Renovations in lieu of rent in Spanish tenancy law

Rosa Maria Garcia Teruel[1]

Summary

1. Introduction

Ten years after the bursting of the housing bubble and the beginning of the housing crisis in 2007, the access to affordable housing is still a concern for many of the households that, in that period, lost their dwellings[2], and for those that nowadays have major difficulties gaining access to housing, such as young people.

Rented housing is not yet a real alternative to homeownership in Spain, representing, even today, the form of housing tenure held by only 13.8 per cent of the population (EUROSTAT, 2016). Two of the main reasons that contribute to this are the following:

1. The average rent is more expensive than the average mortgage instalment (but, in this last case, savings are needed, which is not easy for all households)[3] and rental prices have been constantly increasing over recent years (more than 9 per cent in the period 2016-2017[4]). Thus, the rental market is not affordable enough for low income households, who, at the same time, cannot access social housing due to its scarcity (LAMBEA, 2016).

2. Rented housing is generally in worst condition than homes available for sale (KEMP, 2011). Apart from that, the Spanish housing stock is not in proper state of repair and, as a consequence, there is a lack of available and suitable properties. While more than 16 per cent of people live in properties that do not

[1] Postdoctoral researcher at the UNESCO Housing Chair. Universitat Rovira i Virgili (Tarragona, Spain). This paper has been possible thanks to the grant FI-DGR 2015 of the Agency for Management of University and Research Grants (AGAUR, Generalitat de Catalunya).

[2] Between 2010-2015, more than 210,377 evictions were carried out at primary residences, and foreclosures for the non-payment of rent reached a similar number, 206,109 (NASARRE and GARCIA, in press).

[3] According to Idealista stats, there are only three Spanish provinces, where renting is cheaper than buying a property, when comparing rent to the instalments on an average 25 year mortgage . EL CONFIDENCIAL. *Pagar una hipoteca resulta ya más barato que un alquiler en la mayor parte de España*. 13.2.2016.

[4] EL MUNDO. El precio medio del alquiler sube un 9,4%. 10.7.2017.

meet the minimum standards (leaking roof, damp walls, floors or foundation, or rot in the window frames or the floor, EUROSTAT 2016a), more than two million properties need renovations before they can be deemed to be in a fit state for habitation (IDAE, 2015).

With the objective of addressing the housing crisis, Act 4/2013, regarding the implementation of measures to promote the housing rental market[5] and to make it more flexible, was passed on the of 4th June 2013. This act represented one of the most important amendments of the *Ley de Arrendamientos Urbanos* (Urban Leases Act[6], hereafter referred to as LAU) since it came into force in 1995 to protect tenants' rights.

An amendment entered into Act 4/2013, intended to increase the rented housing stock, was the introduction of a new paragraph 5 into art. 17, which is the object of this paper, and which is called "renovations in lieu of rent" (*rehabilitación por renta* in Spanish, NASARRE 2014). Said article establishes the following:

"*In tenancy contracts, parties may agree to wholly or partly replace the obligation to pay the rent with a commitment from the tenant to renovate or restore the property under the agreed terms and conditions. At the end of the contract, the tenant may not claim, in any case, compensation for works performed. The breach of the obligation to perform works under the agreed terms by the tenant may be grounds for terminating the contract and section 2 of article 23 shall be applicable*"[7].

As seen above, according to the literal interpretation of this article, a tenant may, after reaching an agreement with the landlord, live in the rented property without paying a rent (because the concept of "rent" only includes a consecutive obligation to pay money or crops[8]), but performing renovation works instead. At the same time, a landlord may improve the standards of his property without the need for additional investment thanks to the works performed by the tenant. Due to these characteristics , renovations in lieu of rent may facilitate access to housing for those prospective tenants that do not have sufficient economic resources but do have construction skills (for example, former construction workers that are currently unemployed) as well as improve the conditions of rented housing stock[9]. Similar provisions have also been included in art. 6.a) of French Law No. 89-462[10] and art. 8 of the *relatif au bail de résidence principale* act, dated 20.2.1991.

Nevertheless, since its regulation in 2013, not many authors have analysed this new scheme[11] and, the ones who did, have criticised the system of renovations in lieu of rent.

