs, the size is determined to be between 0.07 to 0.1 hectares, and the size of the plot of land possessed by a citizen based on pre-emptive rights is between 5- to 100 hectares. On the other hand, if a foreigner desires to acquire a land use right for the above purposes, the methods of auction or selective tender will be used. The Land Law does not provide objective requirements or minimum standards for procedures of either methods. The Land Law simply transferred this duty

to the government in stating that "Regulations of auctions and selective tenders shall be adopted by the government."

Consequences of expiration of a long term right to possess and a use right

Accordance with Article 41 of the Land Law, upon the expiration of a long term right to possess, the holder has an obligation to release the plot of land within 90 days and transfer the land to the relevant administrative authority. A holder of the right is responsible for all expenditures and costs related to the release of the plot of land. Pursuant to Article 3.1.5 of the Land Law "to release the land" means to remove any obstacles to returning the land to the owner by such actions as transferring buildings and other properties on the land and rehabilitating the land as stipulated in the law and contracts, upon the expiration of the long term right to possess and use the land or upon (removal of the land) when it is used without authorization.

Moreover, the provision confirms that the expiration of the terms of the long term right to possess and use rights is the justification to end the ownership right of any property erected on the land is another serious violation of property right. In this case, the Civil Code suggests more respectful ways to handle property rights such as by confirming the property owners right to compensation or the possibility of extension the relevant land rights. The Land Law provides two sub-Articles in this regard and certain impacts of the expiration of land rights are left unaddressed. For example, contractual relations that a land right holder entered into before his right expired or the right of a mortgagee and other third parties' rights will be affected by the land right termination.

4.1.5. Uncertainty of legal nature of a use right for state land

In stating that *in rem rights* are only created on grounds of law under the application of the *numerus clausus* doctrine in terms of private property law of Mongolia, one may claim that a use right and a long term right to possess fulfill the first requirement to be an *in rem right* feature established by the Land Law. However, a use right is a critical subject within this reference. A use right is granted for short term, is not heritable and potential to be a hypothec item is doubtful.

In *Turiin Bank v.Parknian*, Turiin bank had created a hypothec over a land use right. The use right over two hectares' land was given to the Company General Expedition for the purpose of constructing a tourist complex in an area under state special protection. The company Parknian, which is a subsidiary of General Expedition built luxury residential apartments on that land, and for that purpose took out a large amount financial loan from Turiin Bank (State bank), and provided a security right of mortgage over the use right of the land by General Expedition.[58] However, although apartments were built and purchased by individuals at market price, Parknian became unable to pay its debt to the bank. The bank filed a lawsuit against the companies seeking to exercise its mortgage over the land and unfinished apartments, among other claims. In that case the judge found that the use right to the land is not an *in rem* right and also cannot be mortgaged. Although, the appeals court overturned the decision of the court of first instance because of procedural breach by the court of first instance, the Supreme Court rescinded the appeals court's decision and the judgement by the first instance court remained legally effective.

In the decision of the first instance, the judge found that in particular, the use right to land in the Land Law cannot satisfy essential requirements necessary to be considered an *in rem* right. Apparently, this right lacks an *erga omnes* effect, along with characteristics of inheritance, mortgage-ability, inalienability as well. Instead, the main characteristics of the use right to land likely made it similar to *in personam* rights created by an obligation law. For example, use rights are given to others with considerably short periods and may be revoked easily by the Land authorities.

However, on the other hand, classifying this right as an *in personam* right is complicated as well. Because in accordance with Article 48[59] of the Land Law, holders of the two types of state

---

[58] Decisions of the Courts is available on the https://shuukh.mn/single_case/107286?daterange=2018-01-01%20-%202021-12-14&id=1&court_cat=1&bb=1 , (last accessed April, 2021)

[59] Article 48 of the Land Law provides as follows:
Article 48. Limited Use of Land in Long term right to possess or in Use for Entering and Crossing
48.1. If land in long term right to possess or in use is not specifically protected by erected fences or posted warning signs prohibiting entering and crossing, any person may enter or cross this land

land rights are subject to the limitation. Pursuant to article 48.2-48.4 of the Land Law private servitude can be created on the state land that granted under the long term right to possess and the use right. If the limited rights (for example servitude) are created through limiting rights with broader natures than the limited rights, it cannot be concluded that the nature of the use right in the Land Law is obligation law.

Moreover, the use right in the Land Law is a main right to land of the apartment owners through their association's right to use the land for residential purpose. Land related rights of the condominium owners are usually identified as a property right than a contractual right.

In this regard, a land use right is an important issue, that requires careful analyses from a property law perspective. In effect, the ambiguity of core perceptions and incompatibility between two important laws raises conflicts and disputes between real property owners, and it has been becoming more difficult to resolve the disputes within the given rules, considering that the cost of these conflicts begins to outweigh the benefits as time passes. Under a system with well-defined and complete property rights, stakeholders can manage their properties in more efficient way.

---

without causing damage to the land. The state central administrative organization in charge of land issues shall determine the design of warning signs as well as procedures for their use.

48.2. To use and protect their property, owners of immovable property shall have the right to demand a limited use of land possessed or used by others in order to construct roads, power, communication and engineering lines through that land, transit points and for other purposes.

48.3. The limited right to use land shall be established by an agreement between the possessor or user of land and the person demanding to use the land with limited rights. In the event of transferring rights for possession or use to another person, the rights of other parties for limited use shall be preserved.

48.4. Possessors and users of land shall have the right to demand the person using the land with limited rights to terminate their land use if such use deems making the land unusable for its designated purposes.

48.5. It shall be prohibited to transfer the limited land use rights to persons other than owners of the property referred to in provision 49.1 of this Law. - 24 - Unofficial Translation 48.6. Disputes arising in relation to the limited land use rights shall be resolved according to provision 60.1.4 of this Law.

48.7. Other affairs related to the limited land use rights shall be regulated by relevant provisions of the Civil Code

4.1.6. Limited Rights in the Land Law

In addition to long-term right to possess and a use right, the Land Law provides in Article 48 for "a limited right". Annual land surveys report no instance of this right is ever having been recorded. Pursuant to Article 48.1 of the Land Law, the public has a right to pass and access through a plot of land in other's long term right to possess or use right if there is no sign and fence. This is a public servitude right that limits land rights created on state land. As it is noted above, Articles 48.2-48.4 of the Land Law regulates relations between a certain limited right holder and land right holders under the Land Law. Therefore, it refers to a private servitude. The Land Law accepts that the Civil Code applies to relations regarding limited rights in accordance with Article 48.7 of the Land Law.

4.2. Private Land Use System

4.2.1. Introduction

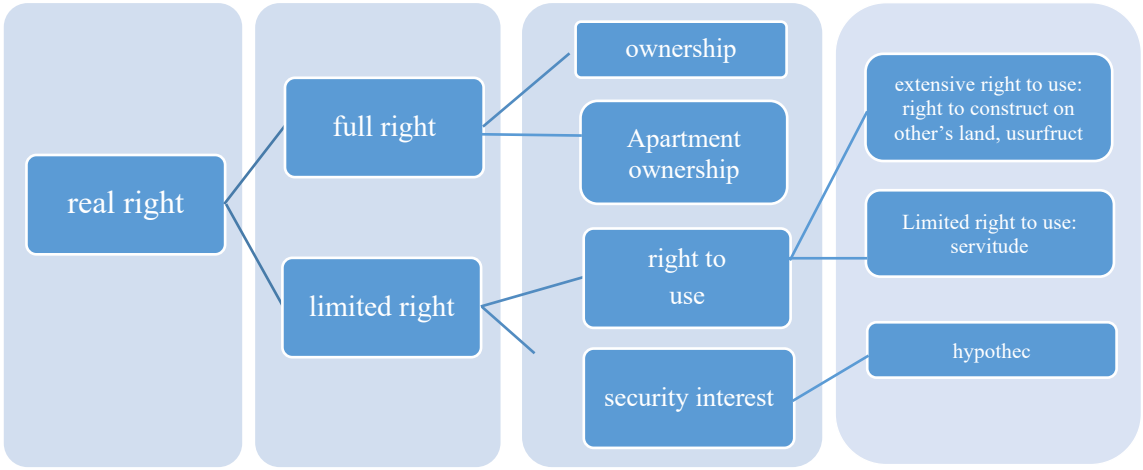
The current Civil Code of Mongolia is the second revised version in the transition period. The code is the largest and the basic legal source for property relations. As it states in Article 3.3 of the Civil Code, the Code will function as either a general or specific legal source for private law relations.[60] In general, as it is noted in the previous sections the property law provided by the Civil Code in 2002 follows the *Germanic* system, leaning on rules and doctrines such as *superficies solo cedit*, and *numerus clauses* supported by strong registration institution. (Figure 2) Yet, for a country which had already started the privatization of commercial buildings and residential apartments prior to the land, the affirmation of the rule of *superficies solo cedit* in its property law, according to which ownership of the land extends to ownership of essential components such as buildings stably erected on the land, was a serious choice that had a significant impact on the country's development

[60] Article 3.3 of the Civil Code provides that:
3.3. In case of laws other than the Constitution and this Law contradict each other, the provisions of the Law, which regulates this matter in more details, or in case of absence of such, provisions of the lately adopted Law shall apply.

of a real property system. Therefore, far-sightedness and careful analysis of future effect was required.

However, because of its conceptual flaws and inconsistency with general theory that applied to private property law, the Land Law failed to maintain the real property system foreseen in Mongolia. As it is evidenced before, the Land Law only created a poor structure for granting rights on state land.

Figure 2. Framework of real property rights in Mongolia



4.2.2. Basic principle and concepts of real property transactions in Mongolia:

The superficies solo cedit rule

The main classification of things is the division into movables and immovables. Under the Civil Code, immovable property is land and essential things attached to the land (rule of *superficies solo cedit*), and those that become useless by its purpose if separated from the land. However, there are some exceptions from the rule of *superficies solo cedit,* and under these exceptions, ownership of land and the building which stands on such land can belong to different persons. Only if it is stipulated in the law, the essential attachments to the land are considered as independent real properties in accordance with Article 85.1 of the Civil Code.[61]

[61] Article 85.1 of the Civil Code provides as follow:
85.1. If it is provided by law, components that cannot be destroyed or separated without losing their original designation shall be independent subjects of civil legal relationship

An important and major exception of *superficies solo cedit* rule is apartment ownership. An apartment owner is required to register his/her special ownership right at the State Registration Agency which was established in 1997 during the privatization of commercial and residential buildings. While the special ownership right for an apartment is registered, the land ownership is remained under state. Yet, the regulation on relations between an owner of an apartment and a landowner is absent in the property law of Mongolia. For clarity, in the case of the demolition of a condominium for various reasons, an owner of an ex-apartment does not have any right with regards to the land on which the apartment used to be locate.

The next minor exception from *superficies solo cedit* principle in the Civil Code goes back to Roman law principles that state a small part of a building erected unintentionally on foreign land will continue to belong to the owner of the main part of the building. Accordingly, Article 137.1 of the Civil Code stipulates that if a possessor of land constructs a building without a neighbor's permission, then the neighbor shall have to accept such violation unless they demand that the possessor halt their activities prior to or soon after beginning the act of boundary violation.

The last exception is the right to build and construct on another's land stipulated in Article 150 of the Civil Code. This right provides for the separate ownership of a building or construction that is built under this right from the beginning, while Article 137.1 of the Civil Code above establishes a separate right *in rem* to own part of the building which was unintentionally erected on foreign land without the right to erect.

Possession

As it is noted before, the Land Law created two major types of land rights: 1) *ashiglah erh* (ашиглах эрх) and 2) *ezemshih erh* (эзэмших эрх). From the linguistic perspective, while the word "*ezemshih*" indicates meaning "to possess" one the on hand, a legal concept of "possession/ezemshil" is differently interpreted as it is an actual fact on the other hand.

In accordance with the concepts in the Civil Code, commerce in movable property is determined by provisions on possession, while commerce in immovable property is determined by

provisions of immovable registration. Possession in the Civil Code is recognized according to its Roman law concept referring to the factual situation of control over a thing in property law. Possession has three functions in Mongolian property law: first, it signals indicates the ownership of movable property. Pursuant to Article 91.1[62] of the Civil Code, the possessor of movable property shall be deemed the owner of a thing. Second, it creates a right since the delivery of possession is a basis for the creation of the majority of rights in movables. Third, it provides owners of movable or immovable with the right to protect their possessions. These are completely novel norms, and they can often be underestimated in practice.

The exact same word "ezemshih" (to possess) is used as a name of a land right,[63] in the Land Law. It is an entitlement of certain category of people to use state land with a slightly longer term and the possibilities of mortgage and inheritance. Although an actual legal meaning of a concept of "possession" in the Civil Code does not play any role in the Land Law, it often causes confusion. Therefore, property rights created on the state land should be clarified as they are in the Civil Code.

4.2.3. Apartment Ownership

Ownership may belong to several persons and in that case, it is referred to as common ownership. Common ownership is divided into shared ownership and joint ownership in accordance with Article 108.1 of the Civil Code. In the case of shared ownership, the shares of co-owners are determined in legal shares, and in the case of joint ownership, the shares are not determined.

Apartment ownership is recognized as a separate and mostly real right in all European states.[64] In Mongolia, it is legally constructed as a separate real right as well. This is complicated by the fact that apartment ownership consists of various elements (the plot of land, the apartment,

---

62 Article 91.1 of the Civil Code runs as follow:
91.1. As to third persons, the possessor shall be considered the owner of the property.

63 In this work "ezemshih erh" in the Land Law refers as a "long-term right to possess".

64 CHRISTOPH U. SCHMID & CHRISTIAN HERTEL, *Real Property Law and Procedure in the European Union*, General Report (European University Institute (EUI); Florence/European Private Law Forum; Deutsches Notarinstitut (DNotI) Würzburg, 19 (May 31, 2005).

the administrative property of the apartment owner, the apartment owner's rights to vote, etc.), which gives rise to the question of what the object in commerce is in the case of apartment ownership.[65] However, under the Constitution, only a citizen of Mongolia is allowed to own land, except for the state. Buildings and apartments are frequently owned by foreign citizens; therefore, if apartment owners are allowed to own the land underneath in common ownership, it will require a constitutional acceptance beforehand.

Later in 2005, a provision specifying that a use right to a plot of land shall be given to an apartment owners' association for a term of up to 15 years was added to the Land Law. The use right of the association can be extended in increments of 15 years each for an unlimited number of times as long as the building exists. But, if a building is torn down for any reason, the apartment owners' association no longer exists, and therefore the use right in the land will be extinguished. Until now, there has yet to be solid study identify the nature of this right. Thus, apartment owners' rights to land are vulnerable, and this is an issue to reconsider within the scope either of the Civil Code or the Land Law.

Another important issue relating to apartment ownership is that of non-residential building ownership rights. It is very common for a commercial building to be owned by several parties. However, this is a completely unregulated field of property law. In fact, owners have been maintaining their own regulations, duplicating provisions of residential apartments.

Moreover, in practice, building companies, who construct residential apartments, are usually entitled to use, or possess with long term the plot of state land under the apartments. However, process to transfer land rights to the real owners of the apartment is unregulated. There is no such mechanism to transfer the land rights to the apartment owners or at least to the association of apartment owners after completion of the project. There are many apartments that have never

[65] Priidu Parna, "Development of Apartment Ownership Legislation in Estonia in 1994-2009 and Reform Plans in the Context of European Judicial Practice," *Juridica International* 16 (2009): 106.

established an apartment association. In this regard, apartment ownership is one of the vulnerable rights to real property in Mongolia that is on the list of rights waiting improvements.

4.2.4. Limited real right in the Civil Code

The Civil Code stipulates four types of limited rights: the right to construct on other's land; the right to limit others' ownership right of immovable property *(servitude);* the right to use others' property with limitation *(usufruct);* and the right to pledge, including pledging immovable property *(hypothec).* Article 87.1 of the Civil Code provides the definition of the limited right as rights inherited from and limited by wider ranging rights. In other words, these rights limit the right of ownership, and an owner accepts that certain of his ownership rights can no longer be used, to the extent, and for the period, that a limited real right has been created.

In accordance with Sjef Van Erp's classification of approaches to limited rights in a civil law system, the external cumulative approach of limited rights is recognized in the Civil Code of Mongolia. In his opinion, under the "elastic concept of ownership" which is the first approach to a limited real right restricts the right of ownership "from the inside" and in consequence, the limited real right plus what remains of the ownership right amount to full ownership.[66] On the other hand, in accordance with the external cumulative approach ownership and limited real rights are then seen as strictly separate rights, because an owner accepts that certain of his ownership rights can no longer be used, to the extent, and for the period, that a limited real right has been created.[67]

Pursuant to Article 168 of the Civil Code, if the claims secured by a hypothec are terminated, or upon dissolution of the claim, the hypothec will transfer to the owner of the real property. This is the consequence that the external cumulative approach of limited rights desires to reach. In other words, in the external cumulative approach, the owner of real property can be both

[66] Sjef Van Erp's view is that the civilian tradition has two approaches to limited rights: first internal cumulative, in other words an"elastic concept of ownership", and second external cumulative. For further detail: *Comparative Property Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW , 1057 (2006).

[67] *Ibid.*

mortgagor and mortgagee at one and the same time upon the limited right is vanished. It also evidenced the Civil Code follows the same approach with German real rights.

Right to construct on other's land [RCOOL]

In general, limited rights may be further subdivided into rights to the use of an assets, security interests and pre-emption rights in civil law system. The first category of limited rights may be divided again into two parts, namely, extensive rights to full possession, and limited rights for specific purposes, also called proprietary burden.[68] In the Mongolian context, RCOOL may alternatively be placed within the first subgroup as a sibling of the usufruct; and within the second subgroup as a type of servitude.

RCOOL is a transferable, mortgage-able, and inheritable right to erect and own a building on foreign piece of land. The right is granted for up to 99 years once it has been registered, and the conditions of premature termination are deemed to be void. There is no single right in local practice, because in response to the strict limitations created by the Constitution and other laws on the private ownership of land, the right of possession and right of use have supplanted the more limited rights specified in the Civil Code. In contrast to the long-term right to possession of state land, the RCOOL is consistent with and governed by the terms of the Civil Code because of its *in-rem* nature. For example, the condition of premature termination is deemed to be void, and the only justification that could expire the right is given in Article 150.7 of the Civil Code.[69] Other grounds are explicitly prohibited according to Article 150.4[70] of the Civil Code.

---

[68] CHRISTOPH U. SCHMID & CHRISTIAN HERTEL, *supra* note 64, 16.

[69] Article 150.7 of the Civil Code runs as follow:
150.7. Unless provisioned otherwise by contract, a person who obtained the rights to construct a building or installation, shall pay the payments for possessing the rights to the land owner in accordance with the procedures stated in Item 137.2 of this Law. In case this payment is not done for two years, the land owner shall be entitled to cancel the contract at own initiative.

[70] Article 150.4 of the Civil Code provides as follow:
150.4 In cases other than specified in Item 150.7 of this Law, it is prohibited to terminated the rights to construct a, at one party initiative.

Under the Land Law, nullifying certificates of long-term rights to possession or rights of use in state land are considerably subjective and dependent on one side's discretion. For instance, two or more breaches of any land-related laws are deemed grounds for nullification of a state land right certificate. Given the scale of investment that may be involved, the grounds for terminating lawful possession should be objective and more certain. Reclamation of land possession from certificate holders is often based on the concept of "purpose of state special use" which is among the most ambiguous categories in the Land Law.

Consequences of the expiration of RCOOL are provided in the Civil Code. Upon the expiration of the term, the landowner is entitled to buy a building at an appropriate price, or to suggest extension of the term within a reasonable period. If an owner of a building does not want to extend the term, he will lose his right to demand compensation for the building. In the case of a long-term right to possess under the Land Law, a possessor only has a duty to release a plot of land within 90 days at his own expense. Abandoning a building and not demanding compensation is not a specified option for the building owner.

Regarding the title of a right, RCOOL may be critical because it seems there is no right covering the underground part of a plot of land as well as a building already erected on the respective land.[71] Not only RCOOL, but the land ownership right itself needs to be updated in this regard. Because of the limitation on private land ownership from the vertical approach of ownership, in a *ger* district area most people are confronted with difficulties in using land even for their essential household needs. In accordance with the Constitution private land ownership applies only to surface of the land, and subsoil remains under state ownership perpetually. The Law on Land Subsoil affirms this concept, which this has affected the further formulation of limited

[71] In Mongolian, the title of *busdiin gazar deer barilga baiguulamj barin erh* (Бусдын газар дээр барилга байгууламж барих эрх) is in the future tense, and from the main body of the text it is doubtful whether the provision applies to a building that has already been erected on the land prior to the creation of RCOOL.

property rights. As a practical matter, neither structures above nor below ground level can be constructed without using areas under the surface of the land to a certain extent.

From a practical and legal viewpoint, another critical point of this right grants the of use another person's land for the purpose of owning the buildings or other structures thereon. The right is given for the purpose of erecting a building on the land, but could it also apply to cases where one desires to own another's building which already been built. For example, in the case where of ownership of the land and a building which belong to the same person are transferred to different persons, the RCOOL can be interpreted as a solution.

Right to use others' property with certain limitations (usufruct)

Traditionally, usufruct is the extensive right to use, give full possession of, and enjoy the fruits of the land, for example, all kinds of earnings from the land including rent payments.[72] Historically, an *in-rem* right with purpose of erecting a building on others' land may constitute a derivative from the usufruct along with rights of superficies, emphyteusis and timesharing.[73]

In accordance with Article 152.1 of the Civil Code, a usufruct is a right to possess and use others' property (movable and immovable) with limitations for the purpose of enjoying its profits. The term of the usufruct could be reasonably long, up to the lifetime of an individual or the existence of a legal entity. Although, it is not as clear as in the case of RCOOL, the usufruct could be subject to a pledge right. If a usufruct holder wants to pledge or lease a usufruct item, he is required to obtain the owner's consent for the item. Consequently, if a usufruct holder pledges a usufruct item with an owner's consent, on what grounds is he restricted from pledging his usufruct right? The provision may have some technical mistakes, perhaps it wanted to express the idea of a pledge-able feature of the usufruct right, because in accordance with a pledge over immovable items, a pledgor is required to be the owner of the item.

---

[72] CHRISTOPH U. SCHMID & CHRISTIAN HERTEL, *supra* note 64, 16.
[73] *Ibid.*

In contrast to a RCOOL, a usufruct is not an inheritable right. Regardless of its *in-rem* nature, a usufruct is, indeed, excessively like a lease contract in obligation law. In the case of immovable property, the creation of a usufruct requires registration. From a purpose perspective, usufruct is a broader concept than a RCOOL because it demonstrates all kinds of purposes to earn profit. Theoretically, if one desires to build a structure on others' land, he is advised to opt for a RCOOL. Yet, people's behavior is unpredictable, and they may choose a usufruct right to construct a structure because of its broader concept of purpose. The Civil Code stipulates that if an object of usufruct is a plot of land, a usufruct holder may erect necessary structures on the land without substantially changing the land's purpose. If the usufruct holder implements a project to develop the land for a building purpose under a usufruct, an interest of the building owner's interest is less protected than it would be under an RCOOL.

As to the degree of the *numerus clausus*'s application to the usufruct, the Civil Code does not seem as strict as an RCOOL. A usufruct is relatively flexible; thus, it has been formulated sufficiently openly for the freedom to contract. In Western European practice, usufructs mainly apply to farming land; under the former Communist system in Poland, a special form of usufruct called "perpetual usufruct" has been, and still is, used to grant land to individuals for long periods while formally keeping it under the ownership and control of the state.[74]

Right to restrict others' ownership right of immovable property (Servitude)

Servitude is a limited right of use, which does not require full possession. This is the most shared concept of limited rights of use in both common and civil law systems. In the Mongolian context, a servitude is the right to restrict the ownership right of another's immovable property owner in certain ways for the purpose of exercising his ownership right of immovable property. The following three ways allow restriction of another's ownership according to Article 151 of the Civil Code: (1) if provided by law or agreement, to use immovable property of others with pre-

[74] CHRISTOPH U. SCHMID & CHRISTIAN HERTEL, *supra* not 64, 16.

emptive rights and in a limited way (positive servitude/affirmative easement); (2) to prevent other owners from carrying out activities conflicting with his rights and legitimate interests; and (3) to prevent an owner of the inferior/burdened property from exercising certain rights (negative servitude/negative easement).

Traditional features of the real servitude that are permanent, accessory and indivisible characteristics are identified in the Civil Code. The servitude is effective for as long as ownership continues. The servitude cannot be conveyed, leased, or encumbered separately from the dominant property, is inseparable from the dominant property and runs with it, which makes it an accessory right. Moreover, the servitude is indivisible; according to the Civil Code it burdens the whole servient property and benefits the whole dominant property. However, if the dominant property is partially divided, the servitude runs to the benefit of each subdivided property, and this does not result in an additional burden for each subdivision on the servient property.

In a servitude relationship, the property owned by the servitude holder is called the dominant property and the property through which the servitude runs is called the inferior or the servient property.

Positive and negative real servitude

Theoretically, under a positive real servitude, an owner of the servitude right can use another's land, whereas a negative servitude means one in which the holder of the servitude prevents other property owners from using their property in a particular way or prevents particular acts by other landowners, such as a servitude restricting the height of buildings on adjoining property. Article 151.1 of the Civil Code affirms the right of a real property owner to use another's real property due to his necessity, which is identified as a positive real servitude. In other words, the owner of the inferior property is required to suffer certain activities of the owner of the dominant property; otherwise, he is entitled to resist. The two sub-Articles 151.2-3 of the Civil Code impose negative duties on the real property owner, restricting them from exercising particular rights or carrying out certain activities, which is classified as a negative real servitude.

Creation of a servitude

The Civil Code does not explicitly require registration of the servitude right for its creation, while registration is necessary for creation of other types of real rights. Because the servitude may arise solely on the basis of necessity, when a servient property exists but a servient owner cannot be determined, and where the law allows, a dominant owner may be granted a servitude right *non-domino*, i.e., absent the servient owner.[75] In this event, the dominant owner will generally not be indemnified by the land registry for the statutory prescriptive period.[76] Nevertheless, some types of servitude may not be based on necessity. For example, a negative servitude restricting the height of a building may not be conditioned on necessity. In this event the conveyance of the servitude may require a registration.

Alternatively, servitudes exist that are not real servitudes i.e., dependent on two pieces of land, but which are personal. Theoretically the Civil Code only accepts real servitudes that are attached to property, and does not recognize *personal* servitude, which is a right that burdens a piece of land but, different from a right of real servitude, benefits any specified person.

Mortgage *(Hypothec)*

A hypothec is the most frequently used, non-possessory right *in-rem* against immovable property. It belongs to the second main category of limited rights, which are called security rights. Unlike a right of pledge over movables, a hypothec is in principle created upon its registration. Thus, this is highly recognizable, satisfying the demand for publicity. On account of its absolute effects, a mortgagee can assert this right against anybody.

Pursuant to Article 172.1[77] of the Civil Code, a hypothec is inalienable from its secured claim; thus, it lies in the principle of *accessoriness*. On the other hand, according to Article 168.1

---

[75] A. N. Yiannopoulos, *Extinction of Predial Servitudes*, 56 TULANE LAW REVIEW 1285–1316 (1981–1982).

[76] *Ibid.*

[77] Article 172.1 and 87.1 of the Civil Code provides as follow:
172.1. Hypothec and claim serving as its grounds may be transferred together to others only in accordance with Article 87.1. of this Law.

of the Civil Code, a hypothec is transferred to an owner of immovable property by the termination of a secured claim or if the creditor refused from his claim. With relevance to this Article, a hypothec can exist without a secured claim. Indeed, the latter led the author to the conclusion of the existence of an external cumulative approach in Mongolian property law, which allows an owner of burdened real property to be both mortgagor and mortgagee at the same time. Theoretically, the external cumulative approach of the security right is only possible under the non-accessoriness of a mortgage because no one can be their own creditor. The accessory version of a mortgage offers the maximum security to the debtor, whereas the non-accessory type enables the repeated use of a mortgage and its transferability among borrowers and lenders.[78]

Therefore, regarding to the concept of hypothecs, Mongolia has adhered to both the accessoriness and non-accessoriness approaches.

4.3. Parallel Registration System for Land in Mongolia

4.3.1. Land recording under the Land Law (Recording of Land Certificates)

With relevance to state land right recording, the Land Law is ambiguous on what concept it follows. It has been amended 30 times since it was passed, and most of the original provisions of the Law purport to create land recording system which is based on the issuance of land right certificates (certificate of a long term right to possess and a use right of state land). For instance, the phrases "type of certificate of a long term right to possess"[79], "auction of a certificate"[80],

87.1. Rights inseparably connected with other rights and that cannot be exercised independently without them shall be inseparable rights.

78 CHRISTOPH U. SCHMID & CHRISTIAN HERTEL, *supra* note 64, 18.

79 Article 28.1 of the Land Law provides that:
28.1. Land possession certificates shall be of the following types: 28.1.1. for household needs; 28.1.2. for government organizations; 28.1.3. for economic entities and organizations.

80 The title of Article 36 of the Land Law is "Auction Price of a Land Possession Certificate and Administrative Fees."

"extension of a certificate time period"[81], "transfer of a certificate"[82], "expiration of a land certificate"[83] and "to mortgage a certificate"[84] are frequently found in the original wordings in the Land Law, remain in effect so far. Pursuant to Article 27.1 of the Land Law "a plot of land shall only be possessed by a rights certificate on the basis of contract in which purpose, time period, and other conditions are stipulated.", and Article 27.4 states that "land possession without a certificate shall be prohibited". All these provisions evidence that a certificate of land rights is at the heart of the state land use system created by the Land Law.

On the other hand, in later amendments to the Land Law, the registration concept has to be changed slightly, but almost unconsciously. While Article 35.3.6 of the Land Law states that if a certificate of a long term right to possess is encumbered with a mortgage or transferred to others it shall be registered, Article 35.1.7, which is added in 2009 stipulates that the long term right to possess may be encumbered with a mortgage. Apparently, whereas one of Articles suggests the establishment of a mortgage over the certificate, which is still effective and provides no more

---

[81] Article 37 of Land Law provides that:
37. Extension of a certificate
37.1. A certificate holder shall submit a request for extension of the term of the certificate to the governor of the relevant level at least thirty days prior to its expiration, with the following documents attached: 37.1.1. the land possession certificate;
37.1.2. land fees payment receipt;
37.1.3. status of the implementation of the recommendations made upon the environmental impact assessment test.

[82] Article 38 of the Land Law provides that:
38. Transfer of a certificate to Others
38.1. Certificate holders may transfer their certificates or put them up as collateral in a legally allowed manner. Such transfers and pledges may be undertaken only between Mongolian citizens, companies and organizations.

[83] Article 39 of the Land Law provides that:
39. Expiration of a Land Possession Certificate
39.1. Certificates may expire in the following circumstances:
39.1.1. if, upon expiration of the land certificate, no request has been made for its extension;
39.1.2. if a certificate holder - a natural person has died, or has been pronounced dead or missing, and it has been established that the certificate holder has no legitimate successors; or if a certificate holder - a legal person has been dissolved or liquidated;
39.1.3. if a certificate holder requested termination of his certificate possession contract;
39.1.4. if certificate possession certificate became invalid;
39.1.5. if compensation has been paid in full to the certificate possessor for the land withdrawn for special needs.

[84] Article 35.3.6 of the Land Law provides that:
35.3.6. to register at the state registry if the certificate is to be transferred or put as a collateral.

comprehensive regulation, the latter encourages a central idea of private real property law of Mongolia, which accepts the *erga omnes* effect of the *inrem* rights and its protection provided by a strong immovable property registration through its openness rule of enforceability upon registration.

Regardless of the late identification of the approach to a strong immovable property registration, the state land use system created by the Land Law is still based on certificate recording. Therefore, under the Land Law, even though a decision to transfer a plot of land into someone's possession has been made by the relevant authority, it has no effect until a certificate is granted to a holder following the certificate recording. This recording system has been serving as a more fundamental system than the immovable property registration established in 1997. The immovable property registration is controlled by the Ministry of Justice and Home Affairs and functions to create a private ownership right of land, buildings, and apartments and is reliable because of publicity in underlining *erga omnes* effect of the real property rights, while a certificate of a long term right to possess and use rights are recorded at the Administration of Land Affairs, Geodesy and Cartography, a separate agency of the Ministry of Construction and Urban Development (land recording). The main criticism towards the land recording system focuses on its nonrecognition of absolute effect of the real property rights.

4.3.2. Immovable property right registration for private land

In Mongolia, the first Law on Registration of Immovable Property was adopted in 1997. Accordingly, the State Registration Agency, the first government authority in charge of the registration of property rights was established by Government Order Number 42, on February 12, 1997. This registration system, formed on the basis of the property regimes provided by the Civil Code is relatively more systematic than the certificate recording system created by the Land Law in compliance with the land cadaster. Land administrative authorities keep the recording duties under their management and have used it only for their own administrative purposes for long time.

The immovable property right registration created in accordance with the principles of the Civil Code is the institution which is comparable to European land registration system. Historic traditions of European property law which recognize *superficies solo cedit rule* and an abstraction principle require a strong land register. The abstraction principle comes from the idea of Savigny to affirm legal certainty and clarity, so that errors in a causal transaction would not influence the legal status of an immovable and would allow the establishment of abstract real rights of an owner.[85] Therefore, a land register must become the foundation and function as the center of reliance for stakeholders in immovable commerce. A land register is maintained for immovables and related real rights. In addition, a land register should be public, and everyone should have a right to examine the land register information and to receive extracts therefrom.