[5] Spanish Official Gazette (*Boletín Oficial del Estado*, hereafter BOE) No 134, 5.6.2013.
[6] Act 29/1994, of 24th November. BOE No 282, 25.11.1994.
[7] Free translation.
[8] According to the Spanish language dictionary RAE, the rent is "what is paid with money or crops by the tenant". Available at: http://lema.rae.es/drae/?val=renta (last access: 5.10.2017).
[9] In fact, more than 55% of housing stock was built before the eighties, when no construction regulations existed. INSTITUTO NACIONAL DE ESTADÍSTICA (2011). *Fecha de construcción de los edificios en España por década*.
[10] *Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986*.
[11] Apart from GONZÁLEZ PACANOWSKA (2013) and GUILARTE GUTIÉRREZ (2014), who thoroughly analyse the new art. 17.5 LAU, other papers slightly cover this scheme when comparing it to other provisions related to the minimum duration of the lease or the need to register the contract in the Land Register. Thus, as an example, PADILLA RUIZ (2013) explains renovations in lieu of rent in two paragraphs, while FUENTES-LOJO LASTRES (2013) and QUICIOS MOLINA (2012) give it a similar amount of attention.

For example, GONZÁLEZ PACANOWSKA (2013) and CARRASCO PERERA (2012) highlighted the incompatibility of LAU with renovations in lieu of rent. This last author even considered that the regulation of this scheme was not necessary and that "(…) the worst part is that this atypical scheme is not compatible with the whole tenancy law"[12].

Thereafter, the aim of this paper is to analyse the legal regime that regulates renovations in lieu of rent, thus identifying those problems that may arise from the application of the urban leases law and proposing amendments to make this scheme a truly alternative way to access housing for those households that cannot afford to pay a rent in money or to buy a property due to the lack of available financing.

2. Field of application of the Urban Leases Act and renovations in lieu of rent

The current version of the LAU provides special rules both for tenancies for housing purposes and for other uses (tenancies for commercial premises or for a temporary housing need), but when the contract is for housing purposes, parties cannot contravene some mandatory provisions (art. 6 LAU).

Key features of LAU include the following: the rental agreement shall be for a specified term . The Spanish Civil Code does not admit open-ended leases such as those regulated in §542.2 of the German Civil Code. The parties may agree on whatever duration they see fit, but the tenant has the right to live, at least, three years in the rented property thanks to a mandatory extension of the contract (art. 9.1 LAU). The tenant may withdraw from the contract under certain conditions (art. 11 LAU) and the rent is freely agreed by the parties, without rent controls (art. 17.1 LAU).

A tenancy contract should meet the following requirements in order to be governed by the LAU and to protect the tenant with special rules (art. 2 LAU):

1. The property must be "urban" (art. 1 LAU): this is understood to mean that the tenant's primary reason for renting the property is to use it as a residence (residential purposes), rather than to use it as a farm (agricultural purposes), in which case it would be considered a rural lease. (VALLADARES and ORDÁS, 2013).

2. The tenant has to fulfil a permanent housing need. Temporary housing purposes are excluded from the scope of application of Title II LAU and considered a tenancy for other uses (Title III LAU). To define whether the tenant needs the dwelling for permanent housing purposes or not, case law[13] establishes that it does not depend on the agreed duration of the contract, but on the temporary need: for example, to rent a property to live in another city while the tenant attends a course is a temporary housing need.

3. The property must be in a fit state for habitation (art. 2.1 LAU). The vast majority of courts consider that a property has acceptable living conditions when

[12] Free translation.
[13] SAP Cádiz of 18.7.2006 (JUR 2007, 63427) and SAP Huesca of 1.7.2005 (JUR 2005, 175202).

it is deemed suitable for housing purposes[14], regardless of whether it meets public rules related to the minimum standard of living conditions. However, although administrative requirements are not directly enforceable through art. 2.1 LAU, in the event that the dwelling does not have the certificate of habitability, the Autonomous Community administration could fine the landlord for concluding a lease without being in possession of this document (VALLADARES and ORDÁS, 2013).

Renovations in lieu of rent is a type of urban lease, not only because it is included in art. 17.5 LAU, but because art. 1543 of the Spanish Civil Code (SCC) only requires a "certain price", and not a price in money, to consider a contract a property lease (GUILARTE GUTIÉRREZ, 2014 and GARCIA TERUEL, 2018). Thus, renovations in lieu of rent includes a principal obligation to perform works that replace part or all of the rental payment in money.