However, until recent amendment in the relevant law on immovable property registration, only building, or apartment ownership right, private land ownership right and hypothec created thereon are registered at the immovable property right registration, while the certificates for a long term right to possess land, or a use right are recorded at the special office of the land authority. It is one of main reasons of land right separation from other main property rights in Mongolia and various contracts and transactions with regards to state land rights are carried out without proper registration of right.

Moreover, the parallel registration system for private and state land is not only issue. The immovable property right registration system has its own problem. Following the LTLOMC, the first land ownership right was registered on November 19, 2003. Although ownership of plot of land and ownership of a building belong to same person, the relevant registrations are made separately, and separate folios for each property are created. (See appendixes A and B). This allows for plots of land and buildings to be entered into commerce separately and in practice commonly resulting in serious and endless disputes among the property right holders. Immovable property

[85] Priidu Parna, *The Law property Act-Cornerstone of the Civil Law Reform*, 6, JURIDICA INTERNATIONAL 89–101, 96 (2001).

right registration system does not support *superficies solo cedit rule*. Although the Civil Code explicitly stated that an ownership right of land extends to a permanent attachment to the land, the registration office developed the registration practice in exactly opposite direction. To clarify, the person who owns the plot of land built a house on his land by himself, a land ownership right and a house ownership right are registered separately, therefore, two full property rights are created.

Similar types of cases are happening in the state land use system as well. Whereas use or a long term right to possess state land are registered at the land certificate recording office, the building ownership erected on those plots of state land is registered separately at the immovable property registration office, which carried out under the control of Ministry of Justice. In result, all those rights are now in commerce causing hundreds of debates and disputes before or out of the courts and become a main reason to unnecessary social costs and hindrance to stable business transactions.

A failure to form a unified real property registration became the root of property right infringements. Considering the dominance of using long term right to possess or use rights in state urban land, an immovable property right registration that cannot provide information regarding land rights is not sufficient from application of publicity principle; therefore, the absolute effect of the property rights is diminished. Moreover, the problems inside the immovable property right registration need to be addressed and treated with principles in the Civil Code.

4.3.3. Recent attempt to consolidate the parallel registration system

As a result of recent reforms to State registration (2019), in accordance with Article 33.7 of the Land Law, information on long term right to possess and use rights of state land is also required to be entered in the intermediary data fund between the General Authority for State Registration and Administration of Land Affairs, Geodesy and Cartography. Nevertheless, inconsistencies between the Land Law approach to establishing long term right to possess and use rights through certificate recording and the Civil Code's approach to establishing the immovable property registration based on the principle of publicity underlines absolute effect of the property

rights and a *superficies solo cedit rule* is still not being eliminated by this solution to form intermediary data (See appendix E that illustrates working mechanism the digital data fund) established between the two authorities.

However, without conceptual and institutional compliance of the substantial laws and registration systems, trifling number of mutual funds will result in nothing. Hypothetically, one cannot easily add two numbers (type of land rights for both in state and private land) are if one is given in centimeters, while the other is in meters. The numbers should be converted into the same units in order to be added. To some extent, the publicity of the land recording may be attained through the above solution; however, land rights of residential, office, and industrial building owners are still unsecure because of the incompleteness of a long term right to possess and a use right of state land. In reality, a building erected on the land of others or even on one's own land is registered separately and this causes distortions of the property market anticipated by the Civil Code. Parallel registration systems irrelevant to each other and defective approaches inside each registration system are followed by infringements of property rights and increasing unnecessary societal cost.

In accordance with the current parallel regime, building owners, who register a building ownership right to the immovable registration also have a right to transfer or to be encumbered with a mortgage to financial institutions separately through their certificates of a long term right to possess or a use right of state land. Therefore, tremendous problems in the real property area of Mongolia have now begun to arise from the property right fragmentation between the two distinct holders of these two rights as a result of a separate transfer such as forced sale or inheritance.

4.4. Common case examples

In *Sarantsetseg v. Amarbat,* Sarantsetseg purchased a house from Enkhzaya in 2006 and had been living in that house since then.[86] However, Amarbat purchased the certificate for the long

[86] Decisions of the courts available on the https://shuukh.mn/single_case/94079?daterange=2015-01-01%20-%202021-12-14&id=1&court_cat=1&bb=1, last accessed April 2021.

term right to possess of that plot of state land on which Sarantsetseg's house was located in 2012 through auction arranged by the court judgement enforcement office of the capital city. Sarantsetseg bought the house from Enkhzaya who was an owner of the house and also a certificate holder of the long term right to possess of that plot of state land. However, Sarantsetseg was not aware of that the land certificate was mortgaged by a Bank, with whom Enkhzaya entered into a loan contract. Sarantsetseg only relied on the registration of house ownership. Finally, Sarantsetseg brought a case to the court demanding actual possession of the land on which her house is existed. In return, Amarbat argued that Sarantsetseg's house should be removed from the plot of land because this plot of state land is in his long term right to possess. The court decided the case dismissing Sarantsetseg's claim on the only ground that Amarbat's certificate was legal, and it did not provide other grounds with regard to the fact of Sarantsetseg's actual possession which protected by the Civil Code. The appeals court found that "In accordance with Articles 84.3 and 85.2 of the Civil Code, the attachment to a plot of land is inalienable and an essential part of the land, therefore, Amarbat's long term right to possess that plot of land is lawful and Sarantsetseg's actual possession of the land should be considered to be terminated.

In *Gursed vs. Enkhgerel*, Gursed purchased a house jointly owned by Bold and his wife Enkhgerel and a long term right to possess of a plot of state land which was held solely by Bold.[87] The price for the house and a long term right to possess a plot of land was paid to the couple. However, the land right certificate was not handed over to the purchaser due to it is being under the procedure of the application to convert the long term right to possess of the plot of state land into the private ownership right submitted by the seller (Bold). Unfortunately, Bold passed away and the purchase contract regards with a land right certificate could not be completed. The plaintiff Gursed demanded possession of the land certificate from Enkhgerel regardless of the fact that he had actual possession and the fact that Enkhgerel had nothing to do with satisfying his claim until

[87] The court judgement is available here, http://new.shuukh.mn/admin/irgen1/101071/edit, last accessed October 22, 2021.

she inherited the long term right to possess the plot of land. If the state and private land uses systems had unified principles with regards to real property transaction and a unified registration system this type of case would not be happened.

Moreover, another common case usually arises in result of the inheritance. Separate registration is not just occurred in relation between of state land and private house, it is also happened in case of privately owned house and land by same person. For example in *Batgerel v.Batdorj*, Batdorj filed a case against his brother Batgerel demanding the release his land from a house owned by Batgerel. When their father died his youngest son Batdorj inherited ownership of his land and his oldest son Batgerel inherited his house. Under the *rule of solo cedit* of the Civil Code if a plot of land and a house on it are owned by same person, these properties are not subject to separate registration as individual immovable properties. However, registration system works differently in practice and officials interview reveals that currently on over 100,000 plots of private land has two and more immovable properties are registered separately from the land, although they have same owner. In cases such as *Batgerel vs Batdorj*, unfortunately, until the brothers get along the Civil Code could not provide a right solution.

In conclusion, the number of these types of disputes will continue to vary and evolve into more difficult shapes, and the remedies be borne by millions unless both registration systems work on the basis of the same principles or legal frameworks for the relations and impacts of property rights that are created by both systems. Generally, any purpose for the use of land should be tied to the nature of the property rights; further, all holders' rights and duties in the public and private law areas are formulated accordingly. Land rights should be consolidated to improve clarity and support for investment. For residential uses, possession is an unnecessary category that could be discontinued and replaced by directly issuing an ownership tenure designation.[88]

[88] WORLD BANK, Land Administration and Management in Ulaanbaatar, Mongolia, available at https://www.worldbank.org/en/country/mongolia/publication/land-administration-and-management-in-ulaanbaatar-mongolia (last visited Dec 10, 2020).

The Land Law which contradicted united principle of property violates the important principles of legal certainty and transparency in state property transfer. Legal entities should enjoy some form of secure, medium-term rights or long-term land leases rather than the more circumscribed rights of possession and use they are currently afforded.[89] If property rights are secure, well defined, and publicly enforced, landowners need to spend less time and resources guarding them.[90]

4.5. Conclusion

In result of lack of policy support for the constitutionally restricted private ownership of land and land reform failure, the state land use system is dominant to the private land use system in Mongolian land relation. However, among many complexities the developmental impact of institutions to establish and maintain secure property rights to state land has been ignored.

Property rights are social conventions, backed by the enforcement power of the state (at various levels) or the community, allowing individuals or groups to lay a claim to a benefit or income stream that the state will agree to protect through the assignment of duties to others who may covet, or somehow interfere with, the benefit stream.[91] How land rights are defined and distributed is a key element of the social fabric, the power structure, and the scope for economic development in a society.[92] Therefore, achievements of the land reform of Mongolia and the current parallel system for use of state and private land may be evaluated by how land rights are defined and granted. In this regard, non-recognition of unified property rules for state and private land relation, different understanding of basic concepts of property law such as "possession" or "right to possess" and ignorance of importance to establish a secure and certain real property right in state

---

89 *Ibid.*

90 Klaus Deininger & Gershon Feder, *supra* note 92, 236.

91 Espen Sgaastad, Daniel W. Bromley, (2000) *The Prejudices of Property Rights: On Individualism, Specificity, and Security in Property Regimes.*, Vol 18. Issue (4). DEVELOPMENT POLICY REVIEW, 89.

92 Deininger Klaus, and Feder Gershon, "Land Registration, Governance, and Development: Evidence and Implications for Policy.," 235. (last accessed April 19, 2021),

land relation are the main reasons for violence of private property rights and instability of economic development of Mongolia.

Under private law, real property rights are created in restricting full ownership right and subject to the *solo cedit* rule in real property transaction and protected by a remedy of a vindication action in addition to remedies of possession protection and a right to file an *actio negatoria*, the Land Law is not clear which rule it follows and on what conceptual basis it is created. For the state and private land use system, the unified basic rules, common definition of property rights and the unified protection is required. Regardless of its ownership type and the law they are regulated by, real property rights that allow a private sector to use the plot of land are private rights. Therefore, unified principles for creation, protection and restriction to this property rights are necessary.

Moreover, both at the level of parallel systems of land right and certificate registration or inside of the immovable property right registration, the unification is needed. As a whole, both institutions of registration need to be harmonized principally not superficially and failure to recognize the *superficies solo cedit rule* in the immovable property right registration is in urgent need.

Chapter V. Comparative Analysis with Jurisdictions of Germany and Japan

5.1. Introduction

Due to different features of property rules that shaped by local conditions and historical accidents, this chapter will study not just a general framework of real property rights of the selected jurisdictions of Germany, Japan and Estonia, also influence of major historical events and land reforms on establishment of main principles of real property law of each country will be analyzed. As evidenced in previous chapters, the state land use system of Mongolia requires comprehensive legal norms that responds to the tensions and contradictions within Mongolian real property system. While no country is a perfect parallel to Mongolian experience, comparison may reveal patterns that will help guide Mongolian reform.

Germany is a country worthy of study in terms of it being the origin of the chosen system of private law of Mongolia, as well as Estonia. Detailed study on importance of *solo cedit rule* in real property transaction of Germany, a unified approach to public and private property system is greatly contributed to find right solution to problems aroused by the parallel system of real property transaction in Mongolia. Therefore, basic principles and types real property rights in urban areas, their protection are significant aspects to be considered for the effective outcome of this study. While acknowledging property rules in urban areas, the assumption here is that a primary task of a functional approach to property rights' creation, the unified policy for public and private property, and a strict application of *superficies solo cedit rule* in real property transaction are crucial to achieve balance between private property rights and the pursuit of public interests.

In this chapter the evolution of the real property regime of Japan will also be considered for particular purposes, which might be a potential alternative to current issues in real property law of Mongolia. This paper traces the development of property rights in Japan during the modern period from just before the Meiji Revolution to the twenty-first century. The development of property rights' protection by the Meiji state has often been cited as one of the key institutions that

facilitated Japanese economic growth during the twentieth century.[93] The most interesting aspects of Japanese law for this study is its peculiarities towards massive immovable structure, which are determined by reference to the land on which they stand. In Japan a building and the land on which it stands are entirely separate pieces of property. Therefore, although the historical conditions and motivations raised may be different, the similarity of facts in an urban industrial area, residential growth and the positive response of Japanese governments to the circumstances recommend the study of Japan.

During the course of this chapter, particular focus is paid to the number of different real property rights in the selected countries and specifically to land ownership rights, and current property law principles formed as a result of land reforms in the respective jurisdictions. However, it is not within the scope of this study to conduct a complete survey of all real property related rights. The research is limited to only real property rights with respect to urban land and security rights in the selected nations' real property registration systems. The main goal of the comparative analysis of the respective jurisdictions is to define an independent path for Mongolia to follow for the purpose of real property law reform.

5.2. Overview of real property rights in urban areas of Germany

As Germany is a country which has the leading economy in Europe, advantaged by private ownership and free trade, land relations in this country often emerge between private land owners, while the land relations involving state are dominant in Mongolia. The German Civil Code (BGB), which was introduced on January 1, 1900, has been a substantial legal resource for real rights ever since. Nevertheless, there have been a number of major statutory and judicial reforms within the last century.[94] The provisions dealing with building leases, which played a crucial role in housing

[93] Stephan Haggard, *Institutions and growth in East Asia*, 38 STUD. COMP. INT. DEV. 53–81 (2004);
[94] Christian Hertel and Hartmut Wicke, Real Property Law and Procedure in the European Union: Germany, National Report, (2005), 5.

and urban land management of Germany were taken out of the Civil Code by means of the Law on Heritable Building Right (*Erbbaurechtgesetz*) in 1919.[95]

The Act on the Ownership of Apartments and Permanent Residential Right (WGB) of 1951 provides for regulations on apartment ownership.[96] Another important procedural act in the German real property system is the Land Registry Act (*Grundbuchordnung*), which was first introduced in 1897.[97] There are parts of real property relations subject to a number of public laws such as the Regional Planning Act of 1997 and the Town and Country Planning Code of 1986. By and large, the real property regulations are uniform in the application of certain types of *in rem* rights regardless of public or private ownership of the land, which is the different from the case in Mongolia.

Following a collapse of the Berlin Wall in 1989, reunification of the legal systems of the German Democratic Republic (GDR or east Germany) and the Federal Republic of Germany (FRG or west Germany) was largely driven by the desire to extend the rule of law to the territory of the GDR.[98] A fundamental concept of the GDR system was socialist property. Socialist property, unlike private property, could not be transferred or encumbered and was immune to bankruptcy. As it is under the Civil Codes of other former socialist countries, real estate in the GDR typically included all buildings and fixtures found upon it.[99] On the other hand, the rule stating ownership of a piece of land also comprises ownership of buildings erected on it is prevalent in the FRG. According to 94 BGB, things which are firmly attached to the land and soil, such as buildings in

---

95 (ErbbauRG), Law on the Heritable Building Right, available at https://www.gesetze-im-internet.de/erbbauv/BJNR000720919.html. (Last accessed in January 2021)

96 Act on the Ownership of Apartments and Permanent Residential Rights (Wohnungseigentumsgesetz, WEG), accessed January 17, 2021, available at: https://www.gesetze-im-internet.de/englisch_woeigg/index.html.

97 GBO, Land Register Regulations, accessed January 17, 2021, available at: https://www.gesetze-im-internet.de/gbo/BJNR001390897.html.

98 Rainer Frank, Privatization in Eastern Germany: A Comprehensive Study, *Vanderbilt Journal of Transnational Law* 27, no. 4 (1994): 811.

99 *Ibid,* 830.

particular, are regarded as essential component parts of that piece of land.[100] As such, there were a number of complex transitional legal issues needing to be dealt with following the reunifications of the GDR and the FRG.

When the State Treaty, which is one of two main treaties on the integration of the FRG and the GDR, entered into force, the GDR abandoned its system in its entirety (subject only to certain exceptions) and adopted a system based on the right to private property.[101] The second treaty is the Unification Treaty (*Einigungsvertrag*), which focused on the Law Concerning Open Property Issues (property law), and the Law Pertaining to Special Investment in the GDR (Investment Law).[102] The Unification Treaty recognized that those who had legally acquired houses in which they lived but not the land on which the houses stood were vulnerable to restitution claims, and thus expressly preserved this form of divided real estate ownership.[103]

German real property law, which was strongly influenced by Pandects' learning of Roman Law, has to a large extent remained unchanged.[104] However, Ernst Feilchenfeld stated Germanic law is not static as Roman law is and it protects activities, directed towards recognized ends, while Roman law protects a static relation and domination.[105] He called it "the functional tendency of German law" as the law contains different rules for different people and he highlighted that the clearest expression of the functional approach of German law is in its property law. The land is occupied by a person who is there in order to exercise certain functions.[106] This functional tendency of German property law is an approach missing in Mongolian property law. Property law should

---

[100] Christian Hertel and Hartmut Wicke, *supra* note 94, 6.
[101] Rainer Frank, *supra* note 98, 830.
[102] The Unification Treaty between the FRG and the GDR (Berlin, 31 August 1990), n.d., 29. Available at, https://www.cvce.eu/content/publication/1997/10/13/2c391661-db4e-42e5-84f7-bd86108c0b9c/publishable_en.pdf (accessed November 2020)
[103] *Ibid,* Annex I, Art 231(5).
[104] Christian Hertel and Hartmut Wicke, *supra* note 94. 5.
[105] Ernst H. Feilchenfeld, Germanic Law and the German Civil Code, *China Law Review* 5, no. 2 (1932): 95.
[106] *Ibid.*

try to protect the various functions of life. Therefore, German law contains more types of real rights than Roman law.[107]

5.2.1. Functional approach of German property law

Basic principles of German property law

The characteristic features of German property law can be summarized by five basic principles: the *numerus clausus,* absolute effect, publicity, specifications and so-called abstraction principles (*Abstraktionsprinzip)*.[108] Article 14 (1) of the Basic Law reads "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws". Therefore, all rights granting less than full ownership are viewed as mere restrictions or encumbrances on the title of an owner that created by only the laws. As a result, the *numerus clausus*, essentially an exhaustive list of all permissible encumbrances, developed.[109] These concepts created a system of real property transfer characterized by fast, secure transfers with the doctrine of *numerus clausus* and the land register institution.[110]

Under the first concept of *numereus clausus,* the available types of rights *in rem* are restricted by the BGB up to six in all. According to Mary-Rose McGuire this restriction is intended to ensure the marketability of property rights.[111] But this also as protects ownership as the most valuable (property) right against excessive encumbrances.[112] Further justification for the restriction of the limited number of property rights may be found in the characterization of rights *in rem* is absolute rights, that is their impact on third parties.[113] If everybody is bound to respect absolute rights, it is a prerequisite that everybody is in the position to ascertain the content of such rights.[114]

---

[107] *Ibid.*
[108] Wolfgang Faber, & Brigitta Lurger eds., 2011, *supra note* 31, 14.
[109] Rainer Frank, *supra* note 98, 827.
[110] Rainer Frank *Ibid.*
[111] Wolfgang Faber, & Brigitta Lurger eds., 2011), *supra note* 31, 14.
[112] Brehm, Wolfgang/Berger, Christian, *Sachenrecht*, 2nd ed. (Tubingen, 2006), no 1.38.
[113] Wolfgang Faber, & Brigitta Lurger eds., 2011, *supra note 31*, 14.
[114] *Ibid.*

The clarity of form reached by the *numerus clausus* prevents the emergence of an impenetrable variety of rights *in rem* and thereby serves the public interest of legal clarity.[115] Therefore, the *numerus clausus* is also closely connected with the principle of publicity. Publicity underlines the absolute and exclusive character of property rights: because all persons should recognize property rights, these rights should, in principle, be perceptible to the general public.

Another dominant principle of German property law is the principle of specialty or the principle of determination, requiring that only specific, individual things may be the object of property rights.[116] As a result each thing is the subject of ownership. Specificity is often achieved alongside publicity, as the instruments of publicity – delivery in the case of movables and land registration in the case of immovables – presuppose clear individualization of things.[117]

One of the main systems in continental law, in French civil law property transfers as a result of the obligation.[118] Only the intention of the parties to the contract to buy and sell is necessary to transfer property rights. By contrast, property transfers under the German BGB are the result only of a special agreement (abstract real agreement) to transfer real property with a kind of legal ceremony, *Auflassung*.[119] The differences between the French and German systems exist not only in the formalism of delivery or registration, but also in the dual agreements of the parties.[120] The German BGB regime is characteristic not only in its requirements of an abstract real agreement

---

115 BREHM, WOLFGANG/BERGER, CHRISTIAN, SACHENRECHT (2nd ed. 2006) no 5.2.

116 Wolfgang Faber, Brigitta Lurger, *National Reports on the Transfers on Movables in Europe Volume 1: Austria, Estonia, Italy, Slovenia* (European law publishers, 2008), 233.

117 Wolfgang Faber, Brigitta Lurger, *supra note* 31, 233.

118 Translated by Georges Rouhette, with the assistance of Dr Anne Rouhette-Berton, French Civil Code (n.d.), art. 711 provides that ownership of property is acquired and transmitted by succession, *inter vivos* or will, and by the effect of obligations.

119 *Auflassung* is a special agreement intended to transfer real property and is accepted by officials at the Land Registry in accordance with Article 925 of the BGB. For further detail please see the comparative study of the transfer of property rights in Japanese Civil Law by Shusei Ono. Article 925 of the BGB (declaration of conveyance) provides that the agreement between the alienor and the acquirer (declaration of conveyance) necessary for the transfer of ownership of a plot of land under section 873 must be declared in the presence of parties before a competent agency. Any notary is competent to receive a declaration of conveyance, notwithstanding the competency of other agencies.

120 Shusei Ono, Comparative Study of the Transfer of Property Rights in Japanese Civil Law, *Hitotsubashi Journal of Law and Politics* 31 (2003): 9.

(*dinglicher Vertrag*; d.V.), but also in the separation theory (*Trennungsprinzip*), according to which property transfers not by the causal agreement of a sales contract, but rather as a result of the abstract real agreement.[121] Thus, hindering the causal agreement does not result in voiding the transfer of property, and property remains in the hands of the purchaser on the basis of the abstract real agreement (d.V.)[122] This separation of causal and abstract real agreement contributes to stabilization of the position of the purchaser.

Superficies solo cedit: Unified conveyancing and exceptions

Although the influence of Roman law in Europe has been tremendous and there is no doubt that its influence upon modern German civil law is of the greatest importance, in 1932 Ernst Feilchenfeld pointed out that

> Roman law dissolves the whole world into a small set of static relations, master and servant, master and res, master and master, all these static relations being a matter of more importance-relations of domination or coordination. … It dealt with permanent relations of rulership and not with functions of life. … [German law] possesses a remarkable ability and inclination to create special rules of law for special problems of life.

Germanic law, as Feilchenfeld puts it, functions to solve real problems, and therefore has developed comprehensive institutional factors such as the Land Registry (*grundbuch*), and an advanced concept of restricted real rights under the doctrine of *numerus clausus* in the real property area. Pursuant to sections 903, 905 and 1004 of the BGB, an owner may, to the extent that statute or third-party rights do not conflict, deal with the property at his discretion and exclude others. As has been mentioned before, in general, ownership of a piece of land comprises also the ownership of buildings erected on that land. There are, however, some exceptions to the rule.

First, if things are attached to the soil for a temporary purpose only, they do not become constituent parts of the land (95 I1 BGB). An example would be the case of a tenant erecting a garden house or a leaseholder who sets up stands for the organization of fairs.[123] Second, the same

---

[121] *Ibid,* 10.
[122] *Ibid.*
[123] Christian Hertel and Hartmut Wicke, *supra* note 94, 6.

applies to a building or other construction which, in the exercise of a right over another's land, has been attached to the piece of land by the person who has that right (95 I2 BGB). On the basis of this provision, the owner of a building lease (*Erbbaurecht*) may acquire ownership of the building constructed in the exercise of that right.[124] A further instance of isolated ownership of at least a part of a building is a case of encroachment upon adjoining land according to section 912 of the BGB. If the owner of a piece of land, in constructing a building, has built over the boundary line, without intent or gross negligence attributable to him or even with the consent of the neighbor, he will become the owner of the whole building.[125] Lastly, in this context, however, the apartment ownership may also be mentioned, which is characterized by the coownership of the land of several persons combined with individual ownership of an apartment or commercial unit.[126]

Also, there might still be an exceptional, but rare, case of separate ownership of a building in former the GDR because of the concept of divided real estate ownership. During the reunification period of the GDR and the FRG, reflecting a hereditary building right and long-term leases that could last for up to twelve years into the sphere of the relevant law's operation could be considered a core solution to integrate different property law concepts of the two Germanys.[127]

The usual form of ownership is sole ownership (*Alleineigentum*). In some instances, the Civil Code also allows several people to own real property in common or jointly. If more than one natural person or legal entity own one property, they become co-owners of proportional, intangible shares (*Miteigentum nach Bruchteilen*) or they hold property jointly (*Gesamthandseigentum*), which only occurs by law. In the case of jointly held property, each owner owns all assets rather than being entitled to proportional shares.

---

[124] *Ibid.*
[125] *Ibid.* 7.
[126] *Ibid.*
[127] According to Rainer Frank, long term leases granted with the term of up to twelve years. *supra note* 98, 847,

Possession

Possession is a physical situation that corresponds to the legal situation called ownership. The owner has the legal power, and the possessor the physical power, to deal with an object as he wishes and to exclude all others from using it.[128] Continental thought about possession was shaped by a great debate in Germany in the 19th century in which Savigny and Jhering were the foremost participants.[129] According to Savigny, the question was "how possession without any regard to its own lawfulness, can be a basis for rights.[130] Savigny maintained two main ideas in his response for the question raised by himself are that (1) "it was to protect those who had no title, not in their private interest, but for the preservation of the public peace"[131] (2) "The law protects victim himself. The victim has a legally protectable claim against unlawful interference even though he does not have legally protectable claim of possession."[132] These ideas were developed from his following statements:

> "[a]n independent right of the person ... is not violated but the situation of the person is altered to his disadvantage; the unlawfulness, which consists in the use of force against this person, can only be eliminated with all of its consequences by the restoration and protection of the factual situation to which the force extended."[133]

On the other hand, Jhering's view is that "possession is protected as an outwork of ownership."[134] Jhering recognized that to explain protection, one needed to identify some substantive right in need of protection and in his theory, however this substantive right was not the possession itself. It was ownership.[135] The protection given possessors who are not owners was an "unavoidable consequence" a "price paid for protecting owners."[136]

---

[128] James Gordley and Ugo Mattei, "Protecting Possession," *American Journal of Comparative Law* 44, no. 2 (1996): 295.
[129] Gordley and Mattei, 294.
[130] Gordley and Mattei, 295.
[131] J.Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, n.d., 55.
[132] Gordley and Mattei, 296.
[133] Gordley and Mattei, 296.
[134] William Warwick Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 2nd ed., 1932, 199.
[135] Gordley and Mattei, "Protecting Possession," 298.
[136] R. Jhering, *Uber Den Grund Des Besitzschutzes Eine Revision Der Lehre Vom*, 2nd ed., 1869, 55.

Above arguments developed by Savigny and Jhering have been challenging for centuries and disputes regarding rationales to protect a mere fact of possession between scholars never ended. However, regardless of this endless debate, the concept of possession which also recognized as a factual situation is one of the important categories in the German property law.

In Germany, real actions that divided into petitory and possessory actions are provided for in the BGB and these actions are called "*Anspruche*". It could be said the German word *Anspruch* is translation of *actio* into substantive law.[137] The main real actions in Roman law, from which the judicial protection of ownership in the civil law in later ages was developed, were *rei vindicatio* and *actio negatoria*.[138] They are considered a petitory actions. *Rei vindication* is brought by one out of possession who is alleging ownership of property against another in possession, in order to determine ownership. In Article 985 of the BGB, the *Herausgabeanspruch* is an action to claim the restoration of the thing, which is a main purpose of the *rei vindicatio*. The main purpose of Roman *actio negatoria* was to confirm that the ownership of the plaintiff was free from servitude, but the main purpose of the *actio negatoria* in the German law was the removal of the disturbing factor under Article 1004 of the BGB.[139] These actions correspond exactly to real actions provided by Article 106 of the Civil Code of Mongolia.[140] The Article 106 of MCC also applies to both immovable and movables as they are in the German property law.

The function of the possessory action is to give the possessor of the property a legal remedy to aid in maintaining his possession or being restored to possession when there has been a disturbance. Under Roman law possession was protected not by actions but by interdicts, although

---

[137] Chung Han Kim, "Real Actions in Korea and Japan," *Tulane Law Review* 29, no. 4 (1955 1954): 713.
[138] Chung Han Kim, 714.
[139] Chung Han Kim, 716.
[140] Article 106 of the Civil Code of Mongolia provides as follow: Claiming right of owner.

106.1. Owner shall be entitled to claim own asset/ property from its illegal possession by others.

106.2. If owner considers that his/her ownership right is violated to some extent, though this is not related to the possession of the ownership object, s/he shall be entitled to demand from the violator to eliminate the violation or stop the act impeding the exercise of the ownership right.

106.3. In case the right has continuously been violated after demanding according to Items 106.1 and 106.2 of this Law, s/he shall bring in an action to Court and have the violated right protected.

at Justinian's time the procedure for interdicts was the same for actions. As they are seen in the Roman law, there are three types of interdicts: one who had been dispossessed could cover land by bringing the interdict *unde vi (by the force)*; one who has not been dispossessed could bring the interdict *uti possidetis (as you possess)* against a person who interfered with his possession of land; one who wished to recover or protect possession of movable property could bring the interdict *utrubi (on which side).*[141]Under Roman law, possessory interdicts were separated distinctly from the question or other real rights to possess, and consequently one might not plead his ownership in reply to a claim for possession.[142]

As it is stated by Chung Han Kim the main function of the possessory actions in modern German property law is the maintenance of public peace, by retraining self-help because the decline of the function of possessory actions as a supplementary means for protection of real rights and the basic fact that petitory remedies under German property law are intensified and all kinds of real rights came to be protected legally.[143] This is the main difference of German possessory actions from the Roman law possessory actions in which the possessory interdicts served for the protection of real rights. In the Mongolian context, legal possession is also protected by petitory remedies under Article 106.3 of the MCC. With this circumstance scope of petitory actions in both jurisdictions have the same approach.

Another peculiar feature of the German possessory actions is related to prerequisites to be a plaintiff and a defendant in these actions. Under Article 861 of the BGB, possessory action accrues only in cases in which the possessor was dispossessed by force, and only against the dispossessor, and not against the third detainer.[144] From these points difference between the MCC and the BGB can be drawn.

---

[141] Gordley and Mattei, "Protecting Possession," 305.
[142] Chung Han Kim, *supra note* 137, 720.
[143] Chung Han Kim, 721.
[144] Gordley and Mattei, "Protecting Possession," 311.

In accordance with Articles 90.2 and 92.1 of the MCC a fair possessor can bring interdicts of *unde vi* and *uti possidetis* in case of immovable properties.[145] Under Article 90.1 of the MCC, a fair possessor is required to have a legal possession.[146] The MCC has uncertainty in defining a fair possessor. To clarify, if the fair possessor is a legal possessor, his possession can be protected through the petitory actions in accordance with Article 106.3 and if the MCC intends to protect legal possession under the petitory action, a reason why the Code needs to provide possessory interdicts under other provisions at the same time is not clear. On the other hand, any possessor can bring possessory action under the BGB. However, there are exceptions provided by Articles 861 par II and 862 par II of the BGB in stating that "the claim is excluded if the possession that was removed was defective in relation to the present possessor or his predecessor in title and was obtained in the last year before the deprivation of possession"[147] and "the claim is also excluded if the possessor possesses the property defectively in relation to the disturber or the predecessor in title of the disturber and the possession was obtained in the last year before the disturbance."

Consequently, although the MCC provides possessory interdicts separate from the petitory actions, defining a fair possessor as a legal possessor has restricted a significance of possessory actions.

Under the BGB, a possessor who lost possession by force can bring the interdicts against dispossessor, not against a third party. However, there is an exception that the possession could be recovered from a third party who allows it to be given him from one whom he knows under the

---

[145] Article 90.2 of the MCC provides that:
> Fair possessor shall be entitled within three years to reclaim from the new possessor the property lost from possession.

Article 92.1 of the MCC provides that:
> Fair possessor likewise the owner shall be entitled to demand elimination of any other persons' impediments to exercise rights to possess and use assets in possession.

[146] Article 90.1 of the MCC provides that:
> Person, legally possessing an asset and having definite possession entitlement, shall be fair possessor.

[147] "German Civil Code BGB," Article 861. (2), accessed January 24, 2021, https://www.gesetze-im-internet.de/englisch_bgb/.

statutory requirement of restitution of Article 819 of the BGB, acts *in fraudem legis.*[148] With this regard, the MCC, a fair possessor may bring the interdicts against a new possessor in general. But the remedy is not available in the case of a new possessor does have a wider entitlement than the aggrieved person unless a new possessor obtained a property by fraud and duress. Defining the person who stands against the possessory remedy is also problematic in the MCC. A category of "a new possessor, who has a wider entitlement than an aggrieved person" is difficult to interpret in possessory interdicts.

In conclusion, recognition of a concept of possession as a factual situation in the MCC is too narrow in the sense that it has a unique definition of a fair possessor, on the other hand it is broad enough in the sense that the Code has developed the wide concept of possessory interdicts simultaneously with petitory actions if one thinks that it has an approach to identify the possession as a type of in rem right.

Land registry

The Germanic system's inherent functional qualities were further improved by the introduction of a registration system. This system requires that all transfers in immovable property must be recorded in the Land Registry either through a new entry or the cancellation of an existing entry.[149] The only exception is to property owned by the state, local authorities, and churches and

---

[148] Article 861 of the BGB provides that: Claim on account of deprivation of possession
(1) If the possessor is deprived of possession by unlawful interference, the possessor may require possession to be restored by the person who is in defective possession in relation to him.
(2) (2) The claim is excluded if the possession that was removed was defective in relation to the present possessor or his predecessor in title and was obtained in the last year before the deprivation of possession.
Article 819 of the BGB provides that: Increased liability in case of knowledge and breaches of law or public policy
(1) If the recipient, at the time of receipt, knows of the defect in the legal basis or if he learns of it later, then he is obliged to make restitution from the moment of receipt or of obtaining knowledge of the defect to make restitution as if the claim for restitution had been pending from this time on.
(2) If the recipient, in accepting the performance, violates a statutory prohibition or public policy, then he is likewise under the same obligation from receipt of payment onwards.

[149] Rainer Frank, *supra* note 98, 827.

rivers and railways - these properties are registered on the application of the owner only.[150] Registration of titles enormously reduces expense. If a right has been registered in the *Grundbuch* in the name of any person, there is a rebuttable presumption that the right to title exists and the property belongs to the named person.[151] However, the *Grundbuch* refers to the cadaster for the position, borders, and size of the cadastral parcel that make up a plot of land in the *Grundbuch*.[152]

According to the *Grundbuchverfügung* (GBV-regulation of the land register), the German land register consists of 4 sections:[153]

1. *Bestandsverzeichnis* (referral to the cadaster) (6 GBV): This section contains a referral to the cadastral number and some cadastral information (such as how the real estate is being used).

2. *Abteilung* I (section I) (9 GBV): registration of the owner and of property transfers.

3. *Abteilung* II (section II) (10 GBV): registration of encumbrances other than real security rights.

4. *Abteilung* III (section I) (11 GBV): real securities: mortgages, land charges, and rent charges.

As has been mentioned before, in accordance with section 873 of the BGB, the registration has a constitutive effect, as it is necessary for the creation or transfer of rights. The registration gives rise to an assumption (*Vermutung*) that the rights registered exist and belong to the person stated in the register (and to an assumption that a right has been cancelled, and no longer exists) and to protection of the good faith of anyone who acquires a right contractually from the person registered in the land register (982 BGB).[154]

---

[150] Section 3 (2), GBO, Land Register Regulations, accessed January 17, 2021, available at: https://www.gesetze-im-internet.de/gbo/BJNR001390897.html.
[151] *Ibid,* section 3(2).
[152] Christian Hertel and Hartmut Wicke, *supra* note 94, 13.
[153] *Ibid,* 14.
[154] *Ibid,*15.

5.2.2. Ownership concept of real property in the German property law

The German legal system belongs to the civil law tradition and the Germanistic legal family. The property aspect of the common law ownership, and the pure property in the civil law are not themselves identical notions. Property is classified into moveable things (*bewegliche Sachen*) and immovable things (*unbewegliche Sachen*). Movable property is property that is not real property (*Grundstück*) or property fixture (*Grundstücksbestandteile*), which is regarded immovable property.[155] The BGB states that "only physical objects are, in the concept of the law, things. However, these things include certain rights in rights like usufructs in rights and pledge in rights.[156] In the civil law it will be remembered, the notion of ownership is confounded with the thing itself as establishing a direct link between person and the thing. Rights in a thing itself are called "*dingliche Rechte*" and mean that the right lies on the "thing" itself, not on the person who owns it. Ownership is one example of a "*dingliche Recht*".[157] On the other hand, in the common law, one is not regarded as owning the land itself, but an estate (tenure in free, common socage for an estate in fee simple absolute in possession) in it.[158]

Rights Ownership in German property law is, by nature, absolute to the extent of the right. In other words, ownership entitles one directly to full power in the land and continues to exist as long as the object exists. In traditional theory, ownership comprises *usus, fructus,* and *abusus.*[159] *Usus* denotes the right of the owner to use the thing personally according to its destination, while *fructus* denotes the right to take the fruits of the land, and to keep them or consume them.[160] *Abusus*

---

[155] Muller, K., *Sachenrecht* (Cologne, Germany: Carl Heymanns Verlag, 1988), 15. Grundstuck is in the BGB, section 1031, translated as "a plot of land", translated by Paash in Classification of real property rights, p 25.

[156] BGB sections 1068-1084 (usufruct in rights), sections 1273-1296 (pledge of rights) Jesper Paasch, "Classification of Real Property Rights : A Comparative Study of Real Property Rights in Germany, Ireland, the Netherlands and Sweden," January 1, 2011, 27.

[157] Jesper Paasch, "Classification of Real Property Rights: A Comparative Study of Real Property Rights in Germany, Ireland, the Netherlands and Sweden," January 1, 2011, 28.

[158] Barbara Pierre, "Classification of Property and Conceptions of Ownership in Civil and Common Law," *Revue Générale de Droit* 28, no. 2 (March 16, 2016): 251, https://doi.org/10.7202/1035639ar.

[159] Pierre, 253.

[160] *Ibid.*

refers to the right to perform material acts of destruction and legal acts of disposition in relation to the land.[161]

In the German law, the ownership is the central institution and of utmost importance in its legal framework. From this concept in which all possible rights and power over land reside, which is therefore valid against the whole world (*absolute effect*), the German property law elaborates its whole theory of the land allocation of rights in land. In theory, ownership in German property law is a parallel concept with the ownership in the Mongolian property law.

Apartment Ownership

In Europe, there are four main types of distinguishable apartment ownership: (1) the land and the whole building are jointly owned, with each co-owner being granted an exclusive right to use a specific apartment (Netherlands), (2) apartment ownership is completely separated from land ownership, i.e. an owner of an apartment need not to be a joint owner of the land (Scotland), (3) apartment ownership is construed as a matter of corporate law - a corporation owns the land and the building, and the apartment owners are shareholders, each share granting the right to the exclusive use of a specific apartment (Finland, Sweden), and (4) apartment ownership is a combination of separate ownership of the apartment and joint ownership of the land and the common structures (e.g., walls, roof, staircases, etc.) of the building (all other countries, including Germany).[162]

There is a separate statutory regulation on apartment ownership outside the BGB, the so-called Act on the Ownership of Apartments and Permanent Residential Rights (*Wohnungseigentumsgesetz,* WEG) in German law, which was introduced in 1951. Pursuant to section 1 of the WEG it is possible to constitute ownership (sole or co-ownership) on a single flat (*Wohnungseigentum*) and a commercial unit (*Teileigentum*) (for shops, offices, etc). Title to an apartment comprises the separate ownership of an apartment together with a co-ownership share of

[161] *Ibid, 254.*
[162] Schmid and Hertel, "Real Property Law and Procedure in the European Union," 19–21.

the jointly owned property which is an integral part of the property, such as staircases, outside areas, roof, etc.[163] Title to a commercial unit is separate ownership of non-residential areas of a building together with the co-ownership of the jointly owned property of which it is an integral part.[164] In contrast to the apartment ownership concept in Mongolian property law, it is explicitly stated that a plot of land on which the apartment building has been erected is jointly owned property within the meaning of the Act, along with those parts, facilities, and installations of the building which are not separately owned property.[165] Beside the relation to apartments, application of this Act to commercial units is undoubtedly a good example for Mongolia to follow since the country has been in urgent need of regulative norms.

In accordance with section 2 of the WEG, apartment ownership is created by two means: (1) a contractual grant of separate ownership and (2) a partition by the owner of the plot of land. Apartments or commercial unit buildings may be erected on a plot of land which is either under sole ownership or under co-ownership. If apartment ownership is established in a way that restricts the co-ownership right stipulated in section 93 of the BGB through a contract concluded between co-owners of a plot of land on which a residential or is non-residential buildings is constructed, or to be constructed, it is a contractual grant of a separate ownership.[166] In this case, a separate land register folio will be created *ex officio* for each co-ownership share.[167] On the other hand, the owner of a plot of land may, by way of a declaration to the Land Registry, divide up title to a plot of land into co-ownership shares such that each share includes separate ownership of a particular apartment

[163] Rainer Frank, *supra* note 98, 827.

[164] Section 1 (3), Act on the Ownership of Apartments and the Permanent Residential Right, *supra* note 169, (Wohnungseigentumsgesetz, WEG).

[165] *Ibid,* section 1 (5).

[166] According to Section 93 of the BGB, Parts of a thing that cannot be separated without one or the other being destroyed or undergoing a change of nature (essential parts) cannot be the subject of separate rights. See Section 3 (1), Act on the Ownership of Apartments and Permanent Residential Rights (Wohnungseigentumsgesetz, WEG), *supra* note 169.

[167] Section 7 of Act on the Ownership of Apartments and Permanent Residential Rights (Wohnungseigentumsgesetz, WEG), *supra* note 169).

and/or of specified non-residential areas of a building constructed, or to be constructed, upon the plot of land. In this case, the apartment ownership is considered to be created by partition.

Land registration of in rem rights in respect to apartment and unit

The Germanic land registry is the title registration system. All those rights that allow one to own, and use an apartment or a unit are the rights in respect to the plot of land and considered *in rem* rights to the real property. In the case of the creation of an apartment ownership right, a hereditary building right, or a permanent residential right, the architectural drawing (partition plan), that shows the partition of the building and the plot of land is a very important document. In contrast, in Mongolia, architectural drawings have hardly any legal connection with respect to the plots of land.

Pursuant to the WEG the partition takes effect upon creation of the register of apartment ownership.[168] If the builder sells apartments in a condominium which he is planning to build, he will first have to divide the land into flat property units.[169] This requires a partition plan, where the apartments and the common parts are exactly described. The partition plan needs to be registered in the land register.[170] The deed of partition usually comprises a plan of flats, building specifications and the condominium by-laws. Usually, sales start prior to the registration of the partition. Therefore, the contracts must refer to the partition plan to describe the object of sale in a sufficient way.

The future ownership of a buyer is ensured by the entry of the priority notice (*Vormerkung*) in the *Grundbuch*. [171] By this means, all later dispositions which run counter to the claim of the buyer to acquire ownership are void as against his person.[172] Indeed his claim to a share of the real

---

[168] Section 8 (2), Act on the Ownership of Apartments and the Permanent Residential Right (Wohnungseigentumsgesetz, WEG).
[169] Christian Hertel and Hartmut Wicke, *supra* note 94, 29.
[170] *Ibid.*
[171] Section 883, German Civil Code BGB, accessed January 24, 2021, available at, https://www.gesetze-im-internet.de/englisch_bgb/.
[172] Christian Hertel and Hartmut Wicke, *supra* note 94, 31.

estate is secured by the priority notice under section 3 of *Makler – und Bautraegerverordnung* (MaBV). The right to acquire real property (*Anwartschaftsrecht*) is a type of *in rem* right developed by the German courts and conceived of as a "vertical pre-state" to full ownership.[173] Under an installment purchase contract, an *Anwartschaftsrecht* is granted *inter alia* to a buyer who has not yet paid all installments when the contract provides that ownership will pass only at that moment.[174]

In urban areas of Mongolia, real property rights of individuals and legal persons, in particular an apartment or a unit owner's rights, are in vulnerable position and require serious attention. As evidenced in the fourth chapter, apartment ownership is not related to the plot of land under the building, and it is constitutionally not possible to fix ownership relations between the separate ownership of a flat and common ownership of the land. In fact, apartment ownership has always been at risk of violation by the land owner's deceptive behavior. Such cases are rare, however, because the ownership right of the plot of land underneath all apartment buildings in urban areas belongs to the state.

In addition to this, in the procedure for the sale of a house or apartment by a building company, buyers are pushed to face another legal complexity. In accordance with the Law of Mongolia on the Registry of Property Rights the unfinished buildings are subject to the ownership right of the builder, which makes it able to be mortgaged by financial institutions. Because of a lack of smart financial schemes which provide connection between the financing from different resources and a property right registration system in Mongolia, builders are in a favorable position by having financial supports from two sources: (1) the buyers, who are paying the instalment purchase price to the builder and have no proprietary rights to be registered and secured; and (2) the banks, who provide loans to builders that are secured by the ownership right of unfinished building.[175] Originally, in this type of transaction the buyer of an apartment is always at serious

---

[173] Christoph U. Schmid and Christian Hertel, *supra* note 94, 4.

[174] *Ibid.*

[175] In the German context, if a buyer needs to finance the purchase price by way of credit, the financing bank will demand sufficient security. In order to protect the seller from the risks of an advance

risk, as they are not protected if the builder goes insolvent. Along with this difficulty, even if the builder is solvent and does finish the apartment, the buyer is still unprotected from the risk of the builder's loan default. In fact, the numbers of apartment holders confronted by such problems is increased by several hundred each year. In German context, with aids of smartly set out land registration system and financing schemes that fully acknowledged true intentions of buyers, sellers and banks in construction process above problems common in Mongolia can be avoided.

5.2.3. Restricted real property rights in the German property law: Use rights

Whereas there are indeed no competing full ownership rights, as is case under Common law, there are real rights amounting to less than full ownership in Germany. Limitations of ownership are subdivided into restrictions *ex* public law (e.g., expropriation and other limitations serving the public interest) and restrictions *ex* private law.[176] Most of the public restrictions on immovable property rights are grounded in zoning, building, and natural resources law. Private law restrictions include the provisions of neighbor law and the spatial extent of ownership. There is a general distinction among the restricted real rights in Europe: **rights to use** (e.g. usufruct, habitation rights, and servitudes or different kinds of easements), **security rights** (i.e., mortgages, liens, charges and rent charges) and **preemption rights** established by contract or statute (such as pre-emption rights in favor of local governments). In general, rights to use may be divided into extensive rights of use giving possession (in particular right of superficies, usufruct, usus, right of

performance, the buyer is normally not entitled to acquire ownership before he has paid the purchase price. Therefore, the seller will grant to the buyer a power of attorney in the contract to set up a mortgage on the object of sale even before the ownership is transferred. In general, the seller also takes up a loan to finance the purchase of the land and the construction of the building. Thus, he also needs to provide security, which is usually a mortgage on the respective plots of land with first priority in the land register. However, according to the sale-construction-contract, the purchase price is not due until the bank of the seller has committed itself to waive the security upon payment of the purchase price. The bank of the buyer will therefore not pay, before the bank of the seller has promised to release its security against payment of instalments, as provided in the sale building agreement. The commitment of the seller's bank to release its security therefore bears a corresponding duty of care. For further detail see, Christian Hertel and Hartmut Wicke, Real Property Law and Procedure in the European Union: Germany, 2004, 31, 32.

[176] Wolfgang Faber, Brigitta Lurger, ed. *supra* note 31, 238.

habitation, emphyteusus, building lease) and limited rights of use (called proprietary burdens), the most important ones being easements or, synonymously servitudes.[177]

Hereditary building right and a permanent residential or use rights are extensive right of use giving possession in German property law, while a servitude, a mortgage and a land charge may be considered limited rights of use or proprietary burdens.

Permanent residential or use right

There is an important right to a plot of land on which a flat or a non-residential unit is constructed, the so called a "permanent residential right" (*Dauerwohnrecht*) and a "permanent use right" (*Dauernutzungsrecht*) that might be a solution to the cases in Mongolia where a foreigner or a legal entity is restricted from owning land. This right is not to be confused with the right of renting a flat.[178] This is a crucial right, because in reality, it allows a person to inhabit the apartment or use a unit for the right holder's lifetime or for a fixed period without owning the plot of land. Under this right, a holder is entitled to inhabit or to use a particular apartment or unit in a building in return to the charge in respect of a plot of land, upon it a building constructed, or to be constructed.[179] Such permanent residential right may also be extended to cover a part of a plot of land located outside the building, provided that the apartment remains the primary economic focus. The permanent residential right can also be created on a plot of land encumbered with a heritable building right.

This is an alienable and heritable right.[180] In the event that the person entitled to the permanent residential right has entered into a lease or usufructuary lease in respect to the parts of the building or a plot of land that are subject to the permanent residential right, the lease or usufructuary lease agreement will cease to exist when the permanent residential right ceases to

---

[177] Christoph U. Schmid and Christian Hertel, *supra* note 64, 103.
[178] Jesper Paasch, *Classification of real property rights: A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden*, 45 (2011).
[179] Section 31of the Ownership of Apartments and the Permanent Residential Right (Wohnungseigentumsgesetz, WEG).
[180] *Ibid*.

exist.[181] In the event that the permanent residential right is disposed of, the acquirer shall, for the duration of his entitlement, step into the shoes of the alienor in respect of all obligations arising from the legal relationship to the owner.[182] If the plot of land is disposed of, the acquirer is obliged to continue the alienor's duty in respect of all rights arising from the legal relationship to the person entitled to the permanent residential right for the duration of his ownership.[183] Even if the plot of land is disposed of as the result of an enforced auction pursued by the obligee of a mortgage and land charge that is prior to or equal in rank to the permanent residential right, this right remains in place if it is agreed to be part of the contents of the permanent residential right.[184]

The permanent residential right is subject to the land registration as well. In accordance with section 32 of the WEG a building or plot of land is subject to the permanent residential rights. Due to the fact that a permanent residential right must always be registered and counts as an encumbrance on the property, the purchase price is reduced considerably.

Hereditary building right (Building lease)

The hereditary building lease (*Erbbaurecht*) is defined in section 1 of the *ErbbauVO* as an encumbrance upon land consisting of the transferable and hereditary right to have a building on another person's land.[185] As it is stated before, this is a further deviation from the principle that the ownership of land extends to all essential component parts of it. In accordance with section 12 (1) of the Law on the Heritable Building Right, the building erected on the basis of a heritable building right is considered an essential part of the heritable building right. The same applies to a building that already exists when the right is created. If the heritable building right expires, the components

[181] Section 37, Act on the Ownership of Apartments and the Permanent Residential Right (Wohnungseigentumsgesetz, WEG).
[182] *Ibid,* section 38.
[183] *Ibid.*
[184] *Ibid,* section 39.
[185] Section 1 (1), ErbbauRG, Law on the Heritable Building Right, accessed January 15, 2021, available at https://www.gesetze-im-internet.de/erbbauv/BJNR000720919.html.

of the heritable building right become part of the property (a plot of land).[186] The economic benefit of this right is that the title of the property in respect of the building may be acquired without the necessity of raising capital for the land.[187] On the part of the landowner, it produces a constant flow of income from the land (though the right may also be granted for free).[188]

Hereditary building rights are registered as an encumbrance in the land register in which the property is registered.[189] Additionally, hereditary building rights are registered in their own hereditary building rights land register.[190] In other words, for a heritable building right, a special land register sheet (heritable building land register) is created ex officio when it is entered in the land register.[191] When the heritable building right is deleted, the heritable building land register is officially closed.

In Germany, apartments or non-residential buildings can be constructed on a plot of land that is subject to a heritable building right. Similar to the ownership right of a plot of land, the heritable building right may be owned by single person or several persons. If a person is entitled to a heritable building right, he may partition the heritable building right, or in case of a heritable building right that is collectively owned by several persons, the shares may be restricted in such a way that each of the jointly entitled persons is granted separate ownership of a particular apartment (a "heritable building right in respect of an apartment or unit" [*Wohnungserbaurecht* or *Teilerbbaurecht*]) pursuant to section 30 of the WEG. A separate land register folio/sheet for heritable building rights are created *ex officio* for each share.[192]

---

[186] Heritable Building Right Regulation - Legal Portal, 12 (3), accessed January 15, 2021, available at: https://www.rechtsportal.de/Gesetze/Gesetze/Allgemeines-Zivilrecht/Erbbaurecht-Verordnung.
[187] Christian Hertel and Hartmut Wicke, *supra* note 94, 10.
[188] *Ibid.*
[189] Norton Rose Fulbright, A Guide to Commercial and Residential Property Investment in Germany, n.d.
[190] Section 14 (1), ErbbauRG, Law on the Heritable Building Right.
[191] *Ibid.*
[192] Section 30 (3), Act on the Ownership of Apartments and the Permanent Residential Right (Wohnungseigentumsgesetz, WEG).

Furthermore, the provisions regarding apartment ownership (and ownership of a unit) are applicable to heritable building rights in respect to an apartment as well. According to section 42 of the WEG, like apartment ownership, a heritable building right may be encumbered by other in rem rights such as mortgages, land charges and permanent residential rights.

Servitude in the real property law of Germany

Servitude (*Grunddienstbarkeiten*) is a right *in rem* stipulated in the book three of the BGB. Unlike in most cases where the servitude is defined as a right to use the land of another person for the convenience and benefit of one's own land, under the property law of Germany, an easement, a usufruct in movables and immovable and a restricted personal easement all constitute servitudes. As for the rights concerning rights-of-way, the right to have cables or pipelines, or water rights, an easement is important for an urban development, whereas a usufruct in a plot of land may be a useful instrument in rural area in most cases.

In accordance with section 1018 of the BGB, a plot of land may be encumbered in favor of the owner for the time being of another plot of land in such a way that the latter may (1) use the plot of land in specific conditions, or that (2) particular acts may not be undertaken on the plot of land or that 3) the exercise of a right towards the other plot of land that arises from the ownership of the encumbered plot of land is excluded.[193] The latter two types are distinguished from each other in that the first restricts certain actions such as preventing a taller building from being erected on the servient property (*dienendes Grundstuck*) than the facilities on the dominant property (*herrschendes Grundstuck*), while the second is for the exercise of particular rights prescribed in the law, for example, not to exercise a right to claim periodic payments or a right to possess.

Usufruct

Sections1030 to 1089 of the BGB concern the relations to usufructs (*NieBbraugh*). German usufructs exist in many forms depending on what area of law they are applied to, e.g. land law,

[193] Section 1018, German Civil Code BGB.

finance, etc. The statutory definition of usufruct in things is "a thing can be encumbered in such a way that the person for whose benefit the encumbrance is made is entitled to take the emoluments of the thing."[194] Together with the usufruct in a plot of land, the usufructuary acquires the usufruct in the accessories if usufructuary and an owner agree that usufruct is to include the accessories of the plot of land to the extent that they belong to the owner.[195] In case of doubt it is to be assumed that the usufruct is intended to extend to the accessories.[196] The usufructuary of a plot of land may erect new facilities to extract stone, gravel, sand and other components of the ground, except where the economic purpose of the plot of land is materially altered as a result.[197] If a forest and mine or another installation designed to extract components of the grounds is the subject of usufruct, both the owner and the usufructuary may require that the degree of use and the nature of the economic treatment are /laid down in an economic plan.[198]

Usufruct is not transferable, but the exercise of usufruct may be ceded to another. Therefore, usufruct may neither be seized, nor pledged, nor encumbered by a usufruct.[199] The usufruct is extinguished with the death of the usufructuary. If usufruct is due to a legal person, it is extinguished when the legal person ends.

Restricted personal easement

Under a restricted personal easement (*beschränkte persönliche Dienstbarkeit BpD*), a plot of land may be encumbered in such a way that the person for whose benefit the encumbrance is made is entitled to use the plot of land in individual respects or is authorized in another way that may form the subject of an easement.[200] A restricted personal easement is similar to usufruct, but

[194] *Ibid,* section 1030.
[195] *Ibid*, section. 1031 and 926.
[196] *Ibid,* section 926.
[197] *Ibid,* section 137(2).
[198] *Ibid,* section 138.
[199] *Ibid,* section 1059b.
[200] *Ibid,* section 1090.

is more limited in the way a person can exploit the real property in question.[201] Only difference from a real easement is a restricted personal easement is created in individual respect of the acquirer of such right.[202] As is mentioned in the section on apartment ownership, a restricted personal easement is one of the main rights used for this residential purpose in Germany.

Lifelong right of residence (Lebenslanges Wohnrecht)

In accordance with section 1093 of the BGB, the right to use a building or part of a building as a residence, excluding the owner, may also be granted as a restricted personal easement. This defines the legal basis of the housing law, which of course is also of great importance for lifelong housing rights. For example, the legislature grants an authorized person the right to take his family, as well as persons necessary for proper service and care into his household. The family can therefore also be accommodated in an apartment or property with a lifelong right of residence without any problems. If the right of residence only relates to part of a property, the person entitled may also use the systems and facilities that were designed for the common use of the residents. According to the law, in the event of a right of residence, the owner has no legal right to visit the premises.

5.2.4. Security rights in the German property law: Types of mortgages

In Germany, the general term for a real security on real property is *Grundfandrecht*. It encompasses the land charge, so called *Grundschuld* (1191 of BGB) and *Hypothek* (1113 of BGB). If a plot of land is encumbered in a way that the person in whose favor the encumbrance is created is paid specific sum of money from the plot of land, it is a land charge, which is a non-accessory security. If a plot of land is encumbered in a manner that the person, who benefits from the encumbrance is to be paid out of the land a specific sum of money to satisfy a claim to which he is entitled, the encumbrance is considered a mortgage (*hypothek*) in accordance with 1113 of the

[201] Jesper Paasch, *Classification of real property rights: A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden*, 45 (2011).
[202] *Ibid*.

BGB. This is an accessory security. A land charge is the most common security for a lender while mortgages are seldom used as lender security due to their nature as an accessory right to the secured claim, i.e., the existence and amount of the mortgage is linked to the loan.[203]

The main difference between these two basic forms of real security rights in German law exists in the characteristics of causality and accessoriness. If the claim which is secured by a *hypothek*, is invalid, the *hypothek* still comes into existence but it belongs to the land owner (an owner mortgage), not to the mortgagee (even though it is registered for the mortgagee).[204] In the case of a land charge, a security right is still effective regardless of whether the underlying claim exists. However, if there is no claim to be secured, the landowner may claim that the mortgagee transfers the mortgage to him or that he consents to erasing the mortgage from the *Grundbuch*.[205]

Because of the rule of unified conveyance in German property law, in general a mortgage on real property also encompasses a house built on the property. A separate mortgage on a building is possible only if there is separate ownership of the building (which still might be the case in the eastern states according to the law of the former GDR).[206] According to section 1120 of the BGB, a mortgage also extends to accessories and products of real property.

5.2.5. Right to acquire real property in German property law

A plot of land may be encumbered in such a manner that the person in whose favor the encumbrance is created has a right of pre-emption against the owner.[207] This right may be granted to an individual person (personal right of pre-emption) or in favor of another dominant property (real right of pre-emption). In accordance with section 1103 of the BGB if a right of preemption existing in favor of the current owner of a plot of land is not separated from the ownership of this

[203] Norton Rose Fulbright, A Guide to Commercial and Residential Property Investment in Germany, n.d, 9.
[204] Section 1163, German Civil Code BGB, accessed January 24, 2021, available at: https://www.gesetze-im-internet.de/englisch_bgb/.
[205] Christian Hertel and Hartmut Wicke, *supra* note 94, 38.
[206] *Ibid,* 42.
[207] Section 1094, German Civil Code BGB.

plot of land, it is a real right of pre-emption; if it is not connected to the ownership of the plot of land it is considered a personal preemption right. In Mongolia, the function of a right of preemption is performed by purely contractual arrangements and governed by the obligation law of the Civil Code.

The right of pre-emption is restricted to the case of the sale by an owner who owns the plot of land at the time of creation or by his heir; it may also be created for more than one or for all cases of sale.[208] The priority notice to protect a claim to a registrable right in landed property may have the same effect as a preemptive right, but it is not restricted to contracts of sale and is therefore flexible. Under section 1099 of the BGB, a person obligated must notify the new owner as soon as the exercise of the right of preemption takes place or is excluded. In this case, the new owner refuses to give his approval of the registration to the person entitled as to be the owner until the purchase price agreed upon between the person obligated and the purchaser, insofar as it is settled, is paid to him.[209] If the person entitled to ownership achieves registration as the owner, the former owner may demand from him payment of the settled purchase price in return for delivery of the plot of land.[210]

5.3. Peculiarities of the Modern System of Japanese Real Property Law

In comparison to real property rights in Germany and Estonia, Japan has developed a different approach to real property law in which a building's ownership is held separately held from underlying land and possession is recognized as one of nine in rem rights. In Japan, there is no element other than the intention (*consens*) of the parties needed to transfer property in the Civil Code.

[208] *Ibid,* section 1097.
[209] *Ibid,* section 1100.
[210] *Ibid.*

Japanese judicial and legislative treatment of lease relations figures prominently in discourse on the development of the nation's modern legal system.[211] There are two entirely distinct types of urban leases in Japanese real estate practice: a building lease (*shakuya*) which grants a tenant the right to occupy space in a building and a land lease (*shakuchi*) which grants a tenant the right to maintain a building on the leased land.[212] Like land, buildings are the subject of a first class alienable property right under Japanese law, separately taxed and subject to independent registration.[213]

From a purely practical perspective, the feature of the Japanese property system maintaining separate ownership of a building and the land beneath it seems similar to the Mongolian property system. However, from a theoretical perspective, there are hardly any parallel structures between the systems. The idea of the separation of ownership in land and buildings in Japan has been formulated through substantive law tracing back to the Meiji period, while in Mongolia the idea of separate ownership of a building distinct from the plot of land underneath arose from historical accidents and the implementation of procedural law launched by the privatization three decades ago. A building can be owned independent of the land beneath it in other property systems. The difference in Japan is the reversal of the common presumption that a building forms a part of the land beneath it.[214]

Land ownership and land profits have perennially occupied a pivotal place in Japanese political economy. However, Japan retained a feudal system that put significant limits on both property rights and land markets until the country opened to the West mid-way through the

[211] Frank Bennett, Japanese Land Leases Revisited Old Tokyo Wine in a New Chicago Bottle, (2019), 1. Received a draft article via email communication with professor Frank Bennett, 2019.
[212] *Ibid,* 3.
[213] *Ibid.*
[214] Frank G. Jr. Bennett, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, *Law in Japan* 26 (2000): 78.

nineteenth century.[215] The nineteenth century land reforms are therefore crucial, as that is when modern property rights and a capitalist land market were created.[216]

5.3.1. The separation of building and land ownership under Meiji land reform

The Meiji Restoration of 1868 was a decisive critical juncture in modern Japanese history, wherein the feudal systems of politics and law were discarded and new governance frameworks established. One of the first major reforms introduced by the new Meiji government was a revision of the tax and land ownership systems, primarily to provide a more stable and equitable source of revenue.[217] Raleigh Barlowe classifies land reforms into four categories: (1) mild reforms involving some regulation and public assistance; (2) programs involving stronger controls, but short of land expropriation; (3) land expropriation from some owners for redistribution; and (4) collectivization and nationalization programs carried out under duress.[218] It will become clear that the Meiji reform can be placed under the third category.[219]

According to the pre-Meiji patterns of landholding land administration was divided into two broad categories: *Shogunate* land (*tenryo*); and "private land" (*shiryo*) held by retainers or peripheral lords at the pleasure of the *Shogun*, which was further divided into samurai lands (*bukeyachi*), temple lands (*jishachi*), and tradesman lands (*choninchi*).[220] As a matter of administrative control, only the tradesman land was alienable among craftsmen and merchants.[221] However, this category of land was allocated in two different ways in Japan during the Tokugawa period. For example, in Osaka, most of the land could be sold outright, and buildings were generally bound to the land, while in Tokyo, where less land was available for purchase as it is dominated by

---

[215] Andre Sorensen, Land, Property Rights, and Planning in Japan: Institutional Design and Institutional Change in Land Management, *Planning Perspectives* 25 (July 1, 2010): 282, available at https://doi.org/10.1080/02665433.2010.481178. (last accessed January 2021)
[216] *Ibid.*
[217] *Ibid,* 283.
[218] James I. Nakamura, "Meiji Land Reform, Redistribution of Income, and Saving from Agriculture," *Economic Development and Cultural Change* 14, no. 4 (1966): 429.
[219] *Ibid.*
[220] Frank Bennett, *supra* note 211, 4.
[221] *Ibid.*

samurai lands, tradesmen frequently leased samurai land, adding improvements to suit their needs.[222] In these cases, the building was understood to be owned by the tradesmen.[223]

The Osaka pattern of Tokugawa land system was not been retained in the new Civil Code of 1896 adopted under the Meiji Restoration. It appears that the extension to the entire country of ownership rights to buildings separate from the land underneath them had more to do with political motivations than the philosophical justifications.[224] During the land reform, in February 1872, the prohibition on the buying and selling of land was removed and title deeds for land, including those of urban plots of land were issued. Meanwhile, some local governments sought for and received permission to issue building certificates, for reasons similar to those behind the national government initiative: to stabilize transactions, and to support collection of (local) tax revenue through a building tax.[225]

5.3.2. Basic principles in the Japanese property law

The *numerus clausus* and the principle of publicity: A consensual approach to acquire ownership

Like other countries with a Pandects system, the *numerus clausus* doctrine is accepted in Article 175 of the Japanese Civil Code (JCC), providing that no real rights can be established other than those prescribed by law including the Civil Code, and thus the categories of real property rights are greatly restricted in Japan. The BGB has no corresponding provision to Article 175 of the JCC,[226] however, as mentioned in the preceding part of this study, Article 14 of the Basic Law of Germany announced a *numerus clausus* doctrine into German civil law. In addition to the feature

---

[222] *Ibid.*

[223] *Ibid.*

[224] Sorensen concluded that the extension of ownership rights to farmers under the Meiji reform was motivated more by political expediency than philosophical principles. Professor Bennett also noted that the aim of the changes with regards to the Tokugawa land system was to lay the foundation for a money tax base, and to create a land market through which privately held land could be valued for that purpose. For further detail see Frank Bennett, Japanese Land Leases Revisited Old Tokyo Wine in a New Chicago Bottle, 2019 *supra* note 353, Andre Sorensen, Land, Property rights and Planning in Japan: Institutional Design and Institutional Change in Land Management, *supra* note 289.