Due to the fact that this scheme is a type of urban lease, its primary legal framework is the LAU. However, the difference between the works as a principal obligation and the payment of rent in the form of money is that the first is a single consideration and the rent in money has a consecutive nature (STS 9.10.2003[15]). LAU provisions are mainly intended to regulate tenancies where the tenant pays the landlord with money. For this reason, we have classified LAU rules into three groups:

1. LAU provisions that are directly applicable to renovations in lieu of rent without any foreseeable problems, even when they were designed for a lease with a rent in money.

2. LAU provisions that require a more inclusive interpretation in order to be applied to a lease with renovations in lieu of rent. Once applied, they may cause some problems for the parties due to the legal nature of the tenant's obligation , which is in form of works and not money.

3. Current LAU provisions that are difficult to apply to the concept of renovations in lieu of rent . Even when they are interpreted in a manner that makes them more compatible with this type of contract, a change in legislation would therefore be advisable.

3. Group 1. Provisions applicable without any problem to renovations in lieu of rent

3.1. The "theoretical rent" of the contract

Under the LAU, prices are regulated in accordance with art. 17 LAU, which refers to the rent charged in the contract. According to art. 17.1 LAU, the amount of rent is freely agreed by the parties. But, as we have seen, art. 17.5 LAU allows parties to replace it with renovation work.

[14] SAP Barcelona 7.6.2012 (JUR 2012, 282178), SAP Barcelona 18.5.2005 (JUR 2005, 169610), SAP Córdoba 5.4.2000 (AC 2000, 1087) and SAP A Coruña 4.11.2005 (JUR 2007, 119361).
[15] TOL 998, 575.

From our point of view, when the parties agree that the tenant has an obligation to pay rent by means of performing works, it does not necessarily mean that they do not have to determine the monetary value of the contract. In fact, art. 17.5 LAU presumes the existence of a theoretical "previous" rent, which is replaced by works. Thus, although a specific price is set even when an agreed list of renovations are the tenant's main obligation (instead of paying a rent in money) according to art. 1543 SCC, when the contract falls into the field of application of the LAU, parties shall likewise determine the theoretical rent in terms of the monetary value that is replaced by renovations.

If parties agree on the value of the works (certain price) but not the rent in money which is replaced, in our opinion, the contract should be also governed by LAU. We consider that the rent in money, in this case, is determinable. In case of dispute, the Court could calculate the value of the replaced rent with a simple mathematical formula like the following one:

$$\text{Monthly rent} = \frac{\text{Value of the works (+partial rent in money, if exists)}}{\text{Agreed contractual term (in months)}}$$

An example of this formula would be the following:

It is agreed, within the framework of art. 17.5 LAU, that the tenancy will be for housing purposes and will have a duration of one year. The tenant is obliged to perform renovation work for a total value of 3,500€, as well as to pay a partial rent of 50€ every month during this year. However, parties did not determine the rent replaced by the works.

The total "equivalent rent" in this example would be the following:

$$\frac{3{,}500€ + \ (50€\text{x}12)}{12 \text{ months}} = 341{,}6€ \text{ per month}$$

Once the theoretical rent is determined, several dispositions of LAU can be applicable to renovations in lieu of rent without any problem.

3.2. Provisions regarding the extension of the contract

One could consider that renovations in lieu of rent is not compatible with LAU because, in any case, the tenant has the right to live, at least, three years in the rented property (art. 9.1 LAU) and once the tenant has performed the works he does not have a contractual duty to pay a rent because his obligation has already been fulfilled.

However, once this term is finished, the tenant in a renovations in lieu of rent scheme will be obliged to pay the theoretical rent in money according to art. 17.1 LAU. The same happens with the voluntary extension of the contract for one year (art. 10 LAU) and also with the tacit renewal (art. 1566 SCC[16]).

[16] According to this article, the extension will depend on the periodicity of the rent. If parties agreed on a monthly-rent, the contract will be extended month by month. If parties agreed on a yearly-rent, year by year, etc.

In addition, the landlord may deny the mandatory extension of the contract for three years because of his own need of housing or that of one of his relatives. This does not imply that the landlord is entitled to terminate the contract while the tenant is performing the works: the right to deny the mandatory extension is only applicable when the tenant extends the contract once one year has already elapsed, e.g. from the first year to the third one (art. 9.1 LAU). Therefore, the landlord could not terminate the contract when the initial agreed term is, for example, three years, because the mandatory extension would not be applicable. From our perspective, when the parties agree that the performance of an agreed list of works is an obligation for the tenant, this period of amortization (the term where the tenant does not pay with money) will be the contractual term and not an extension. As a consequence, the landlord cannot terminate the contract for his own needs when the tenant is performing the works or during the amortization period; he can only do so once the latter begins to pay a rent in money after the agreed works have been concluded. In this case, there would be no distinction between an ordinary rental agreement and renovations in lieu of rent.