[225] Frank Bennett, *supra* note 211, 5.

[226] Shusei Ono, Comparative Study of the Transfer of Property Rights in Japanese Civil Law, *Hitotsubashi Journal of Law and Politics* 31 (2003): 3.

of an exhaustive list of real rights, the JCC also provided the content of real right in Article 206 of the JCC as one of the main elements of the *numerus clausus* doctrine.

The chapter on ownership in the JCC is divided into three sections: extent of ownership; acquisition of ownership, and co-ownership. In the first section, the content makeup of the ownership right is defined by stating what an owner can do. According to Article 206 of the Civil Code, an owner has the rights to freely use, obtain profit from, and dispose of the thing owned, subject to the restrictions prescribed by laws and regulations. It next declares that the right of ownership of land, subject to the restrictions imposed by law, extends to what is encompassed by the rule: *"sic utere tuo ut alienum non laedas."*[227] In addition to this definition, pursuant to Article 86 of the JCC, land and any fixtures thereto are regarded as real estate and any Thing which is not real estate is regarded as movable.

In modern civil law, there are two ways of acquiring property: formalism and consensualism. As has been mentioned in a previous section of this study, the first approach is adopted by the BGB, latter is accepted in the JCC, and strongly precedented in a judicial area. Contrary to the formalism, under consensualism, property is transferred before it is delivered or the transfer has been made public in the land register, its only requirement of parties' intention to reach the contract (Article 176 of JCC) with regards to real property.[228] This is the requirement of publicity which underlines an absolute effect of real rights and prevents from damages in case of double mortgaging and double acquisition. In Japanese law, formalism can be seen only in some

[227] According to the Max Planck Encyclopedias of International law, *sic utere tuo ut alienum non laedas* means of 'use your own property in such a manner as not to injure that of another', for further detail see https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607#:~:text=1%20In%20the%20context%20of,injury%20to%2C%20or%20within%2C%20another last accessed May 8th, 2021 and Kazuo Hatoyama, Civil Code of Japan Compared with the French Civil Code, *Yale Law Journal* 11, no. 7 (1902 1901): 364.

[228] See further in Shusei Ono, Comparative Study of the Transfer of Property Rights in Japanese Civil Law, *Hitotsubashi Journal of Law and Politics* 31 (2003): 7–9. Art. 176 of Japanese Civil Code, (Last accessed February 16, 2021,) provides that: The creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties. available at: http://www.japaneselawtranslation.go.jp/law/detail/?id=3494&vm=2&re=02.

rare cases, e.g. pledges.[229] Article 344 of the JCC provides that a pledge shall become effective upon the delivery to the obligee of the thing pledged.

Although Japanese original system is the consensualism, due to some practical difficulties such as it is not always possible to transfer property at the time of the conclusion of the contract of sale, a new theory came to prevail in the 1920's, namely the Japanese separation theory, according to which the intention of Article 176 of JCC included the abstract real agreement.[230] As Shusei Ono stated:

> "When there is no abstract real agreement (d.v.) there is no transfer of property either. An abstract real agreement can only be found after some formal deeds are realized, such as delivery, registration or payment of the sale price. This theory introduced a kind of formalism as a consequence of the declaration of intention. … [However], it is impossible to introduce the rigid separation theory because when the causal agreement ceases to have effect by reason of fraud of violence (Article 96), the abstract real agreement must also be void." [231]

Consequently, with its avoidance to divide ownership right and recognition of exclusive, single and theoretically indivisible in function and time of ownership right, the Japanese property law belongs to the civil law family. However, with regards to main principles of property law, Japan has developed specific notions which is fully parallelized neither of both systems the German and the French private law that are two basics in the civil law family. Similar to the BGB, the JCC identifies an abstract agreement in certain real right transactions, while it resists to follow *superficies solo cedit rule* in the real property transfer. On other hand, its judicial precedents that strongly favor consensualism in property transaction makes it akin to the French property law.

Right to possess

Rights in rem recognized by the JCC of 1896 are nine in number: possession, ownership, superficies, emphyteusis, easements or servitudes, liens, preferential rights, pledges, and mortgages.[232] While JCC gives it a special place as a species of rights *in rem,* the BGB treats

---

[229] *Ibid,* 8.

[230] Further detail is given in Shusei Ono, "Comparative Study of the Transfer of Property Rights in Japanese Civil Law," *Hitotsubashi Journal of Law and Politics* 31 (2003): 11, 12.

[231] *Ibid,*12.

[232] Hatoyama, "Civil Code of Japan Compared with the French Civil Code," 360.

possession under the general part of the Law of Property before and parallel with the heading of general provisions on rights in land and ownership rights because as it is considered an actual fact, not a type of *in rem* right. Possession under Roman law is protected less because of its intrinsic matters, but because of the general peace of the country.[233] Yet, Feilchenfeld believes that the actual explanation is different than Roman law and may be found in the functional tendency of Germanic law. In his opinion, the decisive point in the actual state of affairs is less the domination which the man exercises over the thing than the fact there is a man living on or with a piece of property, holding it and using it for work and this fact would naturally be of primary importance for a system of law, which visualizes man in action and in function.[234]

In accordance with Article 180 of the JCC, possessory rights shall be acquired by holding thing with the intention to do so on one's own behalf. The Japanese approach to possession is based on the rationale that the possessory right shall be extended to all cases where a person holds a thing for his own benefit, irrespective of the question whether he has an intention to hold it as an owner or not.[235] Because, in Hatoyama's view, the definition of possession in Roman law is too narrow in the sense that possession illustrates a person's intention to own a thing. Yet, such possession may be for the detention of a thing by a pledge or the holding of a thing under a contract of letting and hiring for instance, although lacking the intention on the part of the possessor to acquire ownership.[236]

Besides the recognition a possessory right in the JCC, it appears that some acquisition rights and possessory actions in Japanese law are based on the fact of possession. For example, according to Article 195 of the Civil Code, a person who possesses non-domestic animals is allowed to acquire

[233] Feilchenfeld, *supra* note 178, 97.
[234] *Ibid.*
[235] Kazuo Hatoyama, Civil Code of Japan Compared with the French Civil Code, *Yale Law Journal* 11, no. 7 (1902 1901): 362.
[236] *Ibid.*

a right over them if the certain pre-conditions meet.[237] When the owner of the animal has not demanded the animal within one month after that animal left his possession and the actual possession over the animal is in good faith, the fact of the possession over the animal for at least one month can be considered as grounds for owning that animal. In this case the possession is handled based on its nature in fact rather than by the possessory right.

Moreover, the JCC provides three possessory actions: for recovery of possession (Art. 200), for maintenance of possession (Art. 198), and for preservation of possession (Art.199).[238] The main difference from German law is that the plaintiff is not required to be free from faulty possession as against the defendant.[239] While in German law a remedy is not available if the aggrieved person was himself in faulty possession as against the wrongdoer or as against his predecessor in title, provided such wrongful possession was obtained within a year prior to the

---

[237] Article 195 of the Civil Code of Japan provides "A person who possesses a non-domestic animal bred by others acquires rights to exercise with respect to that animal if he/she was in good faith at the beginning of the possession, and if recovery is not demanded by the owner of the animal within one month of the time when that animal left the possession of its owner."

[238] Articles of the Civil Code of Japan is providing for possessory actions are as follows:

Article 197. A possessor may bring a possessory action in accordance with the provisions of the following Article through Article 202. The same shall apply to a person who takes possession on behalf of others.

Article 198. When a possessor is disturbed in his/her possession, he/she may claim for the discontinuation of the disturbance and compensation for the damages by bringing an action for maintenance of possession.

Article 199. When a possessor is likely to be disturbed of his/her possession, he/she may claim either for the prevention of the disturbance or for the submission of security for the compensation for damages by bringing an action for preservation of possession.

Article 200 (1). When a possessor is forcibly dispossessed, he/she may claim for the restoration of the Thing and compensation for damages by bringing an action for recovery of possession.

(2). An action for recovery of possession cannot be filed against a specific successor of the usurper of possession; provided, however, that this shall not apply if that successor had knowledge of the fact of usurpation.

Article 201 (1). Actions for maintenance of possession must be brought during the disturbance or within one year after the disturbance is extinguished; provided, however, that, in cases where possessed Thing is damaged due to construction, if one year has elapsed from the time when that construction started or if that construction has been completed, such action cannot be brought.

(2) Actions for preservation of possession may be brought so long as the danger of disturbance exists. In such cases proviso to the preceding paragraph shall apply mutatis mutandis if possessed Thing is likely to be damaged by construction.

(3) Actions for recovery of possession must be brought within one year of the time when possession is unlawfully usurped.

Article 202. (1) Possessory actions do not preclude actions on title, and actions on title do not preclude possessory actions.

[239] Chung Han Kim, Real Actions in Korea and Japan, *Tulane Law Review* 29, no. 4 (1955 1954): 722.

ouster or disturbance,[240] in contrast, in Japanese law, there are no conditions that affect the faulty possession of the plaintiff as to the availability of a possessory action. This likely results from the recognition in the Japanese law of possession as a right in the first place. Therefore, wrongful possession is not possible.

Although possession is recognized as a real right under the JCC, at the same time, a possessor is classified into two types, the so called a possessor in good faith and a possessor in bad faith. This classification proves that the JCC identifies possession as a factual situation. Further, the JCC creates specific regulations for consequences of possession in good and bad faith. The classification is similarity between the MCC and the JCC. But the difference is the JCC clarifies that the possession in good faith is defeated in an action on the title, the possession is deemed to be in bad faith as from the time when such action was brought.

Moreover, another interesting approach to possession of the JCC is grounds for treating separately the possessory and petitory actions, even though the Civil Code identifies possession as a real right. Theoretically, a possessory action is an action based on the mere fact of possession, while a petitory action is a suit founded on the legal right of possession independently of the fact of possession.[241] According to Article 202 (2) of the JCC possessory and petitory actions are considered quite independent of each other.[242] An action for the recovery of possession may be based on the mere ground of possession or on grounds other than the fact of possession such as by contract or by law. [243] Thus, an action may be the same while the grounds are different.[244] In conclusion, Hatoyama's view to possessory interdicts on the ground of contract shows that Japanese approach to possession is fundamentally different than the possession in Roman law.

---

[240] *Ibid,* 721.
[241] Kazuo Hatoyama, *supra* note 235, 364.
[242] Article 202 (2) of the Civil Code provides that: (2) With respect to possessory actions, no judgement may be made based on reasons relating to title.
[243] Kazuo Hatoyama, *supra* note 235, 364.
[244] *Ibid.*

In conclusion, possession in the MCC more similar to the possession in the JCC than the BGB, however, the JCC developed a concept of possession in good faith apart from the legal possession and carefully considered future effects from the possession recovery action as for the stolen and lost goods. These are the main differences between the JCC and the MCC that is worthy to be studied in some depth.

Apartment ownership in Japanese real property system

The basic law addressing unit ownership of buildings, including condominiums, is the Act on Building Unit Ownership, and it was established with reference to legislation in Germany (WEG) in 1962 when condominiums were becoming common (there were about 10,000 condominium units at that time).[245] Regardless of the special features of Japanese property law as it is framed based on the separation of ownership to the building and land, Article 22 (1) of the Act on Building Unit Ownership of Japan provides, as exceptions, that where the right to use the grounds is an ownership right or any other right held by multiple persons, the unit owner may not dispose of his/her exclusive elements[246] separately from the right to use the grounds that is connected with his/her exclusive element, unless otherwise provided in the bylaws. This provision reveals two main facts about the apartment ownership system in Japan: (1) property rights other than ownership right are allowed for the grounds of a building, and (2) apartment ownership is an exception to the divided conveyancing of Japanese real property law.

Another important point for the Japanese apartment ownership structure is how "housing complex" is perceived. In the event there are several buildings with unit ownership on a parcel of land, separate disposition of each building and the grounds is prohibited (Article 22, paragraph [1] of the Act on Building Unit Ownership), and the management of the co-owned grounds is carried out jointly by all owners in the "housing complex" (i.e., by an association of building owners in the

[245] Kuniki Kamano, Condominium Legal System in Japan and Current Movement, 32 (n.d.): 123.

[246] "Japanese Law Translation - [Law Text] - Act on Building Unit Ownership, Etc.," accessed February 16, 2021, http://www.japaneselawtranslation.go.jp/law/detail/?id=2015&vm=2&re=02. Art. 2 (3) provides that "exclusive element" means a portion of a building that is a subject of unit ownership.

housing complex) (Article 65 of Chapter 2 Act on Building Unit Ownership).[247] In other words, a single housing complex can be comprised of two or more buildings and the land on which the two buildings are located or their ancillary facilities (including rights related to) are the main factors making such a structure a "housing complex". In the case housing complexes, the owner of the buildings is the same as a unit owner with exclusive elements in the building.

The next notable regulation in the Act on Building Unit Ownership is that the creation of the detailed provisions for the system of "Reconstruction" that allows buildings with unit ownership to be demolished and new buildings to be constructed on the grounds of the demolished buildings by a special resolution of at least a four-fifths majority of the unit owners regardless of the reasons.[248] With regard to buildings with unit ownership in a housing complex, there is a system of "separate reconstruction per building," which requires a resolution for reconstruction for each building and the approval of the co-owners of the grounds in the housing complex as a special majority for the resolution, and a system of "combined reconstruction" to collectively reconstruct all of the buildings in the housing complex.[249] Such a system that approves of reconstruction by majority resolution is not found in other comparable laws.

5.3.3. *In rem* use rights

Superficies *(Chijo-ken)*

The name given to this form of lease (*chijoken*) was a novel introduction to legal vocabulary.[250] In order to understand substance of a superficies right in JCC in addition to the special rules of superficies, other types of leases for building ownership will be discussed below. The Civil Code (1898) establishes two forms of lease relevant to urban land: (1) a contractual lease – with a maximum of 20 years, and no minimum, valid only between the original parties unless registered against the land with the consent of its owner. The name given to this form of lease

[247] Kuniki Kamano, Condominium Legal System in Japan and Current Movement 32 (n.d.): 125.
[248] Article 62-64 of Act on Building Unit Ownership of Japan.
[249] Kuniki Kamano, *supra* note 247, 125.
[250] Frank Bennett, Japanese Land Leases Revisited Old Tokyo Wine in a New Chicago Bottle, 2019, 6.

(*chitaishaku*) was in commonly used in lease agreements before deployment of the Code; (2) a real lease – with minimum term of 20 years, and a maximum term of 50 years, registrable by right.

In accordance with Article 265 of the JCC, a superficies (*chijo-ken*) is a real right by which a person (superficiary: *chijo-ken-sha*) is entitled to use land belonging to another person for the purpose of owning thereon structures or trees and bamboos. Though the term superficies (which is translated into Japanese as "land surface right") may appear to imply that it is simply a right to use the surface of land, such is not really the case: the superficiary may use the land for building houses, constructing structures relating to railways or mining, carrying on forestry enterprises, and so on.[251] Such being the substance and effect of superficies, the rights is closely akin to ownership of land.[252] It is a primary right created for residential purposes in Japan.

Generally, superficies may be acquired in three main ways pursuant to Japanese law: (1) by virtue of an agreement between parties; (2) by operation of law;[253] (statutory or legal superficies-*hotei chijo-ken*) (3) by prescription of the land.[254] This right can be enjoyed by foreigners of all nationalities or of none, equally with Japanese citizens.[255] Another result of the close resemblance of superficies to land ownership is that those provisions relating to the right and liabilities of adjacent landowners, as enumerated in Articles 209-238, apply mutatis mutandis as between adjacent superficies, and as between a superficiary and a landowner holding land adjacent to each other in accordance with Article 267 of the JCC.

---

[251] J. E. De Becker, Principles and Practice of the Civil Code of Japan, 1921, 202.

[252] *Ibid.*

[253] Article 388 of Japanese Civil Code provides that: In cases where land and a building on the land belong to the same owner, if a mortgage is created with respect to that land or building, and an execution of that mortgage results in the creation of different owners, it shall be deemed that the superficies has been created with respect to that building. In such cases, the rent shall be fixed by the court at the request of the parties.

[254] Article 163 of Japanese Civil Code provides that: A person who exercises any property right other than the ownership peacefully and openly with an intention to do so on his/her own behalf shall acquire such right after elapse of 20 years or 10 years consistent with the distinction provided in the preceding Article.

[255] John Gadsby, Foreigners' Right of Ownership to Land in Japan, *Southern Bench and Bar Review* 1, no. 6 (1913): 412.

When a superficiary who owns structures on the land has transferred the ownership of the structures to another person, unless there is an expression of intention to the contrary, the superficies are presumed to have passed to the new owner together with the ownership of the structure;[256] and in accordance with Article 10 (1) of the Act on Land and Building Leases even if the Land Lease Right is not registered, if the Land lease holder possesses registered buildings on the Land, the Land lease right may be asserted against a third party.[257] In order to judicially demand that a registration of a superficies be obtained, on the ground that the plaintiff enjoys a superficies over a lot of land owned by the defendant, it is invariably necessary to show the cause by which the right has been acquired – that is, whether it has been acquired by an act of creation, acquisitive prescription or legal provisions."[258] These circumstances show that registration does not function in Japan as it is in Germany and other countries with Germanic system. Like the Germanic systems, it appears that the main purpose of registration under the JCC is for publicity, to avoid any damage to third parties (*taikou-youken*), but the feature distinguishing the JCC from the BGB is that even if there is a failure to register and the transaction is not publicly open, the contractual relation still remains effective for the contracting parties (*seiritsu-youken*).

Compared to *Erbbaurecht* in Germany, the superficies in the JCC is distinguishable both of which are *in rem* rights and granted for building purpose. While in Japan, a building erected on the basis of superficies is separately registered as an immovable property from the superficies and land ownership right, a building is only considered an object of the *Erbbaurecht* and not subject to separate ownership in *Grundbuch.*

---

[256] J. E. De Becker, *supra* note 251, 203.

[257] Article 2 (ii) of Act on Land and Building Leases, (accessed February 16, 2021) provides that: Land lease right means superficies or the right to lease land for the purpose of building ownership. Available at: http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=1&re=2&dn=1&x=62&y=15&co=01&ia=03&ja=04&ky=land+lease&page=92&vm=02.

[258] J. E. De Becker, *supra* note 251, 203.

With regards to an individual plot of land allocated for the building purpose, it may be possible to create at least three types of *in rem* rights that are subject to the register, namely an ownership right of the plot of land, a superficies and a building ownership right in Japan. The most registered interests in immovables – ownership, easements, security interests – can exist with respect to both land and buildings, and transactions in all such interests can be recorded on one register without reference to the other.[259] Thus, Japan may face difficulties that have never been issues in the jurisdictions of Germany or Estonia, such as the consequences of simultaneously granted hypothecs by each owner of a building and a plot of land to financial institutions and the forced sale of the objects to different parties, who may not easily negotiate with each other. Nevertheless, the most common complexities due to separate ownership are dealt with in the JCC with reasonable depth.

A superficies *(chijoken)* is presumed to run for between twenty and fifty years.[260] Since it can be registered by its holder to protect against sale of the land to third parties, the superficies serves as the legal ground for occupation and supporting an ownership interest in a building reasonably well. Article 605 of the JCC also provides for another type of lease (*chitaishaku*) with the nature of obligation law, which is effective against a person who subsequently acquires real rights with respect to the immovable property.[261] Because of the contractual nature of the lease, a lessee (tenant) cannot force the lessor to give consent to him to register a lease of immovable property (*chitaishaku*), but he can register his ownership right of the building at his own discretion.[262] Again, Article 10 of the Act on Land and Building Leases of Japan also applies to

---

[259] Frank G. Jr. Bennett, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, *Law in Japan* 26 (2000): 90, 91.

[260] Article 268 (2)of the Japanese Civil Code.

[261] *Ibid,* Article 605.

[262] Shusei Ono stated "economically, a right of a lease on real property is like a surface right (superfice, Article 265). The distinction exists only in its theoreticla character, e.g. the former is a claim from the law of contract and the latter is a real prperty right. For further detail see Comparative Study of the Transfer of Property Rights in Japanese Civil Law, *Hitotsubashi Journal of Law and Politics* 31 (2003): 1–22.

contractual leases on land. [263] Because the term "land lease" does not refer just to a superficies, it also includes other lease rights on the land for the purpose of building ownership.[264] It appears that a building lease handled under the Act on Land and Building Leases is a lease on housing and does not cover the relations with respect to land possession under the building.[265]

Usually a superficies is terminated (1) by expiration of its term, (2) by waiver, (3) by failing to pay rent, (4) by bankruptcy of the superficiary, (5) by extinctive prescription, (6) by acquisitive prescription on the part of a third person, (7) by "confusion", (8) by reason of expropriation by the state (9) by the destruction of the land, and (10) by the completion of a condition subsequent (*kaijo-joken joju*). [266]

Generally, when the right of the superficiary is extinguished, he may restore the land to its original condition and remove structures and trees or bamboo on the same.[267] However, provided that if the owner of the land gives notice that he will purchase the structures by offering to pay an amount equivalent to the market price, the superficiary may not refuse that offer without justifiable grounds in accordance with Article 269 of the JCC.

Emphyteusis-Perpetual leases *(Ei-kosaki-ken)*

In the JCC, an emphyteusis is also a right of lease which partakes of the nature of a real right, but it differs from a superficies in that it is a right by which a person (emphyteuta = *ei-kosaku-nin*) is entitled to carry on farming or stock -farming on the land of another person.[268] It does not differ from the superficies in regard to the length of time for which it may be created. There is a

---

[263] Article 10 of Act on Land and Building Leases (provides that: Even if the Land Lease right is not registered, when the land lease right holder possesses registered building on the land, the Land lease right may be asserted against a third party.

[264] Frank Bennett and Shusei Ono viewed originality and legislative history of Japanese peculiarity on the Land lease and ordinary lease for building ownership in greater detail. For further detail see pages 94-95 of Building ownership in Modern Japanese law: origins of the immobile home by Frank Bennett and page 6 of A comparative study of the transfer of property rights in Japanese Civil Law by Shusei Ono.

[265] Article 2 (ii) of the Act on Land and Building Leases.

[266] J. E. De Becker, Principles and Practice of the Civil Code of Japan, 1921, 207.

[267] Article 269 (1) of the Japanese Civil Code.

[268] J. E. De Becker, *supra* note 266, 208.

provision in Article 278 on this point to the effect that the duration of the right of an emphyteusis shall be from twenty to fifty years. As to the duration, however, the Code has departed from the custom, for formerly a sort of perpetual lease could be created which was interminable without the consent of the lessee, nor could the rent thereof be altered without his assent.[269] In contrast to the superficies an emphyteuta is explicitly restricted to make any alteration of the land that will result in irreparable damage.[270]

Easements or servitude

The JCC defines a servitude from rights standpoint similar to the MCC: "A person entitled to a servitude shall have the right to make the lands of others available for the benefit of their own lands in accordance with the purposes prescribed in the acts establishing the servitudes." Servitudes in the JCC has an appurtenant nature to ownership in dominant land; therefore, it is transferred together with that ownership, or is subject to other rights that exist in relation to the dominant land such as superficies (Article 281 of the JCC).

The German law recognizes another kind of servitude which may be styled as a personal servitude, that is, as a right vested in a person, irrespective of his own land, to make use of the land of another.[271] This is not found in the JCC for, the reason that the creation of a right *in rem* over a thing owned by another person ought to be avoided when possible, and because there was no urgent reason for the establishment of such a right irrespective of the ownership of land.[272]

5.3.4. Rights to secure: Rights of retention (liens), and statutory liens (preferential rights)

Rights of retention and preferential rights differ from the preceding *in rem* rights as they are secondary rights for securing rights *in personam*. Article 295, paragraph (1) of the JCC provides that if a possessor of a thing belonging to another person has a claim that has arisen with respect to

[269] Kazuo Hatoyama, Civil Code of Japan Compared with the French Civil Code, *Yale Law Journal* 11, no. 7 (1902 1901): 366.
[270] Art 271 of Japanese Civil Code.
[271] In regards with comparison with BGB see further Kazuo Hatoyama, Civil Code of Japan Compared with the French Civil Code, *Yale Law Journal* 11, no. 7 (1902 1901): 367.
[272] *Ibid,* 367.

that thing, he may retain that thing until the claim is satisfied. However, if the claim has not fallen due, the possessor has no right to retention. In the MCC, provisions for similar rights are found in particular chapters for certain types of contracts, not in the property law; however, it remains questionable to define them as if they are rights of retention or pledges created by law.

A holder of a statutory lien is entitled to have his own claim satisfied prior to other obligees out of the assets of the relevant obligor in accordance with provisions of law, including the JCC under statutory lien (called a preferential right in other jurisdictions).[273] According to the JCC, statutory liens are either general or special, and objects of this right can be movables or immovables property. A general preferential right covers all the property of the debtor, while a special preferential right is good only with reference to a particular piece of property.[274]

Pursuant to Article 306 of the JCC, a person who has a claim that arises from following the causes listed shall have a statutory lien over the entire property of the obligor: (1) expenses for common benefit, (2) an employer-employee relationship, (3) funeral expenses, and (4) supply of daily necessities. Special statutory liens over immovable properties are given when an obligation exists based on one of following grounds: (1) preservation of immovable property, (2) construction work for immovable property, and (3) the sale of immovable property. According to Article 3 of the Real property registration Act of Japan, a statutory lien over immovable property is subject to registration.

A pledge (*shichiken*) is a class of security in the JCC, in which the possession of a thing given for security is transferred to the pledgee.[275] It may be created over movable property, immovable property and rights. The content of a mortgage, (*tei-to-ken)* in the JCC is as follows "A mortgagee shall have the right to receive the performance of his claim prior to other obligees out

[273] Art 303 of the Japanese Civil Code.

[274] Kazuo Hatoyama, Civil Code of Japan Compared with the French Civil Code, *Yale Law Journal* 11, no. 7 (1902 1901): 368.

[275] Article 344 of Japanese Civil Code provides that:
The creation of a pledge shall take effect by delivering the subject matter of the same of the obligee.

of the immovable properties that the obligor or a third party provided to secure the obligation without transferring possession.[276] The JCC does not recognize judicial hypothecs, which is the opposite of Estonian property law.

5.3.5. Treatment of the effect of separate ownership in Japanese Civil Code

In contrast to Mongolia, the divided conveyancing in the Japanese property system has traditionally been well-known, even though it was not widely accepted throughout the country. In many scholars' accounts, the justifications for encouraging the separate ownership of a building and the land by politicians and local authorities was to increase their own tax base. Nevertheless, it appears to be a peculiarity of the Japanese system, and the legal consequences derived from the separation of ownership (divided conveyancing) of land and buildings were the main challenge for the new JCC. The three situations that best illustrate the special features of the Japanese modern system are (1) transfer of ownership, (2) leasing of property, and (3) the creation and exercise of security interests.[277] Measures taken in response to former two situations are the Japanese

---

[276] *Ibid,* Article 369.

[277] Frank G. Jr. Bennett gave following clear examples for each of three cases in "Building Ownership in Modern Japanese Law: Origins of the Immobile Home," *Law in Japan* 26 (2000): 76.
1. Transfer of ownership – suppose that Tanaka owns a parcel of land, Flat Acre, on which stands a building, Block house. If Flat Acre is located is United States or, continental Europe (say Germany), and Tanaka sells the land to Suzuki, we would assume unless told otherwise that Suzuki receives both the land and the building. If the property is located in Japan, Tanaka would retain the ownership of Block house. Before the sale, Tanaka owns two assets, a piece of land and a house. He may sell them both, but he must do so separately.
2. Leasing of property – Flat Acre is vacant land, and that Tanaka leases this land to Suzuki for the purpose of constructing building. Suzuki then constructs Block house. In this case, under Japanese law Tanaka continues to own Flat Acre but, unless there is some agreement between the parties, Block house is owned by the lessee builder, Suzuki. In [the] jurisdictions [with unified conveyance], Suzuki would enjoy the use of Block house during the term of lease, but the fundamental ownership of the building would always be in Tanaka, the owner of the land to which it is attached.
3. Security interest – Suppose Tanaka owns Flat Acre, on which he himself constructs Block house. Suppose also that Bank holds a security interest in Flat Acre only. To determine whether Bank can use its interest to force a sale of Block house, we must address two cases: that in which Block House is constructed after the security interest is created; and that in which it is constructed before. … The principle of divided conveyancing, rigidly applied, would dictate that bank could never force a sale of Block House in either scenario, because it has no interest in the building.

approach[278] to transferring real property, the issuance of real property deeds based on the system effective against third parties, and protection of contractual type of lease rights. [279]

Before the enactment of the Act on Concerning protection of Buildings on Leased Land in 1909, which provides that even when not registered, a lease of a land shall, when the land lessee has a registered building, thereafter be effective against any person who acquired a real property right in the land, a land holder/lessor of the land had bargaining power over the lessee's right to the land, and therefore, his ownership of the building was actually in a vulnerable position.[280] Although the system of building deeds together with the protection provided by a new law for land lessee were the solutions to the problem of lease of property in Japanese separate ownership system, it [the system of building deeds] does not solve the problems raised where a lender extends credit against land (or a building) alone.[281]

As long as deeds are issued for a plot of land and a building separately, they are possible to be used as the items of a mortgage. Article 370 of the JCC legally confirmed this occasion.[282] The JCC further provides regulations for potential conflicts between two owners created as the result of a forced sale and between mortgagees and lessees of a plot of land and buildings by

---

[278] According to Shusei Ono, although it is difficult to identify formalism on account of the Japanese Civil Code, at the same time, absolute consensualism is not recognizable. For further detail see Shusei Ono , "Comparative Study of the Transfer of Property Rights in Japanese Civil Law," *Hitotsubashi Journal of Law and Politics* 31 (2003): 13.

[279] Acts that provided protections for building owner's use Tatemono-hogo-hou [Act Concerning Protection of Buildings on Leased Land 1909], Shakuchi-hou [Rented Land Act, 1922], Shakuya-hou [Rented Housing Act 1921], Shakuchi-shakuya-hou [Rented Land and Housing Leases Act, 1991].

[280] In respect to land leasing during the period after new Civil Code, Shusei Ono and Frank Bennett have clear examples in their Articles. Frank Bennett explains about the term of "earthquake sale", which shows weak position of the land lessee in result of the land sale of a lessor/land owner. For further detail see Frank G. Jr. Bennett, "Building Ownership in Modern Japanese Law: Origins of the Immobile Home," *Law in Japan* 26 (2000): 75–98; Shusei Ono, "Comparative Study of the Transfer of Property Rights in Japanese Civil Law," *Hitotsubashi Journal of Law and Politics* 31 (2003): 1–22.

[281] Frank G. Jr. Bennett, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, *Law in Japan* 26 (2000): 84.

[282] Art 370 of Japanese Civil code provides that: A mortgage shall extend to the things that is in integral part of immovable properties that is the subject matter of the mortgage, except for buildings on the mortgaged land.

establishing means of statutory superficies and priorities by perfections. The concept of statutory superficies and its exceptions are found in Articles 388 and 389 of JCC:

> (Article 388) In cases where land and building on the land belong to the same owner, if mortgage is created with respect to that land or building, and the execution of that mortgage results in the creation of different owners, it shall be deemed that a superficies has been created with respect to that building. In such cases, the rent shall be fixed by the court at the request of the parties.
> (Article 389 (1)) If a building is constructed on mortgaged land after the creation of a mortgage, the mortgagee may auction the building together with the land; provided, however, that his/her right of priority may be exercised solely against the proceeds of the land.

If the holder of a hypothec (a mortgagor) in land is not offered a hypothec in the building, under section 388 (pre-hypothec construction), sale of the building cannot be compelled, while under section 389 (post-hypothec construction), a portion of the value of the building is returned to the borrower.[283]

The superficial picture of the Mongolian property system appears similar to the Japanese system in some ways, such as in having separate ownership of land and buildings and conflicts arising between holders of real properties that are physically connected; however, the theoretical differences and historical grounds leading to conflicts in these two systems run much deeper. For example, the issue arising from the leasing of real property in Mongolia has not been a critical issue yet, the way it is in Japan due to the dominancy of state ownership over the land.

5.4. Conclusion

This chapter examines overviews of real property law of Germany and Japan. In this research, uniform characteristics of the selected jurisdictions property law due to the same legal family of civil law, such as notions of property, a concept of ownership and systemization of real property rights found on the one hand, on the other hand, peculiarities and distinctive features resulted from their unique tradition and historical events were indicated. Absolute effect and abstraction of an ownership concept has been shared among three systems, and this common

[283] Frank G. Jr. Bennett, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, *Law in Japan* 26 (2000): 92.

indication made this comparison worthy to conduct since the country in question, Mongolia has been fashioned by the same system and the ownership concept is paramount importance in property law of the civil law system. Moreover, by and large, the real property regulation is uniform for the whole country in each jurisdiction. There are in particular no special real rights or the system are created separately for state-owned land or private land.