3.3. The estimation of the "rent"

Since a theoretical rent is determined by the parties according to art. 17.1 LAU even when the tenant pays with the performance of the agreed works, calculating the value of a monthly rent will be easy in the several situations when the LAU requires this figure .

1. The estimation of fifteen days or one month of rent due, if the tenant's spouse or partner does not take over the contract when the latter terminates it, foregoes the mandatory extension or abandons the property (art. 12 LAU). When the tenant wants to terminate the contract, the lessor may ask the tenant's spouse if she wants to subrogate. If the spouse or the legal partner decides not to take over the contract, but she has been living in the property in the meanwhile, she will be liable to pay either fifteen days or one month of rent[17]. The estimation of this rent would be easy in renovations in lieu of rent, since it would have been determined by the parties according to art. 17.1 LAU. The same happens regarding the estimation of the three-month-rent that tenant's relatives shall pay in case of the latter's death (art. 16 LAU).

2. The estimation of a monthly rent corresponding to the compulsory deposit (art. 36 LAU). There is a minimum compulsory deposit to be paid by the tenant at the beginning of the lease contract. According to art. 36 LAU, the tenant shall make a deposit equivalent, at least, to a monthly-rent-payment in tenancies for housing purposes. In renovations in lieu of rent, parties will know the equivalent monthly-rent payment, since they have to agree on it (art. 17.1 LAU).

3.4. Subrogation and subletting

When there is a subrogation of a new tenant, he will be liable for finishing the agreed works, and the contract will continue to be in full effect . In addition, when the landlord is the one who changes, the new one has to honour the contract, so it does not lead to

[17] She will have to pay one month of rent when her spouse abandoned the housing; but only fifteen days when he terminated the contract (ordinary notice) or refused to take up the three year extension (art. 12 LAU).

any problems for renovations in lieu of rent contracts. These situations are the following:

1. The subletting and assignment of the lease contract (art. 8 LAU), together with the estimation of the maximum rent in case of partial subletting (art. 8.2 LAU). It is not possible for the tenant to sublet or to assign the contract to a third party without the landlord's consent in writing (art. 8 LAU) under Spanish tenancy law. However, if the landlord accepts it, the contract can be ceded to a new tenant that he has approved and can continue on without the need for any further amendments (assignment of the contract[18]), since said tenant will have to finish the agreed works. In addition, when subletting the property, art. 8 LAU establishes that the rent charged to the subtenant cannot be higher than the one charged to the tenant. The way to determine whether this rent is higher or not in terms of the value of the renovations in lieu of rent will not entail any problem, since the monetary value of the replaced rent has to be agreed by the parties according to art. 17.1 LAU.

2. The subrogation of the spouse, the legal partner or relatives in different situations (arts. 12, 15, 16 LAU). In the case of separation, divorce or marriage annulment, the use of the rented property may be granted to the spouse or legal partner (art. 15 LAU). When the term of this use is longer than the duration of the tenancy agreement, the spouse will subrogate the former tenant. A subrogation is also permitted in the case of the tenant's death, if one of his/her relatives wishes to exercise this option . In these situations, there is no problem regarding renovations in lieu of rent, because the new tenant can continue with the agreed works. However, the completion of the works may be difficult in some particular cases (for example, when there is only a short amount time to finish them), as will be explained in the following section (see below 4. Group 2).

3. The situation that arises when the landlord loses his right to rent the property, because there is a new owner in his place. According to art. 13 LAU, if the landlord loses the ownership of the property (for example, due to his eviction), the tenancy contract will continue if it had been registered in the Land Register prior to the event that caused the lessor to lose his property rights (art. 13 LAU). In this case, the renovations in lieu of rent contract continues to be in full effect (the tenancy contract is protected against third parties).

4. The sale of the rented property to a third party when the contract had been registered in the Land Register (art. 14 LAU), the renovations in lieu of rent lease continues to be in full effect (the tenancy contract is protected against third parties) and so the new acquirer cannot terminate the contract.

3.5. Rent increase and rent update

[18] This is a case of subjective novation according to art. 1205 SCC. The new tenant has to continue the works. In any case, the former tenant and the new one may agree on a price to assign the contract (O'CALLAGHAN, 1995): for example, if the works are already finished, they can agree that the new tenant will pay part of the work value, since he will be living there for free until the agreed term ends.