It is acknowledged that the Germanic is a legal family, which exists parallel with families of Code Napoleon countries, of Nordic countries and of former communist countries in the civil law family. Compared to other two systems, diversification of the special lease interests that have nature of real right in the Germanic system recognized as its distinctive feature. The provisions dealing with building lease were taken out of the BGB by means of the Law on the Heritable Building Right in 1919. This law, and the Law on Apartment Ownership in 1951 played important role in real property development in urban areas of Germany. Within the scope of this research, several types of special lease interests of immovable properties in urban areas of German law were studied and the common ownership of a plot of land or land lease rights that contained in a concept of apartment ownership can be considered alternatives to the problems of apartment ownership in Mongolia.

In this comparison chapter, the Japanese real property system has most prominent features as it allows creations of distinct ownership rights with regards to land and building while keeping an indivisible and absolute ownership concept. Problems, potential to arise from the separate ownership of land and buildings were treated to the sufficient end. Although two systems in Japan and Mongolia have parallel appearance, because of distinguishing features of creation and existence of modern systems solutions to the problems of real property transfer, possession and mortgage in the Japanese system may not work on current conditions of Mongolian real property law. In next chapter author's view of justifications not to suggest adoption of the Japanese approach will be studied.

Chapter VI. Estonia: Analysis Through Similarities

6.1. Introduction

Many similarities with Mongolia are to be found in Estonian political and economic life during the last half of the 20th century. The decision by Estonian authorities to follow the Germanic family of law at the time the country confronted the change to a free-market economy like Mongolia created analogous private law principles in both countries through the Germanic influence. Although, apart from crucial similarity as a transition country, the social life, history, culture, religion, ethnic and geographical conditions of the two countries are not comparable. But, within the scope of this research with a main objective to study property rules for urban land area of Mongolia, difference between nomadic and settled culture of respective countries may be the next issue to consider.

As a former socialist, but a successfully transited country to liberal economy, how to convert land as "state property" into the private property and process to adopt liberal approaches supported by private property theories to the state land circulation of Estonia is primary significant to find reasons for current problems, or "mistakes' that Mongolia might made in transition period. In Estonia, the property law reform begun in 1991 with the Principles of Ownership Reform Act was a preliminary and also the most important step for Estonia. The Estonian legislative framework has been substantially influenced by the goal of becoming a member of the European Union. At that time, as a candidate member to the European Union, Estonia is required to consider the EU directives in its country's legislation.

Unlike the other two countries that will be analyzed, one of the substantial issues for Estonia was not taking back land from private ownership; instead, it was how to return state properties including and most importantly plots of land to private ownership, similar to Mongolia. By 1993 three property reform tasks remained in Estonia. First, a wide variety of mostly unprofitable state enterprises had yet to be sold off; second, the issue of how to provide compensation for prewar property claimants remained unresolved; and third, the process of housing

privatization, in which the average resident was most interested, had yet to begin.[284] These three tasks were all addressed in the Law on Privatization passed by the Riigikogu in June 1993. Sharing similar problems in the political and economic areas, the tasks above were pressing issues in Mongolia as well. Estonian foreign policy since its independence has been oriented toward the West, and in 2004 Estonia joined both the European Union and NATO.[285] Mongolia has chosen to follow the civil law system, and therefore Estonian policy oriented toward the west and its legislative considerations under the principles of the continental system are worthy of study within the scope of this work.

6.1.1. Historical background of the country

Estonia, officially the Republic of Estonia (Estonian: *Eesti Vabariik*), is a country on the eastern coast of the Baltic Sea in Northern Europe. The territory of Estonia consists of the mainland and 1,520 islands in the Baltic Sea, covering a total area of 45,226 square kilometers (land area 43,200 square kilometers),[286] almost equal in size to half of one of the typical 21 aimags (provinces) of Mongolia. Since regaining its independence after the collapse of the Soviet Union in 1991, Estonia has become one of the most economically successful of the European Union's newer eastern European members.[287] The current population of Estonia is 1,326,676 and 67.9 % of the population lives in urban areas (900,365 people in 2020) according to the latest United Nations data.[288]

Estonia's struggles for independence during the twentieth century were in large part a reaction to nearly 700 years of foreign rule.[289] During these 700 years, neighboring countries such

[284] Walter R. Iwaskiw, ed., Estonia, Latvia and Lithuana: A Country Study, (1996), 55. Available at https://www.loc.gov/item/96004057/, (accessed November 2020)
[285] Miljan and Toivo, *Historical Dictionary of Estonia,* (Rowman & Littlefield, 2015), 18–19.
[286] Walter R. Iwaskiw, ed., *supra* note 284.
[287] BBC news, Estonia-Country profile, available at https://www.bbc.com/news/world-europe-17220810, (last accessed in October 2020).
[288] Data provided by United Nations Population Division, available at https://www.worldometers.info/world-population/estonia-population/, last accessed in October 2020.
[289] Walter R. Iwaskiw, ed., *supra* note 284.

as Germany, Sweden, and Russia had control over parts or the entire country. The fall of the tsarist regime in February 1917 forced the issue of Estonia's political future. As the Bolsheviks retreated from Tallinn (the capital city of Estonia) and the German occupation army entered the city, the Committee of Elders of the Maapaev (or standing body) declared the country independent on February 24, 1918. [290]

Unlike its later peaceful return to independence in 1991, Estonia's first modern era of sovereignty began with a fifteen-month war (1918-20) against both Russian Bolshevik and Baltic German forces, which influenced the formation of the first land reform. A year later, Estonia gained international recognition from the Western powers and in June 1920, Estonia's first constitution was promulgated, establishing a parliamentary system.[291] The Baltic Private Law, which was a code based on the pandect system, contained a general part, property law, family law, law of succession, and law of obligations parts, classified as belonging to the Germanic family of laws applied in Estonia both when Estonia was part of Tsarist Russia (1865), and when Estonia was an independent state between 1919-1940.[292]

6.2. Land Owners in Estonia

In Estonia, land can be owned by the state, municipal and private sector regardless of either citizenship or legal status as an individual or a legal entity. Table 7 below illustrates areas and ratios of cadaster land registered in Estonian by ownership form categories as of 2007.

Table 7. Areas and ratio of registered in cadaster land by ownership form[293]

---

[290] Maapaev was the provisional assembly of the Country. During collapse of tsarist regime by February 1917 large number of Estonian populations forced the provisional government to accept Estonia's territorial unification as a one province and the election of provisional assembly Maapaev. Walter R. Iwaskiw, ed., *supra* note 284.

[291] *Ibid.*

[292] Paul Varul, *Creation of New Private Law in Estonia,* 31, Rechtsetheorie, (2002), 349-367.

[293] Siim Maasikamäe and Evelin Jürgenson, Main Principles of the Formation of State Land Reserve in Estonia, n.d., 1, available at http://www.fao.org/fileadmin/user_upload/reu/europe/documents/LANDNET/2008/Estonia_Paper.pdf. (Last visited in September 2020), 2.

Category of ownership	Area of land (ha)	Ratio of land area (%)	Number of parcels	Ratio of land (%)
Private land	2,440,744.5	64.6	517,755	93.3
State owned land	1,295,638.4	34.5	27,045	4.9
Municipal land	22,200.6	0.6	9,862	1.8
Total	3,758,583.5	100.0	554,662	100.0

6.2.1. State and Municipal Land Ownership

In accordance with Article 31 of the Land Reform Act of the Republic of Estonia the following shall be retained in state ownership:[294] (1) land under buildings and civil engineering works retained in state ownership and the land for servicing them; (2) land under state protection and land adjacent to objects under state protection if the established protection regime makes it impossible for another person to use the land; (3) land under bodies of water retained in state ownership; (4) public land; (5) national defense land; (6) state forest land; (7) agricultural land of state companies and state agencies; (8) state land reserves; (9) land necessary for servicing the construction works of another person on which a right of superficies is constituted; (10) land on which a usufruct is established pursuant to procedure for establishment of usufruct on land; (11) land which is granted into the ownership, possession or use by a foreign country or which is subject to a written agreement concerning transfer, entered into by government delegations; (12) land suitable for joining to immovable bordering on land in state ownership.[295]

In accordance with section 3 (1) of the Land Reform Act of Estonia, land to be retained under state ownership shall be determined by this Act, and Part V of this Act provides basic norms on land relations for the retention of state ownership. The area and boundaries of land retained in state ownership is determined in compliance with planning and land readjustment requirements

[294] Land Reform Act of Republic of Estonia.

[295] Land suitable for joining to an immovable is deemed to be a plot of land which is as a rule with shape of a strip, wedge or other irregular shape or which due to its smallness cannot be used independently, to which there is as a rule access from public road and which has been created in nature as a rule in the coursed or in consequence of carrying out land reform mostly due to errors caused by different desk survey or different surveys used at different times. See further in Article 31^1 of the Land Reform Act of Republic of Estonia.

without preparation of a detailed plan.[296] Land shall be retained under state ownership by a resolution of the Government of the Republic or by resolution of a government agency authorized by the Government of the Republic.[297] The relatively rapid increase of land retained under state ownership started in 1997 continued through 2002, because the large areas of forest land were registered to state ownership in the cadaster during that period.[298] The situation changed after 2003 and the focus of the retention land under state ownership was moved from forest land to arable land.[299]

Because of a broad list of the state-owned land and it is a Government power to retain land as state land in accordance with Article 29 of the Land reform Act of Estonia, Estonia has similar regulation with Mongolia. Mongolia has a constitutional provision, which defines a basic scope of state land (pastureland, land for public use and land under state special use), in addition to a provision that declares forest and water is under state ownership. Definitions of above three categories of land are provided by the Land Law under classification of the Unified Land Fund of Mongolia. While pastureland includes in a category of land for rural economy, land for public use belongs to a category of land for settlement. Land under state special use is an independent classification such as a land for rural economy and a land for settlement under the Unified Land Fund of Mongolia. In accordance with Article 16.3 of the Land Law of Mongolia, it is open to transfer land from any categories into the state special use. There is no rationales and justifications to limit the Government's discretion in this regard. Therefore, it is one of most problematic concepts in Mongolian land law. With regards to size of state land, two countries are incomparable.

Private Land Ownership in Estonia

[296] Land Reform Act of Republic of Estonia, section 29.
[297] *Ibid.*
[298] *Ibid,* 2, 3.
[299] *Ibid,* 3.

6.3. Main Policy Towards Free-Market Economy and Land Reforms

6.3.1. The First land reform of independent Estonia (1918-1940)

In 1920, with a political system in place, the new Estonian government immediately began the job of rebuilding. As one of its initial major acts, the large estates of the Baltic German nobility were expropriated, breaking the nobility's centuries-old power as a class, and the government carried out extensive land reform, giving tracts to small farmers and veterans of the War of Independence.[300] As a result of the land reform, the number of small farms doubled to more than 125,000 and agriculture dominated in the country's economy.[301] As was stated by Karin Visnapuu there are also some political factors that rendered this reform necessary:

> Firstly, the fledging Estonian government needed to rally a loyal citizenry, and the only thing that the state had to offer at the time was land. Secondly, since the Estonian War of independence was still in progress, it was necessary to attract men to fight for the new state, therefore, giving soldiers a piece of land was quite good motivation for military service.[302]

There are many examples of Eastern European states carrying out land reforms in the years following World War I.[303] In spite of their different scope and outlook these land reforms aimed at solving similar problems of an agrarian and socio-economic developmental character. The general purpose was the same across all these reforms: to bring an end to large estates dividing the land into smaller estates and give those pieces to peasants.[304] The land reform's achievements owe as much to the social and human infrastructure created in Estonia as it did to changes in land tenure,

[300] Walter R. Iwaskiw, ed., *supra* note 284.
[301] *Ibid.*
[302] Karin Visnapuu, "Land Reform and the Principle of Legal Certainty: The Practice of the Supreme Court of Estonia in 1918–1933," *Juridica International* 27 (September 30, 2018): 53–60, available at https://doi.org/10.12697/JI.2018.27.05, (last accessed in October 2020).
[303] W.Roszkowski, *Land Reforms in East Central Europe after World War One.* Polish Academy of Sciences Institute of Political Studies, (1995).
[304] Karin Visnapuu, *supra* note 302.

land assembly, and land use. This may be one of its most important lessons for those attempting to craft a new agricultural structure for this and other nations in the region.[305]

In 1919, the Constituent Assembly adopted the Land Law Act. With this Act, all the manor lands were expropriated to state ownership.[306] The manors possessed over one half of the entire land, including almost all of the forestland and 20% of the agricultural land.[307] With the Land Law Act and other legislations, 96.6% of the land of large estates held by manors were expropriated without any compensation, which made the Estonian land reform is the most radical of its kind.[308] Eighty per cent of the agricultural land was mostly organized as small farms of about 20–30 ha, of which about a quarter were leased.[309]

This Act has been criticized because of its non-compliance with the principles of legal certainty and legitimate expectation. According to local experts, for example, as a result of expropriation, land was owned by the state and redistributed to the peasants, but the methods how to distribute the land to peasants were not regulated. Moreover, pursuant to section 10 of the Land Law Act the issue of compensation was left open, saying that compensation to previous landowners shall be resolved through corresponding special law. Therefore, implementation of this hastily adopted Land Law Act was largely depended on the Supreme Court's interpretation as Visnapuu stated "… in the yearly years of Estonian independence, there was a paucity of professional Estonian lawyers, so the practitioners' workload was huge. The only way for people to protect their rights was via the courts. The Supreme Court as the final-instance court had the obligation to handle

---

[305] Mark B. Lapping, "The Land Reform in Independent Estonia: Memory as Precedent — Toward the Reconstruction of Agriculture in Eastern Europe," *Agriculture and Human Values* 10, no. 1 (December 1, 1993): 52–59, available at https://doi.org/10.1007/BF02217730, last accessed in October 2020.

[306] Karin Visnapuu, *supra* note 302.

[307] Estonian institute, "Land Ownership in Estonia in the 20th Century," in *Estonica*, n.d., available at http://www.estonica.org/en/Land_ownership_in_Estonia_in_the_20th_century/ (last accessed in October 2020).

[308] Karin Visnapuu, *supra* note 302.

[309] Estonian institute, *supra* note 307.

all of the cases, since a situation in which the courts avoid rendering a judgement and thereby leave a legal question unanswered is untenable." [310]

Although land reform did not solve all of Estonia's early problems, the expansion of landownership helped stimulate new production after the war. This land reform must therefore be seen as a part of the interwar state-building process and struggle for independence. But the path of development was interrupted by Soviet expansion. The clouds over Estonia and its independence began to gather in August 1939 when Nazi Germany and the Soviet Union signed the Nazi-Soviet Nonaggression Pact (also known as the Molotov-Ribbentrop Pact), dividing Eastern Europe into spheres of influence.[311]

6.3.2. The Second land reform of Republic of Estonia (1991-1999)

Following the establishment of the Republic of Estonia as an independent state in 1991, a new constitution was adopted in 1992. Thus, Estonia's legal system changed from the Soviet system to the Roman-Germanic system, which resulted in land reform.[312] As it is classified by Paul Varul, 1988-1991 is the preparatory period for the creation of Estonia's own legal system, and the main legal policy decisions during this period were the passing of the Principles of Ownership Reform Act (entered into force on June 20, 1991) and the Land Reform Act (entered into force on November 1, 1991).[313] He also claimed that the passing of these two Acts was a decisive step for the development of Estonian private law, and the most important circumstance after Estonia's regaining of her independence in August 1991.

While the purpose of ownership reform is to restructure ownership relations in order to ensure the inviolability of property and free enterprise, to undo the injustices caused by violation of the right of ownership and to create the preconditions for the transfer to a market economy, the

---

[310] Karin Visnapuu, *supra* note 302.
[311] Walter R. Iwaskiw, ed., *supra* note 284.
[312] Saint-Petersburg State University et al., "Land Use Policy and Land Management in Estonia," *Baltic Region* 9, no. 1 (March 29, 2017): 91–104, available at https://doi.org/10.5922/2079-8555-2017-1-8 (last accessed in October 2020).
[313] Paul Varul, *supra* note 292.

objective of land reform is to transform relations based on state ownership of land into relations primarily based on private ownership of land, to establish the continuity of rights of former owners and the interests of current land users that are protected by law, and to establish preconditions for more effective use of land.[314] In other words, at the beginning of the 1990s, on the grounds of ownership reform laws, the state began to return immoveable property to its rightful owners, privatize state property, and to set the stage for free enterprise.[315] During the land reform carried out on the basis of these two Acts, land parcels were returned to former owners or their successors and in some cases, compensation was paid.

While in the previous land reform in the 1920s, the land was divided into smaller estates and those pieces given to peasants after it was expropriated into state ownership from the German nobility manor land owners, this time the state, the biggest land owner in the country, was required to build a free-market economy founded on private property through restitution, privatization and municipalization. In brief, the second land reform in Estonia implemented based on principle of restitution principle, while priorities of the first land reform were nationalization and redistribution.

Retention of land under state ownership was another important aim of the second land reform, along with restitution. But it was not a priority and was not implemented at the beginning of the land reform because of the unclear situation of the actual needs of the state at that time.[316] In conclusion, basic and necessary preconditions for the transfer to market economy was to restructure ownership. In doing so, unlike Mongolia, Estonia decided to start the privatization from the state land. At that time, the Civil Code of Estonia was not a sufficient to promote private property

---

[314] Purposes of the respective laws are described in Laws: Riigi Teataga, section 2, "Land Reform Act of Republic of Estonia" (1991), available at, https://www.riigiteataja.ee/en/eli/ee/529062016001/consolide; Riigi Teataga, section 2, "Republic of Estonia Principles of Ownership Reform Act" (1991), https://www.riigiteataja.ee/en/eli/ee/525062015006/consolide. (last accessed April 2021)

[315] Priidu Parna, "Legal Reform in Estonia," *International Journal of Legal Information* 33(2) (2005): 219–23.

[316] Siim Maasikamäe and Evelin Jürgenson, Main Principles of the Formation of State Land Reserve in Estonia, n.d., 1, available at http://www.fao.org/fileadmin/user_upload/reu/europe/documents/LANDNET/2008/Estonia_Paper.pdf. (Last visited in September 2020).

development. Therefore, the property law reform which formed on the publicity principle and strong land register was one of initial steps forward to market transition of Estonia. As Paul Varul stated that a strong land register in turn should ensure legal certainty and contribute to economic development and stability.[317]

6.3.3. Methods to implement land reform

Similar to Mongolia, but with more advanced and functional regulations, privatization of the land is carried out in Estonia through the methods of 1) pre-emption rights, 2) closed auctions, 3) public auctions.[318] While in Mongolia the pre-emption right is only given to a holder of long term right to possess, in other words, the aliens who have use rights under Mongolian law cannot exercise pre-emption rights,[319] in Estonia the pre-emption right is used in a broader scope and given to the following persons regardless of their citizenship, (1) the persons, who have been granted land for perpetual use, (2) the persons, who have the right to purchase land as the owner of a construction works or a plantation, (3) residential building, apartment, garage, cottage or gardening associations for the land in common use of members of these associations, (4) the owner of a residential building situated beyond city boundaries or the boundaries of a high-density area, who is an Estonian citizen, up to 50 hectares of land, which remains vacant in the course of return or within the boundaries of the former registered immovable, (5) the person engaged in agricultural production, with the consent of the local government up to 50 hectares, which remains vacant in the course of the return of land.[320]

However, the situation is different for forest land. In accordance with Article 20 sub clause (1^1) of the Land Reform Act and Article 81 subsection (2) of the Forest Act, areas that belonged to the state until July 23, 1940 and are now covered with forest are not be subject to privatization and no uzurfruct shall be established on such land. Although 1.30 million hectares (out of 4.52 million

[317] Paul Varul, *supra* note 292, 357.
[318] *Ibid,* Section 22 (1) and (4).
[319] See table 2 in the section 3.2.2 of chapter of the thesis.
[320] Land Reform Act of Republic of Estonia, section. 22 (2), (2).

hectares of Estonian territory) is registered in cadaster as state land, the most of that land (approximately 1.04 million hectares) is state forest land and it was the state land also in 1940.[321] It was (and it is today also) the founding principle of the national policy that most the forest as a strategic natural resource must be controlled and managed by state.[322] Therefore, right to pre-emption is implemented in a very strict way. Pursuant to Article 20 (1^1) of the Land Reform Act, the owner of a residential building situated on state forest land has the right to privatize the land up to 2 hectares, and the owner of other construction works has the right to privatize land to the extent necessary for servicing construction works.

Closed auctions are held only for land that is not subject to pre-emption rights and land except agricultural land and forest land.[323] Public auctions are available for (1) land that is not privatized by closed auction, and (2) land that is not forest land, and (3) land, on which the usufruct is not established. Although implementing these regulations was the most challenging overhaul in Estonian history, the creation of legal bases for restitution (re-nationalization) and privatization of state property enables freedom of contract and private autonomy, which were prerequisites for the new private law.

Consequently, in addition to uncertainty of real property regimes in Mongolia, in the Land Law and LTLOMC of Mongolia explicitly lack certain procedural regulation to grant ownership right. Mongolia recognizes two methods to transfer land ownership: for free or under a pre-emption right. Not just means of privatization methods, methods to grant land rights such as possession and use rights should also be clarified. Although such limited alternatives in means of methods to privatize land may have affected by a restrictive concept of private land ownership in the Constitution of Mongolia a procedure to handle methods need to be clarified and internationally recognizable options should be introduced in relevant laws.

---

321 Maasikamäe and Jürgenson, *supra* note 316, 1.
322 *Ibid.*
323 Land Reform Act of Republic of Estonia, section. 22 (4).

6.4. Unified principles of Estonian real property transfer

6.4.1. *Superficies solo cedit* principle in Estonian property law

As it is commonly remarked on in Estonian literature, the reform of the property law, implemented through the Principles of Ownership Act and the Land Reform Act, was the starting point of the Estonian journey towards a market economy. Civil use of land is especially important because it enabled the use of collaterals through mortgage and greatly helped develop the credit system.[324] Lack of a real property system would have prevented the formation of normal economic relations.

An interesting fact on note is that in Estonia the Law of Property Act was enacted in 1993 before the passage of the new Civil Code because of the urgent need to ensure that reforms were carried out. It would have been logical to pass the general part first. However, the Law of Property Act followed by the Civil Code both in its structure, content and abstract wording. Nowadays the basic laws governing land relations or legal relations in real estate of Estonia include the "Land Reform Act", the "Property Act", and the "Restrictions on the Assignment of Ownership of Immovable Property to Aliens, Foreign States and Legal Entities Act".

Things are the general category belongs to the Civil Code. However, in the Estonian case until adoption of the General Part of the Civil Code Act (GPCC), [325] regulations on things were in the Property Act of Estonia. The thing is classified into the division of movables and immovable. This division is the starting point for the separate treatment of real rights and is expressed in differences in the creation, scope and extinguishment of a right and distinct rules of form of transactions.[326] Commerce in movables is determined by provisions on possession, commerce in

[324] Paul Varul, *supra* note 292, 353.
[325] General Part of the Civil Code Act of Republic of Estonia (2002), available at: https://www.riigiteataja.ee/en/eli/ee/530102013019/consolide. (last accessed in November 2020)
[326] Priidu Parna, The Law Property Act-Cornerstone of the Civil Law Reform, *Juridica International* 6 (2001), 91.

immovables is by provisions of land register.[327] Possession and the land register are completely separate norms in the Estonian law of property.

Under Article 50 of the GPCC, an immovable is a delimited part of land (a plot of land). An essential part of a thing is a component part which cannot be severed from the thing without the thing or the severed part being destroyed or essentially changed.[328] Therefore, buildings, standing crop, other vegetation and unharvested fruit are the essential parts of an immovable, due to their nature being permanently attached to it. A thing and the essential parts thereof shall not be in the ownership of different persons and shall not be encumbered by different real rights unless otherwise provided by law.[329] A building remaining on a plot of land upon extinguishment of a real right becomes an essential part of the plot of land.[330]

However, there are exceptions for this *superficies solo cedit* principle like other jurisdictions with Germanic family of law. Buildings which are constructed on the land of another on the basis of a real right and are permanently attached to the land, and things attached to the land for a temporary purpose are not parts of an immovable.[331] A peculiarity resulting from the reforms of the property law system constructions (buildings) as well as flats situated on "non-performed" land (*ie* land not entered into the land register) are treated as movable things, thus the property in such buildings *etc* will also pass to the rules concerning the transfer of movable property (the only difference being that in case of such 'buildings as movables' the contract for alienation needs to be concluded in a notarized form.[332] Therefore most court practice dealing with issues of movable property transfer at all is concerned with such 'buildings as movables' which, however, is only

[327] *Ibid.*
[328] General Part of the Civil Code Act, section 53, *supra* note 325.
[329] *Ibid,* section 53.
[330] *Ibid.* section 54
[331] *Ibid*.
[332] Wolfgang Faber, Brigitta Lurger, *National Reports on the Transfers on Movables in Europe Volume 1: Austria, Estonia, Italy, Slovenia*, 228.

intended as a temporary measure to help out until all land involved in civil commerce will have been entered into the land registry.[333]

The Estonian property law system is characterized by the principle of *numerus clauses* doctrine. Property Act of Estonia provides a list of restricted real rights: servitudes, real encumbrances (real obligation), right of superficies (development right), right of pre-emption and right of security (lien or mortgage). In addition to these real rights other law may create other real rights pursuant to Article 5 (2) of the Property Act.

6.4.2. The abstraction principle and Land register: Legal clarity and certainty

A land register is maintained for immovables and related real rights. Estonian scholar Paul Varul (a professor at the University Tartu, who started work in 1992 and who was a guide for the principal commission of the Civil and Commercial Code) remarked on the importance of a strong land register ensuring legal certainty and contributing to economic development and stability.[334]

The land register of Estonia has developed following the model of the German procedure for land registration, which supported the principle of separation and abstraction.[335] The idea of the abstraction principle, which allegedly comes from Savigny has to serve legal certainty and clarity so that errors in causal transaction would not influence the legal status of an immovable and would allow the establishment of abstract real rights of the owner.[336] The principles of separation is a structural one, meaning that an obligation, as an underlying *causa*, and an actual disposition (transfer) are to be regarded as separate transaction whose legal validity must also be separately evaluated.[337] Further, the principle of abstraction states that the legal effect of the disposition (the real agreement) is not dependent on the existence of an underlying obligation.[338] In Article 6 of the

---

[333] *Ibid.*
[334] Paul Varul, *supra* note 292, 353
[335] See further in Priidu Parna, The Law of Property Act Cornerstone of the Civil Law Reform, *Juridica International*, VI/2001, 92. 89-101 and Priidu Parna, Property Law Act Commented Edition, Talinn (2004).
[336] *Ibid,* 96.
[337] Wolfgang Faber, Brigitta Lurger, ed. *supra* note 31, 235.
[338] *Ibid.*

GPCC, the principles of separation and abstraction are expressly stated, regulating the basics of legal succession.

With regard to acquiring property rights the Estonian property law adopts a formal approach under which the transfer of property is effective only after either delivery or registration of the interest. Therefore, the land register is public and everyone has the right to examine the land register information and to receive extracts therefrom.[339] No one may be excused by ignorance of information in the land register.

All plots of land have to be registered in the state cadaster under the administration of the Ministry of the Environment and the operations of which were established by the Cadastral Register Act.[340] The cadaster establishes a technical-economic regime for plots of land and entries have no legal meaning, however, the land register establishes the regime of immovables in property law and the entries have legal effect.[341] In accordance with Articles 13-16 of the Land Register Act, the register consists of four divisions: composition of an immovable (Article 13), an owner (14), encumbrances (Article 15) and mortgages (Article 16). In the first division, information such as the cadastral code, the specific purpose, the area, the location of the registered immovable, the restricted real rights established for the benefit of the registered immovable, and the merger and division of registered immovables, as well as the joining of a part of a registered immovable with the registered immovable, or separation of a part of a registered immovable from the registered immovable are entered.

Under the "owner division" of the register, information about an owner, or shared ownership is found, for instance, information regarding whether the registered immovable is in joint ownership or common ownership and, in the case of common ownership, the size of the shares

[339] Riigi Teataga, "Law of Property Act of Republic of Estonia" (1993), sec. 55, (last accessed November 2020) available at, https://www.riigiteataja.ee/en/eli/510072014007/consolide.
[340] Riigi Teataga, "Land Cadastre Act of the Republic of Estonia" (1994), (last accessed November 2020) available at, https://www.riigiteataja.ee/en/eli/517072018004/consolide.
[341] Priidu Parna, *supra* note 335, 93.

of the co-owners. The restricted real rights encumbered on registered immovable except the mortgage, or restriction on immovable property ownership (restrictions in public law such as utility networks required in public interest, restrictions on the right of disposal of the owner), or notations concerning restrictions or ownership; amendments or deletion of these entries are entered in the third division "Encumbrances and Restrictions" of a land register part. In the fourth division "Mortgages" of a land register part, the mortgagee, the monetary amount of a mortgage, the notations concerning a mortgage and amendments and deletions to them are entered.

6.5. Land Use System in Estonia: Real Property Rights with regards to State and Private Land

6.5.1. Apartment Ownership

The German *Wohnungseigentumsgesets* was taken as a model for creating the Estonian concept of apartment ownership.[342] This is complicated by the fact that an apartment ownership consists of various elements (plot of land, apartment, the administrative property of apartment owners, apartment owners' rights to vote, etc.), which gives rise to the question of what the object in commerce is in the case of apartment ownership.[343] The theory divides apartment ownership into three parts: special ownership and shares in the common ownership, and the membership element, (i.e., the right and obligations arising from the community of apartment owners).[344] Apartment ownership is a special form of common ownership. In Estonian property law there are two types of shared ownership: joint ownership and common ownership.[345] Common ownership is in legal shares of property belonging to two or more persons concurrently.[346]

---

[342] Since its last property law reform Estonia has revised Apartment Ownership Law three times and according to Priidu Parna, Apartment ownership acts of Estonia 1994, 2001 were largely based on the WEG of Germany (1951), see further, Development of Apartment Ownership Legislation in Estonia in 1994-2009 and Reform Plans in the Context of European Judicial Practice, *Juridica International* 16 (2009), 103-113.

[343] *Ibid,* 106.

[344] *Ibid.*

[345] *Ibid,* section 70 (2).

[346] *Ibid,* section 70 (3).

In accordance with Article 1 (1) of the Apartment Ownership and Apartment Associations Act, "apartment ownership" means exclusive ownership of the physical share of a building together with a legal share of the common ownership of the immovable property to which the exclusive ownership belongs.[347] The object of exclusive ownership is a dwelling or non-residential premises delimited in space and parts of the building belonging thereto, which enable separate use and which can be altered, removed, or added without violating common ownership or the rights of other apartment owners and without altering the external form of the building.[348] The objects of the shares in common ownership of apartment ownership are the plot of land and such parts and equipment of the building which do not constitute objects of exclusive ownership and are not in the ownership of a third person.[349]

Before enacting the new law on Apartment Ownership and Apartment Associations Act in 2014, the most problematic issues in regard to apartment ownership in Estonia were the question of the passive legal capacity of the community and uniting the community to the apartment association, both of which were recognized in Estonian law.[350] With this dualist administration, three different acts[351] are applied, and it is difficult to understand community in legal proceeding. Therefore, the conceptual solution, which preserves apartment associations, by serving as a compulsory association with passive legal capacity was employed in 2014 and through the third law on this subject, the Apartment Ownership Act, which was enacted by the *Riigi Teataja,* the parliament of the Republic of Estonia.

---

[347] Riigi Teataja, "Apartment Ownership and Apartment Associations Act" (n.d.), sec. 1 (1), https://www.riigiteataja.ee/en/eli/518052017002/consolide, (Last accessed in November 2020).

[348] *Ibid,* section 4 (1).

[349] *Ibid,* section 4 (4).

[350] See further, Priidu Parna, *supra* note 335.

[351] According to Paul Varul and Priidu Parna Apartment Ownership Act, Apartment Associations Act and Non-profit Association Act are used to apply to the community relation in case of apartment ownership. See further Priidu Parna, Development of Apartment Ownership Legislation in Estonia in 1994-2009 and Reform Plans in the Context of European Judicial Practice, 16 *JURIDICA INTERNATIONAL* 103–113, 110 (2009) and Priidu Parna, The Law Property Act-Cornerstone of the Civil Law Reform, 6 *JURIDICA INTERNATIONAL* 89–101, 95 (2001.)

Registration of Apartment Ownership

In Estonia, an application to register apartment ownership is filed with the land register, but it has close ties to the apartment associations register as well. In accordance with Article 6 of the Apartment Ownership and Apartment Associations Act, after receiving a registration application, the registrar of the land register is required to forward the application to the registrar of the apartment associations register. The registrar of the land register and the registrar of the apartment associations register shall review the application at the same time.

An entry on the registration of apartment ownerships is made after the registrar of the apartment associations register gives notification that there are no hindrances to the opening of the registry card for the apartment association, entry of which is made immediately after creating an entry for the registration of the apartment ownerships.[352] The advantages of such a close relationship between these two registration process provide publicity of the property right and at the same time clarifies the legal status of the organization which has a compulsory membership and provides information of members who may have liability for such an organization's activity. Indeed, this could be a good example for Mongolia to follow.

In Estonia the concept of apartment ownership has been paid serious attention by lawyers in connection with country's choice to follow Germanic concept on ownership of immovable property. Except for the land restitution, Estonian privatization starts with dwellings created during Soviet period like Mongolia, however, unlike Mongolia, Estonia has given quick and reasonable responses to the radical change of the country's economic principles by recognizing future effect of the principles such as rule of *superficies solo cedit* before the country starts privatization.[353] Apparently, Estonia was confident about the choice and a decision to follow Germanic law of

---

[352] Section 6 (4), Apartment ownership and apartment associations act of the Republic of Estonia, *supra* note 463.

[353] Both Privatization of Dwellings Act and Property Act of Republic of Estonia adopted in same year of 1993. Riigi Teataga, Law of Property Act of Republic of Estonia; Riigi Teataja, "Privatisation of Dwellings Act of Republic of Estonia," accessed May 12, 2021, https://www.riigiteataja.ee/en/eli/520122018009/consolide.

family and able to assess the consequence and impact of *superficies solo cedit* rule on the future real property market and urban development.

Mongolia has adopted the *superficies solo cedit* principle in 2002, ten years after the implementation of general privatization. As of the time explicitly placed the rule in Mongolian property law, it had been 5 years after the first apartment and a house was registered at the State Immovable Registration. Consequently, two basic differences, first, the creation of well-thought legal environment on land reform and second, careful attention paid to build the concept of apartment ownership are positively relevant to the Estonian successful ownership reform.

6.5.2. Restricted real rights in Estonian property law: Right to use

In the Estonian property law, restricted real rights are divided into servitudes, rights of preemption, real encumbrances, rights of superficies and rights of security. The notion of a restricted real right appears as early as the draft of the Civil Code in 1939.[354] Under the general classification of real rights in Europe, real rights in Estonian law such as servitudes, and right of superficies are categorized as rights to use. In general, rights to use may be divided into extensive rights of use giving possession (in particular right of superficies, usufruct,) and limited rights of use (called proprietary burdens), the most important ones being servitudes.

Right of superficies (Hoonestusoigus)

In the Estonian case, a right of superficies is considered an extensive right of use giving possession; however, usufruct which is considered a real right giving possession in general, is called a personal servitude.[355] Immovable property may be encumbered such that the person for whose benefit a right of superficies is constituted has a transferable and inheritable right for a specified term to own a construction permanently attached to the immovable property.[356] As the main right of construction on the land of another, it has been used in cases where the owner does not wish to

[354] Priidu Parna, 108.
[355] Law of Property Act of the Republic of Estonia. Chapter 9.
[356] *Ibid,* section 241.

relinquish ownership or where the transfer of ownership is restricted by public law restriction.[357] Construction which conducted on the basis of a right of superficies or exists at the time of its constitution and to which the right of superficies extends is an essential part of the right of superficies.[358] Therefore, it can be concluded that in Estonian property law, the right of superficies is established for the benefit of existing buildings or a building under construction, and thus is one of most useful real rights in an urban area.

The right of ground lease provided in the Baltic Private Law Code may be considered a predecessor of the right of superficies in Estonian property law; however, it was provided for in the Law of Property Act following primarily the German *Erbbaurecht* example, which is also the root of the right to erect on other's land in Mongolian property law.[359] Unlike Mongolia, Estonian lawyers were in a better position to predict the future design of the real market of country due to their previous experience with private ownership of land. Therefore, restricted real rights such as the rights of superficies, servitude, and usufruct were not completely new concepts for those lawyers as they were for lawyers of Mongolia.

A right of superficies may only be established for a limited term of not more than 99 years. If the term is not specified or is more than 99 years, the term is deemed to be 99 years.[360] Because of its long-term nature, the holder of a right of superficies (superficiary) has the right to transfer or bequeath a right of superficies or to encumber it with real security, a servitude, a real encumbrance, or a right of preemption.[361] A right of superficies shall not be encumbered with another right of superficies. [362] Estonian property law provides for specific provisions in cases where a right of superficies is terminated pre-maturely, the lack of which in the Mongolian property regime is a

---

[357] Priidu Parna, 108.
[358] Law of Property Act of the Republic of Estonia, Section 241 (5), *supra* note 469.
[359] A ground lease was one of the main real rights in the Baltic Private Law Code and in accordance with local scholars such as Paul Varul and Priidu Prana it functions similar duty as superficies in Estonia, for further detail see Priidu Parna, *supra* note 237 and 77.
[360] Section 251, Law of Property Act of the Republic of Estonia, *supra* note 469.
[361] *Ibid,* section 249.
[362] *Ibid.*

serious. For example, according to Article 244^3 of Property Act of Estonia, upon reversion of a superficies because of the failure to erect a building within the term, a mortgage or real encumbrance which does not belong to the superficiary are preserved.[363] In Mongolian property law, pre-mature termination is accepted on very limited grounds and there is no further regulation governing the fate of real rights that have already been encumbered by other real rights such as hypothecs and servitudes.

Superficies on state land

In accordance with Article $35^1(1)$ of the Land Reform Act, a right of superficies is constituted for the benefit of the owner of a construction work who does not wish or who does not have the right to acquire the land. The procedure, terms, and conditions for the constitution of the right of superficies on state land during land reform, including the amount of the annual charge for the rights of superficies and the procedure for amendment and the payment thereof, are established by a governmental regulation.[364] More importantly, the superficies is not constituted on the basis of a building permit if the construction has not commenced.[365] The owner of a construction work, whose superficies right has commenced has a right to privatize the land if the land is not necessary to the state for performing its function and the land being used for the construction work is registered in the land cadaster.[366] If the owner of a construction work loses to exercise the right to privatize the land his or her right to the superficies is continued.[367] The category of "construction

[363] In countries that follows civil law system, mortgage can be transferred upon satisfaction of a claim secured by mortgage to an owner of immovable. In Mongolian property law, it is called as an owner's mortgage. In theory this can also be applied to a superficies right. For example, bank B established a mortgage over a superficies right of A (superficiary) in securing a loan of $ 1,000,000. Upon a full payment of a loan, bank B discharged the mortgage. In this case, superficiary A may demand entry of the mortgage in his name in accordance with Article 349 of the Law of Property Act of Estonia. In this case, such mortgage may be classified as "a mortgage which belongs to the superficiary".

[364] Section $35^1(1^1)$. Land Reform Act of the Republic of Estonia, *supra* note 414.

[365] *Ibid,* section $35^1(1^2)$.

[366] *Ibid,* section $35^1(2)$.

[367] *Ibid,* section $35^1(4)$.

work" in the Land Reform Act, the Property Act and the State Assets Act, which is an essential part of the superficies right under those laws is considered an object of the right.

These are very important provisions missing in state land relations of Mongolia, and it is why there is significant use of RCOOL in state land relations. In relation to "unfinished" property in Mongolia, both purchasers and investors confront serious legal issues because the unfinished buildings are allowed to be registered as separate immovable apart from the land possession right.

Under the State Asset Act of Estonia, state owned immovable property may also be encumbered with superficies interest for the purpose of developing the business environment and for permitting significant investments in the development of the Estonian economy. Exceptions to the application of the State Assets act, immovable property stands for any land unit which is owned by the state and which has not been registered as an immovable property, and to any construction work or any legal or physical share in a construction work, until the land supporting the construction work and the land required to service the construction work is registered in the Land register, as well as to any ship which belongs to the state. Thus, the superficies interest created in accordance with State Assets Act may encumber broader objects than superficies in the Property Act of Estonia.

State owned immovable property that is suitable for developing the business environment is called "business environment immovable property" in the State Assets Act of Estonia. An applicant who desires to have state owned land as a superficies right must recorded the right in the Estonian commercial register or the register of non-profit organizations and foundations.[368] The superficiery can also be a local authority. The most important justification to be granted this right is that the investment made by local authority or undertaking must generate economic value added, facilitate regional and socio-economic development and promote environmental soundness.[369]

[368] Section 74, 74^{2}(1).1), State Assets Act of the Republic of Estonia (2015), available at: https://www.riigiteataja.ee/en/compare_original/526012015001. (last accessed in November 2020)
[369] *Ibid,* section 74^{1} (1).

When immovable property is encumbered with a superficies interest through discretionary procedure, the term of the superficies interest for the designated purpose of the immovable property set out in the agreement must be at least 10 years from when the superficies interest is entered in the land register.[370] These provisions encourage investment in the Estonian economy, and the idea could be used within the broader concepts of the Mongolian municipal land use system. Although it is constitutionally certain that a local authority does have land ownership rights in performing its functions, the type of property rights of local authority from private and public law perspective remains unclear through today. Since it is unconstitutional to transfer land to municipal ownership in Mongolia, it is inarguable that a municipal right to land should be clear. Therefore, transferring land to other types of *in rem* rights of municipal authority such as superficies could be an alternative.

Real servitude (reaalservituut)

Servitudes in Estonian law are divided into real servitudes and personal servitudes.[371] In accordance with Article 172 of the Property Act a real servitude encumbers a servient immovable property for the benefit of dominant immovable property such that the actual owner of the dominant immovable property is entitled to use the servient immovable property in a particular manner or that the actual owner of the servient immovable property is required to refrain to a particular extent from the exercise of the owner's right of ownership for the benefit of the dominant immovable property. In other words, real servitude exists between a servient and dominant immovable property.

A real servitude may be created on an immovable property encumbered with superficies or usufruct only with the consent of superficiary or usufructuary.[372] Consequently, Estonian law recognizes a broader concept of the servitude. To clarify, necessity nature of the servitude is not an

[370] *Ibid,* section 74^5 (2).
[371] Section 172 and 201. Law of Property Act of the Republic of Estonia.
[372] *Ibid,* section 173 (4).

essential requirement for the creation of a real servitude in the Estonian context. The law on Property Act of Estonia developed the concept of "restriction," which is one of the rationales to limit ownership rights, instead of requiring the pre-condition of necessity of an owner of immovable property in order to be dominant. Under the concept of "restriction" in the Law of Property Act of Estonia, a restriction on owner's right through whose immovable property a public road passes or a restriction on another immovable property owner's right because of need to access to a public road or to separate part of the immovable property or, a restriction on owner's right on or in or above whose immovable utility networks and utility works are built that is necessary for the other immovable properties are identified.[373]

Another important notion in Estonian law is that a real servitude cannot be established without a consent of a superficiary and an usufructuary if an immovable property encumbered with the rights of superficies and usufruct in accordance with Article 173 (4) of the Property Law. On the other hand, it seems like a superficiary may create a real servitude as a dominant immovable in accordance Article 241 (4) of the Property Law of Estonia.[374] Dependency of owner's dominance under a real servitude from the a superficiary or a usufructuary's consent of Estonian property law may be justifiable because it does not require necessity pre-condition. In contrast, although Mongolian servitude requires existence of necessity feature of a dominant immovable, the issue is that whether a real servitude right of an owner of dominant immovable is also applicable to the superficiary is not clear. Moreover, in case of state land, how servitude applies to possession and use right's circumstances is one of the major flaws of the Land Law of Mongolia.

Consequently, Mongolian concept of servitude in the Civil Code has a similar feature with the concept of "restriction" in Estonian property law because of a requirement of necessity. In Estonia, establishment of a real servitude is more flexible in two ways by not requiring to present

[373] *Ibid,* section 155 (1), 156 (1), 157 (1).

[374] Article 241 (4) of the Property Law of Estonia provides that: The provisions concerning immovables apply to a right of superficies unless otherwise provided by law.

necessity pre-condition, and to be an owner of the relevant immovables. This is a basic difference between same concepts in jurisdictions of property law of Estonia and Mongolia.

Personal servitude: Usurfruct (kasutusvaldus)

Personal servitudes are divided into the usufruct and the personal right to use. A usufruct entitles a person to use an immovable property and acquire the fruits thereof.[375] Before 2003, establishment of a usufruct used to be allowed for movable property and rights.[376] Similar to Mongolia the duration of usufruct is limited by the lifetime of a natural person or the term of 100 years for legal persons.[377] Due to these features, the establishment of usufruct is a common substitute for right to privatize land in Estonia. For state land, natural persons and Estonian legal persons under private law are entitled to establish of a usufruct on land, especially in agriculture areas.[378] Usufruct in the Property Law of Estonia is not transferable.[379] However, the rights and obligations arising from a usufruct may be exercised by another person unless otherwise provided by law or the transaction which is the basis for the creation of the usufruct.[380] In contrast, under Mongolian usufruct, an usufructuary has a right to pledge and lease an usufruct item and to transfer usufruct with a consent of an owner. This makes usufruct under Mongolian Civil Code is more flexible and similar with a personal right to use in Estonian law.

Usufruct is a primary right used in state-owned agricultural areas in Estonia, while in Mongolia, it is only possible in private property law, but no single case in practice until today. Whereas the Law of Property Act governs relations relating to immovable property in private ownership and provides basic principles of both state and private *in rem* rights, the Land Reform Act provides specific norms on state land relation.

---

375 *Ibid,* section 201.
376 Priidu Parna, 97.
377 Section 210 (1), 211 (2). Law of Property Act of the Republic of Estonia.
378 Section 21 (1^1), Land Reform Act of the Republic of Estonia.
379 Section 215. Law of Property Act of the Republic of Estonia.
380 *Ibid.*

Personal servitude: Personal right to use

A personal right of use encumbers an immovable property such that the person for whose benefit it is established is entitled to use the immovable property in a particular manner or to exercise with respect to the immovable property a particular right which in substance corresponds to a real servitude.[381] A personal right to use is transferable to another person with the consent of the owner of immovable property.[382] Although a personal right to use encumbers immovable property, objects of this restricted right can be a utility networks or construction. If a utility network or construction on immovable property is part of a personal right of use, the personal right of use can be transferred without the consent of the owner of immovable property. In the case of residential buildings, the personal right use is provided separately and by nature refers to a residential lease under property law. Even though object of this real right is a residential building, immovable on which the residential building is situated is deemed to be encumbered by this right.[383]

This is a real right which is not existed in Mongolian property law. However, usufruct in Mongolia has similar features of this right, such as transferring to other with consent of owner. Thus, Mongolian usufruct may delegate both of these rights, usufruct and a personal right of use in Estonia.

Real security right interests in Estonian property law

Real encumbrance (Realkoormatis)

An immovable property may be encumbered such that the actual owner of the immovable property must pay periodic payments in money or in kind to the person for whose benefit the real encumbrance is established, or perform particular acts.[384] According to the national classification

[381] Section 225, Law of Property Act of the Republic of Estonia.
[382] *Ibid,* section 226.
[383] *Ibid,* section 227.
[384] *Ibid,* section 229.

system it is a security right.[385] An owner of an encumbered immovable property is required to perform an activity. A real encumbrance is classified into two divisions: (1) a real encumbrance in public law, which is established pursuant to law for the benefit of the state, local government, or other legal person in public law, and (2) a real encumbrance in private law, which is established for the benefit of subjects in private law.[386] A real encumbrance is established on the basis of contract and the land register or it may result directly from law in the case of real encumbrances in public law.[387]

A real encumbrance may also be established for the benefit of the actual owner of another immovable property or for the benefit of a natural person.[388] If it is established for the benefit of the actual owner of an immovable property, the real encumbrance is not severed from the immovable property. The most common example of a real encumbrance established for the benefit of the actual owner of immovable property is a real encumbrance secured by the payment of superficies,[389] and if a superficies right is encumbered by a real encumbrance and the right of superficies is transferred, the real encumbrance must not be severed from the superficies right.[390] On the other hand, if a real encumbrance is established for the benefit of a natural person, it is not connected to the immovable property and the transferability of this type of encumbrance depends on the nature of the real encumbrance.[391] For example, if an individual obligation arising from the real encumbrance is not transferable, the real right cannot be transferred.

---

385 European Land Registry Association, Publication on Encumbrances of the Republic of Estonia, available at: https://www.elra.eu/contact-point-contribution/estonia/encumbrances-section-c-7/. (last accessed in November 2020.)
386 Section 230 (1), (2), Law on Property Act of the Republic of Estonia.
387 *Ibid,* section 231 (1), 51 (1), 62.
388 *Ibid*, section 229 (2)
389 Priidu Parna, 98.
390 Section 237 (2), Law on Property Act of the Republic of Estonia.
391 *Ibid,* section 237 (3).

Security right: Pledge

Similar to the Civil Code of Mongolia, in accordance with Estonian property law, the right of security is called a pledge generally and is categorized into two divisions: a security over movable property and a real security.[392] In Estonia securities over movable property are divided into possessory pledges, registered securities over movable properties, pledges on securities. This classification is clear from the structure of the Property Act. A registered security over movable property is drafted later in Estonian Property Act. Mongolia also identified registered securities over movable properties in separate code after 15 years the possessory pledge drafted in the Civil Code. Yet, the clear distinction between registered and possessory pledge was drafted into the Civil Code. In the Civil Code of Mongolia, terminations of a "possessory pledge" or a "registered pledge" are not used. Therefore, substantial errors in use provisions regarding one type of pledge to another type are frequent in Mongolia.

Real securities: Mortgage

An immovable may be encumbered with a mortgage such that the person for whose benefit the mortgage is established (mortgagee) has the right to satisfaction of a claim secured by the mortgage from the pledged immovable property.[393] Similar to a *hypothek* in Mongolia, by recommendations of foreign experts in favor of a real security as having capabilities in commerce, mortgages that do not presume the existence of a claim to be secured was accepted in the Civil Code of Mongolia.[394] This the nature of mortgages is similar in both property laws of Estonia and Mongolia.

In accordance with Article 87.1 of the Civil Code of Mongolia, a mortgage is the accessor right, however, because its formal establishment by an entry to immovable registration, there is a possibility to transfer the mortgage without actual creation of the claim that is secured by the

[392] *Ibid,* section 276 (2).
[393] *Ibid*, section 325 (1).
[394] *Ibid*, section 325 (4).

mortgage. For example, when bank B establishes mortgage over A's immovable prior to a loan actually transferred to him, bank B can transfer the mortgage to C and if C registered this mortgage in his name, his right is protected under the immovable registration. In this case, A who has not yet receive the loan from bank B is in risk to lose his immovable for the claim that has not created yet. Against this situation, there is a concept of "confirmed mortgage" is entered in the Civil Code of Mongolia, under which a mortgagee obliges to prove his claim and an entry in the registration is not sufficient *per se*. Within the scope of this study, the similar concept as "confirmed mortgage" of Mongolian property law is not identified in Estonian property law, however, it does not mean that proper protection is not provided. Detailed regulation on notation in land registry law of Estonia may serve to this duty.

There is also a judicial mortgage identified in Estonian property law. According to the Article 363 (1) of the Law of Property Act, to secure an action, a court may establish a mortgage to the extent of the claim of the action which shall be entered in the land register as a judicial mortgage. In contrast, general type of mortgage, a judicial mortgage secures a claim satisfied on basis of a court decision.

Pre-emption right in Estonian property law

Pursuant to Estonian property law, an immovable property may be encumbered with a right of pre-emption relating to real rights. The European picture of rights *in rem* to acquire real property, in particular pre-emption rights, is very diverse. Whereas in some countries, such as Holland, and Italy, such rights do not seem to exist and their function has to be performed by purely contractual arrangements, or exist only in limited form, usually granted by statute in certain situations (in favor of municipalities or tenants), or in countries like Spain, Sweden, and Scotland such rights exist by contract.[395] Conversely, in countries such as Germany, Portugal, and Hungary, far reaching and stable real preemption rights exist.[396] Estonia may be included in the latter group.

[395] Christoph U. Schmid and Christian Hertel, *supra* note 64, 18.
[396] *Ibid*.

Most of the privatized land in Estonia was privatized under the right of preemption between 1997 and 1999, and ownership acquired by preemption rights were brought about 26 percent of the private grounds registered in 2012 according to the data provided by the Statistics Department of the Republic of Estonia.[397] In Estonia, pre-emption rights *in rem* may be granted to an individual person or the owner of other land (usually neighboring land).[398] And if it is established for the benefit of the actual owner of an immovable property , it may not be severed from the immovable property, while a preemption right established for the benefit of particular person cannot be connected to any other immovable property and is not transferable or heritable.

In Mongolian private law, a pre-emption right is purely contractual. However, in accordance with the LTLOMC, the pre-emption right is recognized as one of methods to privatize land. Comparative study of property laws of some European countries, the pre-emption right is one of the optimal and common rights exercised by the public authorities in real property system. This might be good experience that should be considered carefully in development of property law of the country.

Conclusion Apart from its culture and tradition, Estonia has historical similarities with Mongolia from the political perspective. This particular comparison leads both countries to pass through identical events such as privatization of state property and public and private law reforms that follows the basic ownership reform during the transition towards market-economy. However, Estonia's transitional provisions for deploying the new system are elaborated and implemented under well recognition of the country's legal system from which it borrowed. In addition to this, the country's experience collected from private land ownership and a land reform in 1919 had contributed significantly to its successful transition to a market economy. The key performance that

[397] Saint-Petersburg State University et al., Land Use Policy and Land Management in Estonia, *Baltic Region* 9, no. 1 (March 29, 2017): 93, available at https://doi.org/10.5922/2079-8555-2017-1-8. (last accessed in November 2020)

[398] Section 256 (2) of Law of Property Act of Republic of Estonia provides that a right of pre-emption may be established for the benefit of a particular person or the actual owner of another immovable.

leads to today's achievement of the country was a property law reform that carried out prior to a revision of the entire Civil Code. With regards to real property system, the country almost mirrors the German real property law, however, its post socialist characteristic has similar impact on formulation of state land regulation with Mongolia. Bearing in mind that balancing between public and private interest, creation of uniform regulation of state and private land relations in principle does not result in real property system as it is in Mongolia.

Important conclusion of unified rules for state and private property relations that found in result of the comparative analysis made in German and Japanese real property law also recognized in Estonian real property law. Among these three jurisdictions, no countries created entirely different rules for the state land circulation like Mongolia. This may be because of unified nature of land, fundamental importance for encouraging certainty of property right protection.

Chapter VII. Consequences of the Parallel System for Land Use in Mongolia

7.1. Introduction

After seventy years of efforts to build a socialist system based on the people's or cooperative property, Mongolia transferred to a market economy and has been struggling to develop a system grounded on private property for over thirty years. Nevertheless, it is difficult to say that the overall economic conditions of Mongolia have been progressing well.

The country's total external dept has jumped by approximately $4 billion since 2016, reaching $30.7 billion in 2021 and it currently amounts to 220 per cent of GDP.[399] This is an extremely high number according to experts in the field. On average, almost a third of the population lives in poverty, while in some regions approximately half of the population lives below the poverty line.[400] With two-thirds of the total population of Mongolia living in urban cities, poverty has become concentrated in urban areas. The percentage of the poor population in urban areas has increased from 62.1 percent in 2016 to 63.5 percent in 2018, and more than 40 percent of the poor lived in Ulaanbaatar in 2018.[401] The concentration of poverty is growing in urban areas.

In 2020, a total of 222,014 houses and gers, and condominium type buildings that were only 4946, were counted in Ulaanbaatar.[402] All these houses and gers naturally require a certain size of plot of land underneath them in order to be used. As has been mentioned several times in this study 99.94 per cent of the total land of Mongolia belongs to the state. According to the past

---

399 United Nations, Juan Pablo Bohoslavsky, Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, on His Visit to Mongolia, n.d., 7, available at: https://www.undocs.org/A/HRC/43/45/Add.2. (accessed February 2021)

400 World bank, Mongolia's 2018 Poverty Rate Estimated at 28.4 percent, accessed March 22, 2021, available at: https://www.worldbank.org/en/news/press-release/2019/06/21/mongolias-2018-poverty-rate-estimated-at-284-percent.

401 Mongolia's 2018 Poverty Rate Estimated at 28.4 percent.

402 National Statistics Committee, "Summary of the Aggregate Annual Estimation of Population and Dwellings in Capital City of 2020. Үндэсний Статистикийн Хороо, Хүн Ам, Орон Сууцны 2020 Оны Улсын Ээлжит Тооллогын Нийслэлийн Нэгдсэн Дүн.," n.d., 18, available at. https://www.1212.mn/BookLibraryDownload.ashx?url=1.Summary%20report_Ulaanbaatar.pdf&ln=Mn ,(accessed February 2021), .

several years of annual reports by the Judicial Counsel of Mongolia, cases between the holders of state land use right or long term right to possess and the state authority at the administrative court has had one of the highest numbers of disputes. Land cases in which an administrative body is not a defendant are subject to the jurisdiction of the civil court. In accordance with the judicial annual reports, loan related cases are the top number of cases that are resolved by the civil court and behind almost every loan case is a mortgage dispute. Lately, immovable property issues are becoming more complicated due to Mongolia's parallel system for land use. Without further development of legal norms on the choice between of concepts of unified or separate ownership of the land and building, proper recovery from infringements of property rights' is barely possible.

It is common, for land-related disputes to be solved at the administrative stage before they are brought to the court and the procedural norms require a compulsory non-judicial process at the early stage of the dispute. One of the most regrettable indicators demonstrating the issues with the current situation in Mongolia is that land administrative authorities at all levels have been named as one of the most corrupt institutions in Mongolia according to the "Assessment of Fairness" carried out over five years by independent experts and the Anti-Corruption Agency of Mongolia.[403] Although cases are brought to court the judicial experience does not suggest a fundamental solution. For example, a ruling on the case of *Sarantsetseg vs Amarbat* where the valid land certificate holder's right was protected against a building owner and the actual fact of building owner's possession remained in a vulnerable position, is the typical outcome for this type of dispute.

This research suggests looking at the problems through the application of unified property law principles and aims to understand the reasons and consequences of the parallel system for land use in Mongolia. As is evidenced in the thesis, it is unclear whether the basic principles of absolute effect, publicity, priority, and principles of separation and abstraction that are core aspects in

[403] Independent Authority Against Corruption of Mongolia, "Assessment of Fairness-2018, p.18, n.d., Авилгатай Тэмцэх Газар, Шударга Байдлын Үнэлгээ-2018.," n.d., (last accessed in February 2021), https://www.iaac.mn/news/shudarga-baidliin-unelgee-2sh18-sudalgaanii-tailan?menu=181.

Germanic law property systems apply to the property law of Mongolia. This uncertainty has produced the following deficiencies in the real property market of the country:

1. Unclear information asymmetry regarding land transactions.
2. Weak protection of real property rights.
3. Emergence of multiple *in rem* rights regarding single plots of land and their attachments.

7.2. Nonfunctional approach to the state and private land relation of Mongolia

Defects in the parallel system for land use of Mongolia have materialized in different shapes, and the stakeholders in this market have been seeking their own ways to solve the problems. But a solution at the fundamental level requires legal and institutional reform. Although the problems of the parallel system that inconsistent with each other have been sketched in different ways in previous chapters of this research, it may be useful to summarize the core problems here once again to draw a general framework for the needed legal reforms:

Nonfunctional restriction on the marketability of the real property right –There is a view that is an owning land is not as efficient as holding a long term right to possess a plot of land. Mongolians are not commonly motivated by the free ownership offered under the LTLOMC[404] Survey shows that 9.9 percent out of the total respondents believed that a private ownership right is not as beneficial as a long term right to possess. (appendix C). Therefore, requests to convert an ownership right over a plot of land into a long term right to possess land are frequent. The reason behind this unusual phenomenon may be that non-functional approach to restrictions on private land ownership such as "purpose" or "need" that forcefully substitute for the zoning functions in land management.

According to the LTLOMC, if a citizen of Mongolia owns a plot of land for free, he or she is allowed to have his *ger* or a house on it only for household need. Even if the plot of land is located in a residential or industrial zone, because the purpose of "family or household need", the

[404] The Law on to Transfer Land Ownership to Mongolian Citizens (2002)

ways of developing the plot of land are restricted. If it was a long term right to possess land, instead of an ownership right, a holder would have more options to generate profit from the land right. For instance, he or she could sell it or use it as an investment for a company, or constructions. Along with the development of real property rights diversification, if restrictions on real property right were established in connection with building or planning laws like in other jurisdictions, the nonfunctional, subjective restrictions would cease to limit the marketability of property rights.

Limited number of types of real property rights. Actually, land is used by two types of rights: (1) a long-term right to possess land and (2) a use right. A long term right to possess land and a land use right are both available for the purpose to erect any type of buildings, facilities, or structures, they are even granted for the purpose of husbandry, cultivation, and mining. Indeed, minor features distinguish the two rights from each other are: (1) legal status of holder (whether a holder is foreign person or not), and; (2) legal status of land (whether a plot of land is located on a special protected area or not). These are constitutional justifications, but functional approach is ignored for creating these two types of rights. Development of a urban area requires substantive investment. Therefore, variation in types of real property rights is required that meets for various needs of national or foreign investors. A property right created on the basis of political rationales rather than on the economic functions are not adequate to promote the country's economic development.

Weak protection for real property right because of uncertain legal nature. It is a reason for land developers seek safeguards from community conduct, not from legal norms. Ambiguity in legal nature of common land rights follows by unintentional or intentional illegal behaviors, that later leads the right holders to seek protection from society, not from the rule of law. The companies who granted a use right on state land for five years of term for a purpose to develop long term project such as building apartments or community facilities end up not being able to extend the term of the land right and it is common to seek protection from community that already involved in the project. In the interest of the hundreds of purchasers who already paid for the apartments not

knowing about the land use purpose or five years of term, the administrative authority is now under the social pressure. In recent years, in order to safeguard their immense investment to the land, land developers have frequently exploited community power as a way to protect their land rights. If there is unified approach to create property rights with regards state land, legal protection for state land right would be certain and this type behaviors would be prevented.

Parallel registration systems- As it has been noted before, there are two main types of registration systems for land relations in Mongolia: (1) recording of land certificates, (2) registration of immovable property.

Recording of land certificates – This system works with similar techniques to deed registration in common law systems. But difference is that recording has no function to facilitate the business operation, while a deed registration in common law countries is used for third party needs. A main objective land certificate recording system of Mongolia seems to use data for internal administrative purpose. Decisions by the authority to grant a land right is not effective until the actual certificate is issued and recorded in the system. Contract to use state land under a use or long term right to possess state land are less important because it concludes after the issuances of the certificate. The system is not transparent, and the legal effect as to third parties is not clear. The system was created by the Land Law and explicitly prescribes that an item of a mortgage is the certificate, and not the right itself. However, the information on the mortgaged certificate is not available to third parties. Even defining the moment of creation of a mortgage is not clear in the law.

Registration of immovable property rights – Because the principle of this system follows the Civil Code, legal effects and consequences are clear. Initially, it used to cover only private land ownership, building or apartment ownership right and mortgage created on them. After the registration reform in 2018, a use right, and long term right to possess state land is started to registered through intermediary fund. It was one of efforts to unify the systems. However, the basic registration law remains untouched and following main deficiency with regards to state land

registration 1) inconsistency with *superficies solo cedit rule*, 2) land right creation on the ground of certificate issuance, 3) unclear legal effects to third party, 4) uncertainty of consequences of other real property rights that created on the land right such as mortgage or servitude; are still existing theoretically.

Therefore, steps towards to unify these systems is technical and cannot address the underlying principles. For example, a fundamental decision on whether to follow the rule *superficies solo cedit* (make a choice between divided and unified conveyancing in real property transaction), endeavors to harmonize the systems might be waste of effort. Alongside notaries, a land registry is the most important institution in the countries with civil law, in which the principles of legal certainty and publicity are often credited to land right registration.

Conflicts between multiple in rem rights established on the same plot of land. Theoretically and practically, there is possibility to create at least three *in-rem* rights on the same plot of land: In case of state land relation, (1) state land ownership right, (2) long term right to possess, and 3) a hypothec; In case of private land, (1) land ownership right, (2) building ownership right (3) hypothec of a land ownership right, (4) hypothec of a building ownership right. If there is a building erected on a plot of state land, the potential number of *in rem* rights may be more than three. Because most of the land is state owned, ownership rights of land are not encumbranced by hypothecs, however, the building ownership which registered separately from the long term right to possess the state land is frequently mortgaged separate from the land right. In addition, because of the limited knowledge of property law, private land owners do not establish other limited rights over the land than mortgage, although it is theoretically possible under the Civil Code.

Although specific statistics are not available, the interview (appendix E) with the officials at the Government agency of immovable property right registration revealed that approximately 100,400 plots of land in private ownership, attachments to which are separately registered from the land ownership as an immovable property are registered. According to the Report of the Unified

Land Fund of 2018, 88,911 plots of land under private ownership is encumbranced by hypothecs.[405] The same story can be told for long term right to possess the state. Compared to private ownership, relatively few plots of land under long term right to possess are encumbranced by hypothecs, numbering just 11621.[406] Out of the total number of plots of land under private ownership rights and long term right to possess land that are encumbranced by hypothecs, 34 per cent are plots of land, to which buildings are attached as separate immovable property.[407] In practice, it is common to create and to enter into commerce at least two *in-rem* rights on the same plot of land and another two *in rem* rights regarding to same building existing on that land, overall four *in-rem* rights with regards to one plot of land.

7.3. Alternatives, Challenges, and the Way Forward

Before discuss about what is next, we need to look once again at the questions posed in the introduction: Is a creation of parallel system in land relation of Mongolia consequential? Is it effective to have the unified concept of immovable property relation in Mongolia? Can the property transaction rule of *superficies solo cedit* provided by the Civil Code be applicable to private and state land relation?

The Civil Code recognizes certain principles in real rights and formalism in transferring property. However, an application of the Civil Code is limited to only private ownership of land. On the other hand, the Land Law which governs state ownership of land, has been seriously lacking in a theoretical approach and has formed structures that do not work alongside the principles and institutions established by the Civil Code and other property law acts. Even the most fundamental principles in the law of property, such as *numerus clausus* or the manner of acquiring property,

[405] Government Agency for Land Administration and Management, Geodesy, Cartography, "Unified Annual Report on Land Fund 2018, Газрын нэгдмэл сангийн тайлан 2018 он" (Ulaanbaatar, 2019), 46, https://www.gazar.gov.mn/report/gnst/gazryn-negdmel-sangijn-tajlan-2018-on.
[406] *Ibid.*
[407] *Ibid,* 47.

differ between countries. Indeed, some elements of these different systems that cannot logically exist simultaneously have appeared in the single jurisdiction of Mongolia.

The evidence shows that there are certain problems caused by the conflicts between these two systems that are created by the Civil Code and the Land Law with regards to respectively private and state land and answers to the first two questions are provided to some extent in previous sections of this work as firm steps towards creation of single or unified property system supported by creation of uniform type of property rights, unified protection actions and unified understanding of basic categories of property law are required to land relation in Mongolia regardless of the ownership type.

The third question requires development of an idealistic, and at the same time pragmatic approach in order to be answered because it connects to a narrower issue inside private property law. In other words, besides lack of unified property system Mongolian private property law suffers from serious practice that is inconsistent to basic rule of the real property transaction provided in substantial law (the Civil Code). The immovable property right registration system established the practice to register attachments to the private land separately from the ownership right or attachments to long term right to possess state land or the use right of state land separately from the respective land rights, to which no laws provided answer. As this study noted before, the sequence of general privatization also contributed significantly to establish this divided conveyancing practice of immovable property transaction. It is now time to make a policy choice of principles and approach to ownership conveyancing in real property transaction of Mongolia.

Should Mongolia choose to follow the unified conveyancing of ownership in land or stay on a path of the divided conveyancing the immovable property right registration has already created? Reaching such a fundamental decision in light of the concepts of immovable property transfer is a priority on the country's "to do list". Afterwards, the principles of an immovable property registry, the doctrines of acquiring a property, creation of appropriate types of property

rights, and the fashioning of institutions to support the system will be next in list of items needing consideration.

7.3.1. Challenges of Approach to Unified Conveyancing

Justifications

The rationales or the advantages and disadvantages of each approach should be considered. What are the justifications to vote for approach to unified conveyancing of land ownership and to apply the Civil Code principles to the ownership of state land? They could be as follows:

Firstly, unified conveyancing in land ownership is more natural than separate ownership. The *superficies solo cedit* principle is not just a theory it is well-suited to human life bound to the land. It may not, however, be as important as it is in urban lifestyle to a nomadic culture. With only a hundred years of urban history and a solid culture of interacting with the land as nomads, Mongolia suffers from a lack of experience in using land as a commercial product. Although its nomadic culture is the identity of Mongols in the modern world, urbanization is currently prevailed and unavoidable to become a dominant living way in the future.[408]

Second, theoretically, land leases (*in rem* right) such as superficies, *Erbbaurecht*, or RCOOLs are considered as exceptions to unified conveyancing. Nevertheless, these rights demonstrate unified conveyancing as well by virtue of the buildings and constructions being erected on the basis of them not being considered as separate immovables properties, but rather they are essential parts of these rights. The fact that the facilities constructed in compliance with land use

[408] At present, 47 percent of the total population has settled in the capital city of Mongolia, up from only 26.8 percent of the population living there in 1989. In accordance with a report conducted by the National Statistical Committee, 126,143 people immigrated to Ulaanbaatar between 2010-2016, and the city's population reached 1,463,000. One third of the population of the ger district in Ulaanbaatar moved from countryside into the city, and they named seeking permission to locate a plot of land to have ger for residential purpose as one of the five most problematic issues facing them. Therefore, it is common for people to settle in places without permission that are not appropriate for living due to the risk of flood and other natural disasters. For further detail: International Organization for Immigration: Urban Migrant Vulnerability Assessment (Mongolian) - | Librería En Línea de La OIM," (last accessed March 28, 2021), available at https://publications.iom.int/es/books/hotod-shilzhin-iregsdiyn-emzeg-baydlyn-sudalgaa.

are inseparable from restricted or full *in rem* rights simplifies the transactions and function as an information stream in commerce.

Thirdly, this option will eliminate the unreasonable multiplicity of *in-rem* rights created on a single plot of land. There would be no problematic issue caused by the overlapping *in rem* rights. Fourthly, Mongolia does not have the same reasons as Japan to encourage separate ownership of land and building for tax purposes, and historical custom. Property tax (including movable and immovable properties) in Mongolia accounts for 1.8 per cent of the total tax revenue in 2020, and it is 12 per cent of the tax revenue of local governments in 2019.[409] By 2018, immovable property taxes have brought in revenue of over 101 billion tugriks, and it was the 1.2 percent of the total tax revenue in the country's budget.[410]

According to the Law on Immovable Property Tax, the following immovable properties are exempt from the tax: (1) apartments located in condominiums, (2) buildings and other constructions under state and municipal ownership legal entities in both private and public law, (3) buildings and other construction in public possession, and (4) buildings and other constructions in free zones. In addition to these exemptions, homes on privately owned land and land under a long term right to possess land for family purposes are not subject to the property tax. Private land holders are subject to the tax, but depending on the location and purpose, they are possible to be exempted from the tax between 30 to 98 percent as well. A long term right to possess land and use right holders are not subject to property tax but do have a duty to pay a fee under respective land contracts. According to national statistical data, the total amount of land fees accounted for 8.6

[409] National Statistical Committee, "Report on Income of Unified Budget of Mongolia, Үндэсний Статистикийн Хороо, Монгол Улсын Нэгдсэн Төсвийн Орлого," 409, accessed March 28, 2021, https://www.1212.mn/tables.aspx?tbl_id=dt_nso_0800_002v1&13999001_select_all=0&13999001singleselect=&tt1_select_all=0&tt1singleselect=_1020101_102010103&yearm_select_all=0&yearmsingleselect=_202011_202010_202009_202008_202007_202006_202005_202004_202003_202002_202001_202012&viewtype=table.

[410] National Statistical Committee, "General Report on Budget 2018, Үндэсний Статистикийн Хороо, 2018 Оны Төсвийн Тайлан.," accessed March 28, 2021, https://1212.mn/Stat.aspx?LIST_ID=976_L08.

percent of local government revenues in 2019.[411] These numbers prove that the transition from uncertainty to certainty, following unified conveyancing, does not have a severe effect on tax revenue and there could be several revenue alternatives such as developing the concept of building taxes, or increasing land fees for *in rem* rights in order to substitute for the revenue that lost because of this fundamental decision.

Fifth, it is not too late to look beyond the legal choices made in the 1990's and 2002. Land reform strategies should be an integral part of a tailor-made process of ownership reform; however, there has been uncertainty regarding what achievements to aim for and in the policies of the land reform. Nevertheless, the slow-moving land reform procedure could be considered an advantage as it indicates that there are a reduced number of ownership separations in reality that could be reflected during the transition. Finally, as was mentioned before, Mongolia selected the legal family that follows the *superficies solo cedit* principle in early 2000.

Drawbacks

The disadvantages of approach to the unified conveyancing seem more practical than theoretical. The largest potential challenge to the reform might be public objections. Although relevant statistics are not available, an interview with a senior official of the registry office revealed that there are over 100,400 plots of land in private ownership on which two or more *in rem* rights (an ownership right to plot of land, an ownership right to the house on the land, and in some cases also an ownership right to a garage or other similar building) created apart from the ownership right. (Appendix E). As it is noted before, 63 percent of the plots of the land (under private ownership and long term right to possess land) that are subject to hypothecs have on them buildings and other structures that are registered as separate immovable property.[412]

---

[411] National Statistical Committee, "Report on Income of Local Budget, Үндэсний Статистикийн Хороо, Орон Нутгийн Төсвийн Орлого.," accessed March 30, 2021, https://www.1212.mn/tables.aspx?tbl_id=dt_nso_0800_004v1&class3_select_all=0&class3singleselect=_10101_1010102_101010404&yeary_select_all=0&yearysingleselect=_2019&viewtype=table.

[412] Government Agency for Land Administration and Management, Geodesy, Cartography, *supra* note 432, 44.

Based on these statistics, reform that adopts unified conveyancing could be confronted by strong objections from the public and business, both of whom do not want to lose their immovable property on the one hand, and on other hand also desire to keep hypothecs which were already created over the buildings and structures apart from the land rights. If the owner and the holder of respective *in rem* rights are the same person, there will be less distress than situations where the holders of the rights are different people. However, in both cases a mechanism forcing the downgrade of *in rem* full rights to *in rem* limited right is unconstitutional. Therefore, measures that are voluntary or motivated by just compensation or self-interest would be preferable.

Second, following the above assumption, the next difficulty facing a change to unified conveyance is the financial burden that will fall on the government. However, it is not necessary that compensation is in monetary in nature. Money could be replaced with sound promises from the government using economic motivations.

7.3.2. Challenges of an Approach to Divided Conveyancing

Justifications

Under the choice of approach to divided conveyancing, the current practice will remain untouched, and thus negotiations with building owners is not required and certain efforts and expenses can be avoided. This might be considered an advantage of this option. Although the option is less functional in practice, it can be corrected. Mongolia may learn from the experiences of countries with divided conveyancing in their real property law like Japan and other similar jurisdiction such as Korea, Russian, and some Post-socialist Eastern European countries. Common conflicts derived from multiple *in rem* rights could be managed in a way similar to how they are treated in the Japanese Civil Code.

The Civil Code of Mongolia may borrow a concept of statutory superficies in Article 388, and forced sale mechanism in Article 389 of the Japanese Civil Code (JCC) as a solution for conflicts between right holders. However, as studied in comparison part of this research other institutions such as private land ownership, possessory interdicts and petitory actions, land

registration, and other real property environment (broad concepts of land and building leases, and detailed regulations for mortgages) and traditions of Japan are different from Mongolia.

As far as this author understands that it is common case of being owners of land and a building are same person in Japan. Therefore, the "OO" (land ownership + building ownership) formulation[413] is common, whereas in Mongolia, a long term right to possess land is subject to hypothecs separate from building ownership, and therefore, the formula of "OPO" (state land ownership + long term right to possess + building ownership) is prevailed. In the case of private ownership, the creation of a long term right to possess on private land is limited under the *numerus clausus* doctrine. For private land, the theoretically rights formula may change into "ORcoolO" (private ownership to land + right to construct on others land + building ownership).[414] "OPO" formula, which is only possible for state owned land, may not be as bad as it looks because state ownership rights are not likely to be encumbranced by hypothecs. Therefore, the real problem may raise from either the "PO" formula (long term right to possess land + ownership of building) on state land or the "ORcoolO" formula on private land. Under divided conveyancing it is potential to emerge various types of formulas in respect to each real right and each formula will generate different pattern that requires special regulation. On the other hand, if it is a unified conveyancing, formulas would be much simpler to understand, for example, in the case of private ownership land, a formula would be only the "O+RCOOL".

Another impediment adopting the Japanese approach lies in difference between registration systems of two countries. Even under Japanese divided ownership there is only one unified immovable property registration existed, whereas Mongolia has two fundamental systems treated

[413] In accordance with Article 389 (1) of the JCC, building ownership can be created separately from land ownership.

[414] The right to construct on others' land (RCOOL) has never actually been registered or created so far. According to Article 150.5 of the Civil Code, any objects of an RCOOL are an essential part of the right. Therefore, building and construction erected on the basis of this right should not be considered as immovable property separate from the right. However, simultaneously, a possession right on state land is separable from the buildings erected on it and this is common in Mongolia. Therefore, it is hard to believe that once the RCOOL is in commerce, it can be exercised in line with its original idea in the Civil Code.

to the immovable property. Thus, under a divided conveyancing system, the real property system of Mongolia is still in need of collaboration between registries. Therefore, the Japanese treatment to separate ownership may not be the good answer to issues in the real property law of Mongolia and this alternative is not free from certain complications.

Drawbacks

At the outset, if we follow the divided conveyancing approach, the fundamental principles of property law in the Civil Code need to be reviewed and reformed. Although divided conveyancing may apply to state land transfers, the state is involved as an owner only in the first layer of land relations, the next layers of land rights (long term rights to possess, use rights and hypothecs), should be treated and protected by private property law. Consequently, it is impossible to imagine retaining the dual standards for real property relation contrasted to each other in one jurisdiction.

Moreover, the effects of divided conveyancing in the real property law of Japan are usually handled with through the means of judicial discretion. In other words, crucial contractual elements such as time period, and the amount of rent that are subject to negotiation between a landowner and a building owner end up with judicial intervention pursuant to the Japanese Civil Code. It is a questionable solution for Mongolia because of its forceful nature of interference in private relations and degree of training and experience in property law area of judicial professionals.

Additionally, there is criticism towards land leases in Japan, in that they are is a source of dissatisfaction among land owners for the exceedingly protective mechanisms for tenants. Masao Osawa, who encouraged the importance of a conceptual transition from land as investment to land for effective and appropriate use, suggested ways to accomplish the transition including a new system of leaseholds.[415] He envisions a new system that can be implemented on an experimental basis, and the revision of real estate taxes in order to ensure the gradual increase in rents is one of

[415] Masao Osawa, Japanese Consciousness of Land Ownership: A Questionnaire and Comments, *Law in Japan* 20 (1987): 147.

the main measures. Such experience in Japan demonstrates that the idea of absolute ownership requires absolute protection, and as a result, there are competitions between holders of absolute rights. Therefore, what is waiting for Mongolia in the destiny to follow divided conveyancing approach is too unpredictable.

Finally, regardless of the reform of real property transfers, the harmonization of the separate systems of registries is unavoidable. Even under divided conveyancing, the current mechanism for recording certificates of long term right to possess or use rights does not work with the principles of the building or the land ownership registration system. At a minimum, the principles of both registry systems should be made uniform. Bringing together the systems of registration along with the acceptance of divided conveyancing would be more inflexible than changing to unified conveyancing.

7.4. Suggested Solutions

Unified conveyancing is a functional and natural approach to real property transfers, while divided conveyancing lacks philosophical justification and is a more problematic choice. The extreme differences in the existing models of real property law in Mongolia make these two systems not viable. The coexistence of divided conveyancing in reality and the theoretical promotion of unified conveyancing is clearly not a consequential choice.

Emergence of the building ownership separate from plots of land in Mongolia was not affected by factors similar to those which contributed to adoption of divided conveyancing in the Civil Code of Japan: the demand for revenue at local government level; and the existence of a limited model for divided conveyancing in the Tokyo area. On the contrary, a preexisting custom of treating land as rooted in the state, and a lack of experience with owning land privately has had the effect of the idea of buildings as an immovable property entering Mongolians' consciousness prior to the concept of land rights. In addition to this, two other factors also appear to have contributed to generating the current model: (1) the privatization that followed the democratic revolution started with factory buildings, construction in 1994, while the allocation of land into

private ownership commenced in 2005 and (2) the introduction of immovable property registration in 1997 through registering buildings for the first time as immovable properties separate from the land rights underneath.

From both historical and legal point of view, the concept of land ownership was a considerably new to Mongolians in the 1990s, when compared to Estonia, a former socialist country, and Japan, a country with a system of divided conveyancing model of real property. However, the responses to the questionnaire suggest that Mongolians' attitudes towards land and awareness of land ownership have evolved slightly. When the new constitution was adopted, the issue of private land ownership was one of the hottest topics, and as a result of extensive debates for 50 days, private land ownership was declared first time in Mongolian history by the *Ulsiin Baga Khural.*[416] The Constitution of 1992 provided solid conditions limiting foreigners and all types of legal person's ownership and prohibition to own land for pasture, public use and for special needs of the state. As for the question on the legal conception of land ownership in the questionnaire (Appendix C), the understanding of land ownership as an "absolute right entitling landowners to use freely, take profits from and dispose of their land" was supported by the highest percentage of respondents, at 65.2 percent. This can be understood as a manifestation of the natural change in people's minds caused by 30 years of building a market economy. On the other hand, however, 27.1 percent of the respondents understood the right of land ownership as a "relative right subject to restrictions". But certain restrictions are eternal and considered proper for humans' relationship to the land because of the land's communal characteristics and necessary basis for human survival.

Another interesting common mindset of Mongolians towards land revealed by the survey is that regarding the direction of land use reform, the least popular answer was that the present system is acceptable (8.85 percent), while 53.44 percent of the respondents felt that the system should be reformed. Following that question, the participants in the survey were almost equally

[416] Before the adoption of the new constitution, the *Ulsiin Baga Khural,* composed of a delegation of all people, was the supreme body with legislative power of the Republic of Mongolia.

divided in supporting and not supporting the idea of unified conveyancing. On the other hand, at 44.9 percent of the respondents accepted the answer of "building ownership needs to follow the land because of its inseparable nature", while on the other 36.6 percent desired to keep the separation of the ownership of building and land due to not being willing to reduce the number of immovable properties they own. Hence, the idea of changing to unified conveyancing system may be confronted with public protest. However, if a reform is conducted correctly and respecting of constitutional rights, the objections should be controllable with sound measures.

As a result of careful analysis of the applications of each of the two real property ownership transfer models, the system based on the unified conveyancing might be an effective and important solution for Mongolia in the long run. Nevertheless, every practical aspect of reform and that impacts land value and taxes should be considered from the view of law and economy. Some examples will be addressed in the next section.

7.4.1. Exploration of Some Practical Difficulties

In reality, there are two main models of land use depending on the ownership type of the plot of land in Mongolia: (1) the model created for the private ownership of land, and (2) the model created for the state ownership of land. Each model may have several subtypes.

Table 8. Subtypes of Models Created for Private Ownership of Land [417]

№	Owners / properties	Plot of Land called Hunnu	Building on the Plot of Land called Hunnu
1.	Same owner	Bat	Bat
2.	Different owners	Bat	Dorj

In the case of the first subtype, probability of declining the system of unified conveyancing may be low because the owner of the two properties is the same person (Bat) and the value of the building can be added to the value of the land (Hunnu). However, a real problem will arise if one of the two properties is encumbranced by a hypothec, and that is likely according to current

[417] The idea of the practical examples offered here originated from the examples using abstract names of Tanaka, Block House and Flat Acre given in the article "Building Ownership in Modern Japanese Law" by professor Frank Bennett in 2000.

statistics. Therefore, the transition between the systems concerning real property transfers is not subject to the sole discretion of Bat; a bank that may have a secured right over Hunnu or the building on it definitely requires a right to vote for a solution to the unified conveyancing approach. Nevertheless, this is manageable under the priority rules of secured rights according to chronological order if there are separate hypothecs created on each property. Even though the owner of the properties is the same person, these measures should not be obligatory and the new mechanism can be delayed from applying until the building is demolished.

In case of the second subtype, in which the plot of land Hunnu is under Bat's ownership, while the building on Hunnu belongs to Dorj, Dorj's ownership right to a building needs to be converted into a limited right of RCOOL. It might be more complicated than the case in which the properties belong to the same person, as in former case a full right remains as a full right, while in the latter the full *in rem* right is required to convert into a limited *in rem* right. In this case, compensation could be offered by the government and serve to satisfy the difference between the theoretical qualities of these two *in rem* rights. In fact, compared to a full ownership right without a right to access the land underneath, a limited *in rem* right providing with full and legal access to land may be economically more efficient. Moreover, the fact of the possibility of security rights over each ownership right should be addressed.

Table 9. Subtypes of Model Created for State Ownership of Land

a. Long Term Right to Possess /LTRP/

	Owner / property	Land	LTRP	Building
1.	Same owner	State	State	State
2.	Different owners	State	Bat	Bat
3.	Different owners	State	Bat	Dorj

Suppose that Bat has a long term right to possess over the plot of land Hunnu, on which a building stands, and Bat also owns that building. A result of the transition to unified conveyancing of long term right to possess a plot of land converts Bat's rights into the limited *in rem* right RCOOL. Accordingly, the building will be considered an object of the RCOOL, and therefore, the

building ownership needs to be extinguished without any legal grounds, which is the main problem with this reform. This problem and other problems stem from secured rights being treated in the same way as in subtype 1 and 2 of the private ownership model.

In the case of last subtype of the state ownership model, retention of all three *in rem* rights is not unlikely. Because the building is always an essential part of the *in-rem* rights that provide for the possibility of a building being stably erected on land, land ownership, or a superficies unless certain exceptions are provided by law. Thus, one of the *in-rem* rights of Bat or Dorj must necessary be extinguished. In order to reach a conclusion and provide a just and fair solution, specific data concerning a case, (for example, the statistical information of incidents and reason and grounds for separation of a long term right to possess and a building ownership) will be required. Although the statistics may affect the political solution, the forced termination of any rights cannot be suggested as a solution.

b. Land Use Rights

As has been mentioned in previous parts of this study, land use rights are granted when (1) a holder is a person specified in the Land Law (a foreign person or a stateless person, etc.), (2) the plot of land is located in a special protected area, and (3) the plot of land is land underneath a condominium. The first depends on who is a holder of the right, while the next two are determined by the location of the plot of land. From the functional approach of unified conveyancing, rather than a use right, a superficies or a RCOOL in the Civil Code of Mongolia is a proper way to grant rights in compliance with the Constitution. Therefore, the same treatment of long term rights to possess is suitable in the first case.

The second and the third subtypes, however, requires different treatment. In other words, the importance of a use right to land in a special protected area is for the pursuit of the public interest with regard to environmental management, and against disrespectful use by humans and unwelcome abuse of state power. In this circumstance, one of the *in-rem* rights provided by the Civil Code may not have the potential to satisfy this purpose. Therefore, we need to create a new

type of *in-rem* right or *in-personam* right to use land in this area reserved for the primary task of environmental protection and to achieve balance between private property rights and the public interest.

As for the third case, an apartment association has the right to use the land underneath the apartment building, which makes the land right separable from the sole ownership of an apartment and extinguishable if the apartment association is dissolved. On the other hand, the land under a condominium cannot be transferred to the co-ownership of the apartment owners because of the constitutional restriction of foreign ownership of land, and foreigners are often owners of apartments. Thus, a special model for condominiums that suits the Mongolian context should be created, in which the land underneath a building is subject to *in-rem* rights, possibly RCOOL or similar concepts, with permanent residential use right as used with German and Japanese condominiums, and not ownership by apartment owners.

7.4.2. Other institutional changes

This paper examines the establishment of the modern system of real property rights in Mongolia from the private law perspective: how this institution was founded and changed, why these changes have occurred. The institution of real property rights is particularly important as it has long-term impacts on economic development, but that is not the only reason for its importance. As planning approaches and laws have served to put constraints on private property rights, city planning regulations play an important role in shaping property rights and in appropriate urban land use.

The careful examination of land rights in previous chapters of this paper have evidenced that land rights (including land ownership) established by the Land Law have been associated strictly with the perceptions of "purposes and needs" of certain types of land rights, which substitutes for the role of planning or zoning restrictions in our community. Zoning, which is a method of controlling community development by creating zones such as residential zones that are primarily for housing or for apartments and an industrial zone for heavy or light industry, follows

and enforces a general plan for the community so that the community develops in an orderly fashion.

Although the institutions of planning and zoning is beyond the scope of the paper, a conclusion can be drawn from the previous chapters that along with clear and strong property rights, the development of urban areas in Mongolia is in dire need of the strengthening of planning and land regulation systems that can properly constrain property rights. Underestimating private ownership right from a long term right to possess is a clear example of the lack of the planning and zoning system.

Chapter VIII. Conclusion

As stated at the outset of this research, the history of modern Mongolia is about the transition from a nomadic to a settled lifestyle. It is important, however, to note that this thesis does not focus on establishing a legal framework guaranteeing a right for nomadic people to continue their lifestyle. Rather, this work has explored the legal approach towards the urbanism of a nomadic people under a democratic constitution and a liberal property law. General, but important conclusions lead this study one more step forward to specific answers for each research questions drawn as follows:

1. Unlike other post-socialist countries, Mongolia has not experienced to use land in private ownership, like a society with a settled culture has, before the democratic revolution, and in particular prior to 2003. The country with a population of 542,500 nomadic people and a territory of 1.8 million square kilometer met the people's revolution followed by the socialist regime. Although urban lifestyle and economy developed rapidly during the 70 years of socialist history, the economic freedom, in particular, the concept of private property was eliminated from legal area. Finally, in 1990 the democratic revolution arrived peacefully, and the Constitution framing the liberal values has been welcomed. However, the change was too rapid for most of Mongolians to recognize the functions and true consequences of the reforms, including the application of private land ownership in the Constitution. Yet, having noted that a strong root of nomadic culture regarding land and its incidental sequence of socialist history, the acceptance of the concept of private land ownership in the Constitution was a major step towards a market economy for Mongolia.

2. Although it was highlighted by the deputies of the *Ulsiin Baga Khural* private land was necessary because of the experience of foreign countries with market economies, the protection was provided to expedite the economic development by fostering foreign investment and capitalizing on citizens who became landowners; however, constitution has considerably restrictive

approach to private ownership of land. The survey that taken in thirty years after the constitution adopted shows the fact that there might be slight change in social understanding of land as the most advantageous asset and the land ownership as an "an absolute right entitling landowners to use freely, take profits from, and dispose of their land." However, on the other hand, recent amendment to the constitution that turned the "state land" into the "state public land" affirms that restrictive approach to private ownership of land in the Constitution may exist longer. Because there is a still strong, public mindset to view land from the perspectives of land as a root of sovereignty or geographical, cultural, social uniqueness of the country is the most important factors to formulate land regulations.

3. Within considerably restricted constitutional environment, Mongolia has been creating its land use system through the land reform and creation of various land rights to state and private land for last thirty years. A main objective of the land reform is to capitalize citizens of Mongolia within the limitations of the Constitution. However, the reform is not successful. Besides constitutional restriction on private land ownership, lack of policy support, extended limited approach of private ownership restriction by other laws contributed to insufficient result of the land reform. One of most decisive factors is that the Constitutional court's interpretation (1995) on Article 6.3 of the constitution and concluded that the private ownership of land is an optional concept for the state. Therefore, most of the land remains under state control, and is subject to the administrative law.

In relation to the first research question "Is ignorance of private property rules in state land relations consequential?" the study confirms the factual pre-condition that Mongolian property law suffers from the lack of unified rules or foundation for real property transfer and existence of parallel system to use land in Mongolia in which the private property law could not perform its duty in private land relation because a dominant market of state land. The Land Law and the Law on to transfer land to ownership right of Mongolian that created their own rules to use state land apart from the property law principles of the Civil Code play in major role in land relation.

Another important factor that has contributed to the ignorance of unified property rules in land relations is the privatization sequence that starts from privatization of attachments to the land such as buildings and structures and follows by the next stage of transferring land to the private property rights (the land reform). At the same time the country declares the important rule of *superficies solo cedit* (unified conveyancing) in the main legal resource of property law, the Civil Code. Transferring buildings distinct from land right has significantly affected the ability to maintain the common knowledge of real property separation with regards to the application of legal principles. As a result, any transactions related to buildings and apartments are subject to private property law, while the transfer of the plots of land right underneath them falls under the application of laws (the Land Law LTLOMC) in which basic rules in real property transfer are uncertain. Although the property norms in the Civil Code have certain points to be criticized, it suggests much comprehensive mechanisms with regards to protection and certainty to the property rights as compared to Land Law. The findings in this study authorizes the author of this study to conclude that current dominancy of state land may be consequential, however, the lack of unified foundation for property law in Mongolia does not seem as a necessary result.

From this point of view, the importance of the next research question "in respect to protection and certainty, what is suggested by the property rights in the Land Law" increases. The question may be shaped differently as "Since rules provided by the Land Law dominates, can the further unified rule for land relation is developed by these rules?" or "Can the property rights provided by the Land Law deal with the functions of life?". The thesis recognizes that while the land rights (long term right to possess and use rights of state land) in the Land Law were formulated as a direct reflection of wordings in the Constitution and may have been influenced by land related legislation of the Russian Federation, the property rights in the Civil Code were formulated based on the theoretical concepts of the Germanic legal family. As it originally purported to be, the property rights in the Civil Code protect activities, and are directed towards recognized ends. In other words, the property law in the Civil Code protects the functions of life, the best example of

which is that it accepts the notion that land is occupied by a person who is there in order to exercise certain functions.

In addition to the conflict with the ordinary understanding of the terms possession and use, creation of the land certificate recording system, lack of a theoretical approach to land transfer and its essential role are the main failures of the Land Law. However, if the long term right to possess and use rights in the Land Law were functional to life or the land rights were more diverse in their forms and identified further consequences derived from the notion of separate ownership, it would be only a technical issue to deal with the names of certain property rights.

One the one hand, regardless of its flaws the Land Law is a main resource provided handful rules for land relation in Mongolia, on the other hand, the real property rights in the private property law have not been an optimal for this society because of the insufficient scale of privately-owned land, the constitutional approach to limit private land ownership, and the legal interpretation encouraging the tendency of viewing the land as a public property. However, it does not negate the strong public characteristic of land or its feature as a basis for human life; however, any restriction on private property rights, especially on urban land rights has to be on certain legal grounds, such as urban planning or for the purpose of improving the residential environment, but not just for the exceedingly broad justifications of “sovereignty” or “independence”.

From the recent amendment of the constitution, it seems that the state policy of Mongolia tends not to foster land privatization; however, Mongolia does not have choice to follow private land use systematics, the option available to Mongolia is to enhance the state land use system which is inconsistent with private property principles. To clarify, because the Land Law could not provide sufficient protection for land rights, the real property law with regards to both state and private property need to be fallen under the unified rule of single umbrella established by the property rules provided in the Civil Code with some functional restrictions in the public law. Moreover, both at the level of parallel systems of land right and certificate registration or inside of the immovable property right registration, the unification is needed. As a whole, both institutions of registration

need to be harmonized principally not superficially is in urgent need. The present study evidenced that not just the non-recognition of property theories but the lack of proper institutional management such as registration, planning, and zoning, invalidates the significance of the creations of the Land Law. Without relevance to the existence of state and private property and the choice of approaches to property right transfers, a country requires a unified institution responsible for property right registration, especially with regards to the rights of real property. The justifications for registering property rights to land and buildings separately by different institutions and applying different rules to them are barely found elsewhere, and a current situation is a serious accident that should be urgently unified.

Important conclusion of unified foundation for state and private property relations that found in result of the comparative analysis made in German and Japanese real property law also recognized in Estonian real property law. Among these three jurisdictions, no countries created entirely different rules for the state land circulation like Mongolia. This may be because of unified nature of land, fundamental importance for encouraging certainty of property right protection.

From this standpoint, the third research question "with relevance to property right transfers, should we follow the path carved by property law rule of *superficies solo cedit* (approach of unified conveyancing) or the current practice of divided conveyancing" is presented.

The thesis found that both options have their own weaknesses and strengths. As long as the correct treatments are established for the further gaps that will be produced by the divided conveyancing, retaining the current practice may be attractive. However, as evidenced in this thesis, unified conveyancing is more functional to real property usage and a strategically correct approach. Therefore, it does not force the addition of judicial costs in order to solve the raised through the legal usage such as selling and mortgaging land and buildings. The functional approach of the unified conveyancing may be affected the majority of those involved in the survey conducted with people from various areas without specific knowledge on the theory of property law to vote for the idea of unified conveyancing at 44.9 percent.

Moreover, because of the presence of parallel systems for state and private property, founded on different theoretical approaches, in light of which the transferring and mortgaging is not possible, if one approach is selected the other should be rejected. In this regard, if the current practice of divided conveyancing is opted for, the real property rules created by the Civil Code would be subject to fundamental alterations, which requires the current real property principles to be viewed through rather new lenses.

Recognizing some of the findings of the current research in recent Mongolian real property law, the notion of land law and state property law reforms that has been reflected in state policy documents and in the concepts of the drafts of the Law on Land and the Law of State and Local Property are examples of a practical application of the claim of this thesis and in other study papers by the same author. A main finding of these studies, including those carried out since 2015 and this thesis, is that regardless of property forms, identifying the uniform real property rights in theory, as well as in practice, is an important contribution to the economic development of the country, and has been widely promoted by local scholars; however, progress on the reform of state land regulation has been considerably slow, presumably because of political reasons.

Regarding suggestions for further research relevant to this thesis though there are many findings in this research, particularly those that identify the parallel feature of the real property rules in urban areas of Mongolia and their causes and consequences from a private law perspective, this thesis is not an exhaustive study of all aspects relevant to real property transfers in Mongolia. More specifically, what is not covered by the current research is recognition of the future tendencies of real property rights in light of the public law restrictions under land administration or land economy such as planning, zoning, and building laws and tax. Further research needs to be conducted concerning real property transfers from the public and private law perspectives, more precisely, the formal approaches in property law and its institutional public law supports such as notaries, registrars and building authorities, need to further enhance their responsibility in real property transactions.

Bibliography

A N Yiannopoulos. “Extinction of Predial Servitudes.” *Tulane Law Review* 56, no. 4 (1982 1981): 1285–1316.

“Act on the Ownership of Apartments and the Permanent Residential Right (Wohnungseigentumsgesetz, WEG).” Accessed January 17, 2021. https://www.gesetze-im-internet.de/englisch_woeigg/index.html.

Ardiin Ikh Khural. *Minutes of the Second Session of Ardiin Ikh Khural of MPR*. Vol. 45, 1991.

Bennett, Frank G. Jr. “Building Ownership in Modern Japanese Law: Origins of the Immobile Home.” *Law in Japan* 26 (2000): 75–98.

Brehm, Wolfgang/Berger, Christian. *Sachenrecht*. 2nd ed. Tubingen, 2006.

Ch. Dalai. *The Great Mongol Empire (1206-1260), Ч.Далай, Их Монгол Улс (1206-1260)*. Vol. 2nd, n.d.

Chimid Byaraa. *Concept of the Constitution, Бяраагийн Чимид, Үндсэн Хуулийн Үзэл Баримтлал.* 2nd ed. Ulaanbaatar, 2017.

Chung Han Kim. “Real Actions in Korea and Japan.” *Tulane Law Review* 29, no. 4 (1955 1954): 713–24.

“Civil Code of Mongolia 1963.” In *Laws of People’s Republic of Mongolia,* 1:132–258. Ulaanbaatar, 1980.

Davharbayar Tsedevsuren. “The Possession in Property Law and Its Protection Issues.” Accessed April 16, 2021. http://data.stf.mn/Scientist/ProfileViewPublic.aspx?id=1098956.

Deininger Klaus, and Feder Gershon. “Land Registration, Governance, and Development: Evidence and Implications for Policy.,.” *World Bank Research Observer.* 24 (2009). available at: 10.1093/wbro/lkp007.

D.Lhamjav vs State Great Khural, legalinfo (The Constitutional Court 1995).

E. A. Suhanov,. *Grajdanskoye Pravo, (2008), Е. А. Суханов, Гражданское Право,*. Project of Institution of Economy and Law eBook, 2008. available at https://be5.biz/pravo/g016/index.html, last accessed April 19, 2021.

“Encumbrances,” n.d. https://www.elra.eu/contact-point-contribution/estonia/encumbrances-section-c-7/.

“ErbbauRG - Law on the Heritable Building Right.” Accessed January 15, 2021. https://www.gesetze-im-internet.de/erbbauv/BJNR000720919.html.

Espen Sgaastad and Daniel W.Bromley. “The Prejudices of Property Rights:On Individualism, Specificity, and Security in Property Regimes.” *Development Policy Review* 18 (4) (n.d.). https://www.researchgate.net/publication/229786281_The_Prejudices_of_Property_Rights_On_Individualism_Specificity_and_Security_in_Property_Regimes/link/5ca4bff0458515f78520db9a/download.

Estonian institute. “Land Ownership in Estonia in the 20th Century.” In *Estonica*, n.d. http://www.estonica.org/en/Land_ownership_in_Estonia_in_the_20th_century/.

Feilchenfeld, Ernst H. “Germanic Law and the German Civil Code.” *China Law Review* 5, no. 2 (1932): 89–102.

Frank Bennett. “Japanese Land Leases Revisited Old Tokyo Wine in a New Chicago Bottle,” 2019.

Frank, Rainer. “Privatization in Eastern Germany: A Comprehensive Study.” *Vanderbilt Journal of Transnational Law* 27, no. 4 (1994): 809–68.
G. Saishaal,. *Chingis Khaanii Tovchoon,*. Khukh hot, 1989.
Gadsby, John. “Foreigners’ Right of Ownership to Land in Japan.” *Southern Bench and Bar Review* 1, no. 6 (1913): 410–13.
“GBO - Land Register Regulations.” Accessed January 17, 2021. https://www.gesetze-im-internet.de/gbo/BJNR001390897.html.
General Part of the Civil Code Act (2002). https://www.riigiteataja.ee/en/eli/ee/530102013019/consolide.
“German Civil Code BGB.” Accessed January 24, 2021. https://www.gesetze-im-internet.de/englisch_bgb/.
Gordley, James, and Ugo Mattei. “Protecting Possession.” *American Journal of Comparative Law* 44, no. 2 (1996): 293–334.
Government Agency for Land Administration and Management, Geodesy, Cartography. “Unified Annual Report on Land Fund 2018, Газрын нэгдмэл сангийн тайлан 2018 он.” Ulaanbaatar, 2019. https://www.gazar.gov.mn/report/gnst/gazryn-negdmel-sangijn-tajlan-2018-on.
———. “Unified Annual Report on Land Fund 2019, Газрын нэгдмэл сангийн улсын нэгдсэн тайлан 2019.” Ulaanbaatar, 2020. https://www.gazar.gov.mn/report/gnst/gazryn-negdmel-sangijn-2019-ony-ulsyn-negdsen-tajlan.
Haggard, Stephan. “Institutions and Growth in East Asia.” *Studies in Comparative International Development* 38, no. 4 (December 1, 2004): 53–81. https://doi.org/10.1007/BF02686328.
Hatoyama, Kazuo. “Civil Code of Japan Compared with the French Civil Code.” *Yale Law Journal* 11, no. 7 (1902 1901): 354–70.
“Heritable Building Right Regulation - Legal Portal.” Accessed January 15, 2021. https://www.rechtsportal.de/Gesetze/Gesetze/Allgemeines-Zivilrecht/Erbbaurecht-Verordnung.
Hertel, Christian, and Hartmut Wicke. “Real Property Law and Procedure in the European Union: Germany,” 2004.
Independent Authority Against Corruption of Mongolia. “Assessment of Fairness-2018, p.18, n.d, Авилгатай Тэмцэх Газар, Шударга Байдлын Үнэлгээ-2018.,” n.d. https://www.iaac.mn/news/shudarga-baidliin-unelgee-2sh18-sudalgaanii-tailan?menu=181.
J. E. De Becker. “Principles and Practice of the Civil Code of Japan,” 1921.
Japanese Law Translation - [Law text] - Act on Building Unit Ownership, etc. Accessed February 16, 2021. http://www.japaneselawtranslation.go.jp/law/detail/?id=2015&vm=2&re=02.
Japanese Law Translation - [Law text] - Act on Land and Building Leases. Accessed February 16, 2021. http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=1&re=2&dn=1&x=62&y=15&co=01&ia=03&ja=04&ky=land+lease&page=92&vm=02.
Japanese Law Translation - [Law text] - Civil Code. Accessed February 16, 2021. http://www.japaneselawtranslation.go.jp/law/detail/?id=3494&vm=2&re=02.
J.Gordley. *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, n.d.

Judicial General Council of Mongolia. “Annual Report on Judicial Process of Mongolia,” n.d.
Kamano, Kuniki. “Condominium Legal System in Japan and Current Movement” 32 (n.d.): 5.
Klaus Deininger and Gershon Feder. “Land Registration, Governance, and Development:Evidence and Implications for Policy,” n.d. https://www.researchgate.net/publication/228181541_Land_Registration_Governance_and_Development_Evidence_and_Implications_for_Policy.
World Bank. “Land Administration and Management in Ulaanbaatar, Mongolia.” Text/HTML. Accessed December 10, 2020. https://www.worldbank.org/en/country/mongolia/publication/land-administration-and-management-in-ulaanbaatar-mongolia.
Land Law (2002). https://www.legalinfo.mn/law/details/216?lawid=216.
Lapping, Mark B. “The Land Reform in Independent Estonia: Memory as Precedent — Toward the Reconstruction of Agriculture in Eastern Europe.” *Agriculture and Human Values* 10, no. 1 (December 1, 1993): 52–59. https://doi.org/10.1007/BF02217730.
Leonid Limonov. “Land Reform and Property Markets in Russia.” *Land Lines*, no. second quarter (April 2002). available at: https://www.lincolninst.edu/publications/articles/land-reform-property-markets-russia.
Maasikamäe, Siim, and Evelin Jürgenson. “Main Principles of the Formation of State Land Reserve in Estonia,” n.d., 4. http://www.fao.org/fileadmin/user_upload/reu/europe/documents/LANDNET/2008/Estonia_Paper.pdf.
Miljan, and Toivo. *Historical Dictionary of Estonia,*. Rowman & Littlefield, 2015.
“Mongolia: Urban Migrant Vulnerability Assessment (Mongolian) - | Librería En Línea de La OIM.” Accessed March 28, 2021. https://publications.iom.int/es/books/hotod-shilzhin-iregsdiyn-emzeg-baydlyn-sudalgaa.
Mongolian Government. Size, location, purpose to transfer for private ownership of Mongolian citizens in 2020, Иргэнд 2020 онд өмчлүүлэх газрын нийт хэмжээ, байршил, зориулалтыг тогтоох тухай, 170 Resolution § (2020). https://www.legalinfo.mn/annex/details/11039?lawid=15377.
World Bank. “Mongolia’s 2018 Poverty Rate Estimated at 28.4 Percent.” Text/HTML. Accessed March 22, 2021. https://www.worldbank.org/en/news/press-release/2019/06/21/mongolias-2018-poverty-rate-estimated-at-284-percent.
Muller, K. *Sachenrecht*. Cologne, Germany: Carl Heymanns Verlag, 1988.
N. Otgonchimeg,. “Historical Comparison of Land Related Legislation of Mongolia.” *Land, Management and Law Collection of Conference Papers*, 2005, 81–102.
Nakamura, James I. “Meiji Land Reform, Redistribution of Income, and Saving from Agriculture.” *Economic Development and Cultural Change* 14, no. 4 (1966): 428–39.
National Statistical Committee. “General Report on Budget 2018, Үндэсний Статистикийн Хороо, 2018 Оны Төсвийн Тайлан.” Accessed March 28, 2021. https://1212.mn/Stat.aspx?LIST_ID=976_L08.

———. “Report on Income of Local Budget, Үндэсний Статистикийн Хороо, Орон Нутгийн Төсвийн Орлого.” Accessed March 30, 2021. https://www.1212.mn/tables.aspx?tbl_id=dt_nso_0800_004v1&class3_select_all=0&class3singleselect=_10101_1010102_101010404&yeary_select_all=0&yearsingleselect=_2019&viewtype=table.
———. “Report on Income of Unified Budget of Mongolia Үндэсний Статистикийн Хороо, Монгол Улсын Нэгдсэн Төсвийн Орлого.” Accessed March 28, 2021. https://www.1212.mn/tables.aspx?tbl_id=dt_nso_0800_002v1&13999001_select_all=0&13999001singleselect=&tt1_select_all=0&tt1singleselect=_1020101_102010103&yearm_select_all=0&yearmsingleselect=_202011_202010_202009_202008_202007_202006_202005_202004_202003_202002_202001_202012&viewtype=table.
National Statistics Committee. “Summary of the Aggregate Annual Estimation of Population and Dwellings in Capital City of 2020. Үндэсний Статистикийн Хороо, Хүн Ам, Орон Сууцны 2020 Оны Улсын Ээлжит Тооллогын Нийслэлийн Нэгдсэн Дүн.,” n.d. available at. https://www.1212.mn/BookLibraryDownload.ashx?url=1.Summary%20report_Ulaanbaatar.pdf&ln=Mn,.
N.Lundendorj. “Historical Debate on Existence of Private Ownership of Land in Mongolia and Philosophical, Historical and Legal Analyses, Н. Лүндэндорж, Монголд Газрыг Хувьд Өмчлүүлж Байсан Эсэх Талаарх Түүхэн Маргаан, Түүнд Хийсэн Түүх, Философи, Эрх Зүйн Шинжилгээ, Газар, Удирдлага, Эрх Зүй Эмхтгэл.” *Land, Management and Law, Collection of the Conference Papers*, 2005, 56–80.
Norton Rose Fulbright. “A Guide to Commercial and Residential Property Investment in Germany,” n.d.
O. Munkhsaikhan. “Concepts of Amendments to the Constitution: Principles to Exploit Subsoil Wealth, О.Мөнхсайхан, Үндсэн Хуульд Оруулсан Нэмэлт, Өөрчлөлтийн Үзэл Баримтлал: Газрын Хэвлийн Баялаг Ашиглахад Баримтлах Зарчмууд.” *Law* 3 (2020): 1–37.
Osawa, Masao. “Japanese Consciousness of Land Ownership: A Questionnaire and Comments.” *Law in Japan* 20 (1987): 131–49.
Paasch, Jesper. “Classification of Real Property Rights: A Comparative Study of Real Property Rights in Germany, Ireland, the Netherlands and Sweden,” January 1, 2011.
Pierre, Barbara. “Classification of Property and Conceptions of Ownership in Civil and Common Law.” *Revue Générale de Droit* 28, no. 2 (March 16, 2016): 235–74. https://doi.org/10.7202/1035639ar.
president Kh. Battulga of Mongolia. “A Draft Amendment to Article 6.2 of the Constitution,” June 16, 2019. Available at https://president.mn/10139/,.
Priidu Parna. “Development of Apartment Ownership Legislation in Estonia in 1994-2009 and Reform Plans in the Context of European Judicial Practice.” *Juridica International* 16 (2009): 103–13.
———. “Legal Reform in Estonia.” *International Journal of Legal Information* 33(2) (2005): 219–23.
———. “The Law Property Act-Cornerstone of the Civil Law Reform.” *Juridica International* 6 (2001): 89–101.

R Ihering. *Uber Den Grund Des Besitzschutzes Eine Revision Der Lehre Vom*. 2nd ed., 1869.
Riigi Teataga. Land Cadastre Act of the Republic of Estonia (1994). https://www.riigiteataja.ee/en/eli/517072018004/consolide.
———. Land Reform Act of Republic of Estonia (1991). https://www.riigiteataja.ee/en/eli/ee/529062016001/consolide.
———. Law of Property Act of Republic of Estonia (1993). https://www.riigiteataja.ee/en/eli/510072014007/consolide.
———. Republic of Estonia Principles of Ownership Reform Act (1991). https://www.riigiteataja.ee/en/eli/ee/525062015006/consolide.
Riigi Teataja. Apartment Ownership and Apartment Associations Act (n.d.). https://www.riigiteataja.ee/en/eli/518052017002/consolide.
———. Privatisation of Dwellings Act of Republic of Estonia. Accessed May 12, 2021. https://www.riigiteataja.ee/en/eli/520122018009/consolide.
S. Chuluun, Ts.Tserendorj, G.Myagmarsambuu, B.Natsagdorj, Ts.Turbat, H.Nyamdulam. "History of Mongolia," 2016. https://mongoltoli.mn/history/h/712.
S. Jalan-Aajav,. *The Khakh Juram Is the Ancient Legal Resource of Mongolia, С.Жалан-Аажав, Халх Журам Бол Монголын Хууль Цаазын Эртний Дурсгалт Бичиг.* Ulaanbaatar, 1958.
Saint-Petersburg State University, Vladimir L. Bogdanov, Yury V. Ryabov, Saint-Petersburg Research Centre for Ecological Safety, Russian Academy of Sciences, Maria K. Burlakova, and Saint-Petersburg State University. "Land Use Policy and Land Management in Estonia." *Baltic Region* 9, no. 1 (March 29, 2017): 91–104. https://doi.org/10.5922/2079-8555-2017-1-8.
Schmid, Christoph U., and Christian Hertel. "Real Property Law and Procedure in the European Union." General Report. European University Institute (EUI); Florence/European Private Law Forum; Deutsches Notarinstitut (DNotI) Würzburg, May 31, 2005.
Sh. Batsukh. "Current Situation and Further Development of the Land Reform of Mongolia, Монгол Улсын Газрын Харилцааны Шинэтгэлийн Өнөөгийн Байдал, Цаашдын Чиг Хандлага," 5–14. Ulaanbaatar, 2005.
Shusei Ono. "Comparative Study of the Transfer of Property Rights in Japanese Civil Law." *Hitotsubashi Journal of Law and Politics* 31 (2003): 1–22.
Sjef Van Erp. "Comparative Property Law." In *The Oxford Handbook of Comparative Law*, 2006: 10.1093/oxfordhb/9780199296064.013.0033.
S.Nyamzagd. "One Important Issue for Thoughts on State of Mongolia (Монгол Төрийн Ухааны Нэгэн Чухал Асуудал)." *People's Right (Ардын Эрх)*, October 20, 1991, №88 (260) edition.
Sorensen, Andre. "Land, Property Rights, and Planning in Japan: Institutional Design and Institutional Change in Land Management." *Planning Perspectives* 25 (July 1, 2010): 279–302. https://doi.org/10.1080/02665433.2010.481178.
State Assets Act (2015). https://www.riigiteataja.ee/en/compare_original/526012015001.
the State Great Khural. *Minutes of IX Special Session of the State Great Khural, Улсын Их Хурлын Хэлэлцүүлгийн 9-р Тэмдэглэл,*. Vol. 35, 1996.
The State Great Khural. "Minutes of the Special Session of August 28th 2019, of State Great Khural /Wednesday/, 39-40, Монгол Улсын Их Хурлын 2019 Оны

Ээлжит Бус Чуулганы 8 Дугаар Сарын 28-Ны Өдрийн /Лхагва Гараг/ Нэгдсэн Хуралдааны Товч Тэмдэглэл," n.d.

———. Program for legal reform of Mongolia, 18 Resolution § (1998). Available at https://www.legalinfo.mn/law/details/6881.

"The Unification Treaty between the FRG and the GDR (Berlin, 31 August 1990)," n.d., 29.

Translated by Georges ROUHETTE, with the assistance of Dr Anne ROUHETTE-BERTON. French Civil Code (n.d.).

"Uisen Deer Bichsen 18 Tsaaziin Bichig", [18 Codes Written on Corkwood], 1600.

"Ulaanbaatar Population 2020," n.d. https://worldpopulationreview.com/world-cities/ulaanbaatar-population.

United Nations, Juan Pablo Bohoslavsky. "Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, on His Visit to Mongolia," n.d. https://www.undocs.org/A/HRC/43/45/Add.2.

V. A. Ryazanovskii,. *Great Rule of Chingis Khaan, Великая Яса Чингис Хана.*, 1933.

Varul, Paul. "CREATION OF NEW PRIVATE LAW IN ESTONIA," n.d., 23.

Visnapuu, Karin. "Land Reform and the Principle of Legal Certainty: The Practice of the Supreme Court of Estonia in 1918–1933." *Juridica International* 27 (September 30, 2018): 53–60. https://doi.org/10.12697/JI.2018.27.05.

Walter R. Iwaskiw, ed. *Estonia: A Country Study. 1995.* Washington: GPO for the Library of Congress, 1995.

Walter R. Iwaskiw, Ed. - 1995 - Estonia A Country Study. 1995.Pdf," n.d.

William Warwick Buckland. *A Textbook of Roman Law from Augustus to Justinian*. 2nd ed., 1932.

Wolfgang Faber, and Brigitta Lurger, eds. *National Reports on the Transfers of Movablesin Europe Volume 3: Germany, Greece, Lithuana, Hungary*. Vol. 12. European law publishers, 2011.

Wolfgang Faber, Brigitta Lurger. *National Reports on the Transfers on Movables in Europe Volume 1: Austria, Estonia, Italy, Slovenia*. European law publishers, 2008.

W.Roszkowski. *Land Reforms in East Central Europe after World War One.* Polish Academy of Sciences Institute of Political Studies, 1995.

Yanjinkhorloo Dambadarjaa. "Pledge over Immovable Property (Hypothec) and Its Contemporary Issues." Accessed April 16, 2021. http://data.stf.mn/Publication/Thesis/ThesisViewPublic.aspx?id=128997.

Нанзаддорж Лүндэндорж. "Historical Debate on Existence of Private Ownership of Land in Mongolia and Philosophical, Historical and Legal Analyses, Монголд Газрыг Хувьд Өмчлүүлж Байсан Эсэх Талаарх Түүхэн Маргаан, Түүнд Хийсэн Түүх, Философи, Эрх Зүйн Шинжилгээ," no. Land, management and law (2005): 56–80.

O. Amarkhuu,. *Modern Ecology Law of Mongolia, О. Амархүү, Монголын Орчин Цагийн Экологийн Эрх Зүй*. 2nd ed. Ulaanbaatar, 2009.

Appendix A: Certificate of a house ownership

МОНГОЛ УЛС

ҮЛ ХӨДЛӨХ ЭД ХӨРӨНГӨ ӨМЧЛӨХ ЭРХИЙН УЛСЫН БҮРТГЭЛИЙН

ГЭРЧИЛГЭЭ

Дугаар 000697616

Монгол Улсын иргэн Чононс овгийн Отгохүрээ Алтанцэцэг

УХ65121203 /иэг иргэний өмч/

Нийслэлийн Чингэлтэй дүүргийн 14-р хороо, Хайлаast 6 гудамж, 54 тоот хаягт байршилтай

40 м.кв талбайтай, Хувийн сууц зориулалттай үл хөдлөх эд хөрөнгийн хууль ёсны өмчлөгч тул эрхийн улсын бүртгэлийн

Нийслэлийн Сухбаатар дүүргийн тойргийн нотариатч Ө.Мөнхтуяа би энэ хуулбарын үнэн зөв гэрчлэв. Үйлчилгээний хөлсөнд 2500 төгрөг хураав

Нотариатч .....

20200325 он ... сар ... өдөр Бүртгэлийн № 1315

185

Y-2202009997 дугаарт бүртгэж гэрчилгээ олгов.

Улсын бүртгэгч / Х.Болормаа /

НИЙСЛЭЛИЙН УЛСЫН БҮРТГЭЛИЙН ГАЗАР

2019 он 05 сар 23 өдөр

Unofficial translation from Mongolian:
The certificate is issued by the State registration agency on the basis of registration entry of the relevant real right

MONGOLIA

State Registration
CERTIFICATE

for Ownership Right of Immovable Property

Number 00697616

Altantsetseg Ochirkhuree Chonons UX65121203, a citizen of Mongolia

/owned by one person/

granted a certificate for ownership right of immovable property, *which is a two-store residential house of 40 m2*, located at the address *54, Khailaast 6th* street, *14th* khoroo, *Chingeltei* district, Capital City, upon the state registration of ownership right number *U-2202009997*.

State register …. (signature) … /Kh. Bolorchuluun/

(STAMP)

STATE REGISTRATION AGENCY FOR PROPERTY RIGHT

May 23, 2019

Appendix B: Certificate of the plot of land ownership

МОНГОЛ УЛС

ГАЗАР ӨМЧЛӨХ ЭРХИЙН УЛСЫН БҮРТГЭЛИЙН

ГЭРЧИЛГЭЭ

Дугаар 00055 8914

Монгол Улсын иргэн Чонос овгийн Оцирхүрээ Алтанцэцэг

УХ65121203 /нэг иргэний өмч/

Нийслэлийн Чингэлтэй дүүргийн 11-р хороо, Хайлаast 6 гудамж, 54 тоот хаягт байршилтай

18612314851882 нэгж талбарын дугаартай 681.41 м.кв талбайтай, Гэр бүлийн хэрэгцээний зориулалттай газрыг 1116 хүүхэд ёсны өмчлөгч тул эрхийн улсын бүртгэлийн

Г- 2202001390 дугаарт бүртгэж гэрчилгээ олгов.

Улсын бүртгэгч / Х.Болорчулуун /

НИЙСЛЭЛИЙН УЛСЫН БҮРТГЭЛИЙН ГАЗАР

2019 он 05 сар 23 өдөр

Unofficial translation from Mongolian:
The certificate is issued by the State registration agency on the basis of registration entry of the relevant real right

MONGOLIA

State Registration
CERTIFICATE

for Ownership Right of Immovable Property

Number 0000558914

Altantsetseg Ochirkhuree Chonons UX65121203, a citizen of Mongolia

/owned by one person/

granted a certificate for ownership right of a plot of land with cadastral number 18642314851882 for a household purpose, which has a size *of 681,41 m2*, and is located at the address *54, Khailaast 6th* street, *14th* khoroo, *Chingeltei* district, Capital City, upon the state registration of ownership right number *G-2202001390*.

State register …. (signature) … /Kh.Bolorchuluun/

(STAMP)

STATE REGISTRATION AGENCY FOR PROPERTY RIGHT

May 23, 2019

Appendix B[2]: Certificate issued from Land Authority

МОНГОЛ УЛС

ГЭР БҮЛИЙН ХАМТЫН ХЭРЭГЦЭЭНИЙ
ЗОРИУЛАЛТААР ГАЗАР ЭЗЭМШИХ ЭРХИЙН

ГЭРЧИЛГЭЭ

Дугаар 0312629

Боржигон (ургийн овог) Нямдоо (эцэг /эх/-ийн нэр) Баярмаа (нэр) -д

Улаанбаатар аймаг (нийслэл)-ийн Сонгинохайрхан сум (дүүрэг)-ын

нутаг дэвсгэрт Засаг даргын 2009 оны 07 сарын 01 өдрийн 169 тоот

шийдвэрийг үндэслэн, нэгж талбарын 18618304813715 дугаар бүхий

700 м² /га/ газрыг 15 жилийн хугацаатай

Сонгинохайрхан, 20-р хороо (газрын байршлын хаяг, нэр) -д

Амины хашаа / Дарцагт уул 48-14 тоот / зориулалтаар

эзэмшүүлэхээр энэхүү гэрчилгээг олгов.

Нийслэл аймаг (нийслэл)-ийн Сонгинохайрхан сум (дүүрэг)-ын

ГАЗРЫН АЛБАНЫ ДАРГА / СУМЫН ГАЗРЫН ДААМАЛ

ТАМГА/ТЭМДЭГ _____ /Э.Болорчулуун/
(гарын үсэг) (нэр)

2010 оны 06 сарын 08 өдөр

Unofficial translation from Mongolian:
The certificate is issued by the Land Authority of
Local Governor on the basis of Local Governor's decision to
Grant a Long term right to possess land to a Mongolian Citizen

MONGOLIA

CERTIFICATE
of a long term right to possess land
for a purpose of household need

Number 0312629

On the ground of Order number 169, issued on date of July 1st, 2009 by the Governor/Zasag darga of Songinokhairkhan district of Ulaanbaatar city, Mrs Bayarmaa Nyamdoo Borjigon is granted the certificate of a plot of land, number 18618304813715, with size of 700 square meter, with term of 15 years on the address of 48-14 Dartsagt Uul, 20th khoroo, Songinokhairkhan district for a purpose of household need.

LAND MANAGER OF LAND AUTHORITY OF SONGINOKHAIRKHAN
DISTRICT OF CAPITAL CITY

E. BOLORCHULUUN

(STAMP)

June 08, 2010

Appendix C: Questionnaire and Response

The questionnaire was developed by N.Bayarmaa,
PhD candidate of Nagoya University
for the purpose doctoral research

QUESTIONNAIRE TO OBSERVE MONGOLIANS' CONSCIOUSNESS OF LAND OWNERSHIP AND RESTRICTIONS TO IT

Only one option is to be selected, unless instructed otherwise.

1. In which field do you work (used to work)?

a) Law……31.5%
b) Economy, finance and banking ..…….8.7%
c) Real estate market……..5.04%
d) Building and infrastructure……5.69%
e) Education and health……6.34%
f) Other ……..42.06%

2. Did you receive a plot of land in your ownership for free in accordance with the Law on transfer of land ownership to Mongolian citizen?

a) Not yet (please proceed to third question) ……..73.48%
b) Yes, but I has not been using……..12.93%
c) Yes, I am living on it…….9.42%
d) Yes, it has been used by others……..4.15%

3. The reason I have not exercised the right to obtain a plot of land for my ownership is (more than one option is acceptable)

a) Do not understand the procedure for owning land……32.1%
b) Land privatization does not cover the location where I want to own land…….12.93%
c) Expect to use my right to own land for free on the plot of land I possessed now..…9.9%
d) Since I possess a plot of land I don't need to own one…..……9.9%
e) None of the above……...13.57%

4. What is your perception of land?

a) Land is communal property necessary for human existence (therefore it is improper to treat it as a good and profit from its purchase and sale) ……42.8%
b) Land is the most profitable asset (therefore it is up to the landowner to profit from its purchase and sale by treating it as an object of speculation) ……..47.49%
c) Neither of the above…….9.6%

5. What do you think land ownership means in legal terms?

a) An absolute right, entitling landowners to use freely, take profits from, and dispose of their land. Therefore, land ownership right should be protected strongly……65.2%

b) Land ownership has strong public characteristics; it is a relative right subject to restrictions (the essential nature of the right has more to do with the use of land rather than its ownership) ……27.1%
c) I don't know……..7.54%

6. What do you think of restrictions on individual rights of land ownership such as urban planning and residential environment improvement projects?

a) Given that land is finite and possesses strong public characteristics, it is proper that land ownership be subject to restrictions……..43.7%
b) Since land ownership is the most important property right, it is absolute and should not, in general, be subject to restrictions……..39.7%
c) Neither of the above……...16.4%

7. Do you think it is right to grant separate certificates for land and building ownership located at the same address? (please do not consider this from a legal perspective)

a) Right, because the number of immovables properties is important.…….36.6%
b) Not right, because without land access, using a building is not possible. Therefore, land ownership is decisive…….44.9%
c) I do not understand how a plot of land and a building are considered as one immovable property ……..;…….18.9%

8. Do you think it is right that legal entities such as companies to have ownerships right to land in urban areas. (Please do not look this at a constitutional perspective)

a) Right, as long as a legal entity is a national investment company……...38.56%
b) Wrong, regardless of the company investment……38.08%
c) I do not know…….…….23.36%

9. Land near your own was developed through the construction of highways, etc., and you made a profit many times over by selling your own land which had skyrocketed in value. How do you think this profit (development profit) should be treated?

a) The profit obviously belongs to the landowner…….61.35%
b) It should go to the state or public entities……..10.46%
c) The profit should be allocated between public entities and the land owner. ……28.18%

10. If the profit should go to the state or public entities because it arose out of development by the state or by public entities, what percent of the development profit should they take?

a) 100 percent……4.76%
b) 80 percent……..6.62%
c) 60 percent……..8.28%
d) 40-50 percent…….16.3%
e) 30 percent……15.73%
f) Less than 30…….48.24%

11. Please put a number 1-5 in accordance with the significance of the following statements. The most important statement should be given number 1, the next most important is number 2, etc., (do not put a number if you believe that is not an important measure).

a) The land certificate registration system is not transparent and protective; therefore, the system should be developed in a way where the immovable property registration system works (transparent, certain, and a right becomes effective against third parties upon its registration, not at the moment of certificate issuance)……46.7%
b) Information regarding land possession rights of state organizations, and public entities should become public and restrict their right to enter into the contract with third parties regards of land they possess……41.14%
c) Activate land reform and privatize plot of land with appropriate prices ……23.27%
d) Cease land privatization and create an effective state land use system……..…9.5%
e) Broaden the possibilities for the private sector to use land transparently, efficiently, and with appropriate consideration under state supervision …...……21.8%

12. Do you think that certainty and diversification in state land rights would fundamentally encourage your business? (For example, creating land rights functional to life)

a) Yes, it is a good way to support the private sector……..…….53.44%
b) No, the current regulations are sufficient…….8.85%
c) Yes, the system should be upgraded, but not in this way……37.7%

Appendix D: Interview

At the office of the State
Registration Agency for Property Right
on March 13, 2021 at 15:00 -16.08

INTERVIEW WITH SENIOR SPECIALIST MRS. UNURLKHAM

Question: Do you have statistical data on the number of ownership rights of buildings and plots of land that are located at the same address and the numbers of hypothec rights created on them?
Answer: We don't have specific data. However, after you made the appointment for this meeting, I searched the relevant data and with the assistance of our IT specialist I found the rough number that we have is around 100,400 plots of land ownership on which more than two immovable ownership rights were created, but I did not have time to collect the data regarding hypothec rights. There are frequent cases where on one plot of land there are more than two immovable properties registered, such as the main residential house, a garage, and land itself. The objects on one plot of land can be shown on the cadaster as well, if you wish.

Question: Do you mind helping me picture the procedure for registering a hypothec created on the land ownership right? For example, how the general description is created and how it looks and how relevant information enters into the registration in actuality.
Answer: Only a land ownership right is registered in the State Registration Agency. The first requirement is a decision of the competent land authority to transfer the land ownership to that person. With this decision land assessments and cadaster mapping needs to be submitted. The address of the plot of land is written on the cadastral mapping. With all these materials, the registration application will start to proceed. A registrar will scan all documents and enter the relevant information into the electronic database. This is called an "initial registration." After that we can register the hypothec on the hypothec part of the database.

Question: How about land possession and use rights?
Answer: In 2003, the law stated that land possession and use rights are to be registered. Therefore, if one applied and brought a certificate of a land right, we registered it. In accordance with a new law , since November 1, 2018, the possession and use rights are registered by the application to *soum* and district governors. With relevance to this procedure, an intermediary information fund was created. The grounds for creating this fund are given in Article 9.11 of the Law. If a registrar looks through the fund information, the data relevant to a decision will be shown and the registrar will understand that it is sufficient to give a registration number for that property right. Before creation of this fund, it was not certain where exactly the land rights were registered, therefore people were often confused and used to apply to both organizations. Now it saves time and costs.

Question: Well, it seems so. But does it (the fund) have a connection to the building rights on the plot of land then? And can the fund provide hypothec rights over a possession right?
Answer: The Land Authority is responsible for hypothec registration, not us. Therefore, I cannot provide certain information in this regard.

Question: We talked before about land ownership rights and building ownerships right that were your responsibility to register. How about a land possession right and a land use right and the ownership of a building erected on the basis of these rights? Do you have any statistical data of the ownership rights of buildings constructed on plots of land with possession rights?
Answer: This is a difficult situation, we did not work to collect this information, and it may be the land authorities that are in good position to answer. Maybe, you can search through the cadastral data.

Question: Do you have statistical numbers on apartment ownership, and do you have any difficulties with the registration procedure?
Answer: Yes, there is residential apartment fund data. Do you know that? If I am not wrong, population and apartments are accounted for every year. However, I cannot provide that data from memory, you have to look at reports from the National Statistics Committee.

Question: Do you know that what zone the ger districts belong to?
Answer: I don't know. This is not information provided to us in order to have property rights be registered. We don't have any statistics in this regard.

Thank you for your time.

Appendix E: Intermediary Digital Data Fund