As we have seen, the concept of "rent" only includes money and not works, so the later are not considered a "rent" but rather a certain price. Therefore, when LAU refers to the rent increase and update, it only affects the obligation to pay money (in renovations in lieu of rent, the tenant may pay a small amount of rent in money, in the case of it being a partial replacement) and not the works. Thus:

1. Rent update (art. 18 LAU). The rent update is the increase or decrease of the rent during the contractual term, according to an index (for example, the Consumers' Price Index). The only thing that can be updated is the rent in money, as it is intended to reflect changes in inflation, ensuring that the rent is set at fair market value (GUILARTE GUTIERREZ, 2014b), but this adjustment is not applied to the works. As a consequence, the parties can increase the rent paid in money in renovations in lieu of rent contracts according to art. 18 LAU, in line with standard rental practices , provided that the tenant has the obligation to pay rent (for example, once the amortization period finishes or when the tenant has to pay a reduced/partial rent).

2. Rent increases due to improvement works undertaken by the landlord (art. 19 LAU). The obligation of the tenant to make renovations cannot be used to justify an increase of the rent according to art. 19 LAU, because this article is only intended to allow a rent increase in cases where the landlord is the one who performs improvement works in the property (BERCOVITZ et al. 2009). However, in a lease with renovations in lieu of rent, the landlord continues to have the possibility of improving the property under certain conditions (art. 22 LAU). In this case, he will have the right to increase the rent. Even when no rent has to be paid by the tenant (because it was replaced by the improvements), from that moment on, he will have the obligation to pay the increase duly set by the landlord in accordance with the terms of the contract .

3.6. Other LAU provisions that are not affected by a main obligation to perform works

There are other general provisions in the LAU which are not affected by a possible consideration in works and not in money. These are the following:

1. The obligation of the tenant to pay general costs and individual services (such as the tax on property, art. 20 LAU), since there is no distinction between an ordinary rental agreement and renovations in lieu of rent.

2. The right of the landlord to ask for the property to be restored to its former state (art. 23 and 17.5 LAU), since there is no distinction between an ordinary rental agreement and one with renovations in lieu of rent. The only difference that may arise, in which case the aforementioned article is also applicable without any foreseeable problems, occurs when the tenant does not fulfil his obligation to perform the works in renovations in lieu of rent. In this case, the landlord may ask for the property to be restored to its former state (art. 17.5 LAU)[19]. Conversely , this restoration is only enforceable in a tenancy with rent paid in money in the event that the tenant performs forbidden works (art. 23 LAU).

[19] However, this restoration may not be convenient, depending on the state of the works.

3. The tenant's entitlement to carry out works to adapt the dwelling to his disability (art. 24 LAU), since they can be performed by the tenant in addition to the renovations that are the price of the contract.

4. Pre-emption rights of the tenant (art. 25 LAU).

5. Compelling the other contracting party to sign the contract in writing (art. 37 LAU) and to register it in the Land Register (art. 1555 SCC).

4. Group 2. Provisions that may cause inconveniences for one of the parties

Other LAU provisions are not so easily applicable to renovations in lieu of rent by just calculating their equivalent to a rent in money according to art. 17.1 LAU. These dispositions may also work in this type of contract, provided that the provisions are interpreted in a manner this is more suited to this type of lease . In some cases, though, they may cause problems for the parties in comparison to a tenancy in which the tenant pays a rent in money, because the renovations do not have a consecutive nature. Thus, in this second group we have:

1. The obligation of the landlord to maintain the property. Some scholars question whether the landlord is still obliged to upkeep the conditions of the property when the tenant has to perform agreed renovation work (GONZÁLEZ PACANOWSKA, 2013 and GUILARTE GUTIÉRREZ, 2014). However, one should take into account that, according to art. 21 LAU, the landlord is still obliged to make repairs in the rented dwelling. This duty is inherent to the lease agreement, since the landlord shall provide the tenant with the agreed use of the dwelling (art. 1554.2 SCC[20]), and this cannot be excluded by the parties (art. 6 LAU). From our point of view, the landlord is still obliged to repair the property in a renovations in lieu of rent lease. Nevertheless, the landlord is only compelled to keep the facilities in the conditions that existed when the dwelling was delivered at the beginning of the contract and is not obliged to maintain the fixtures and fittings built or installed by the tenant (they do not fall into the agreed use of the property).

2. The termination of the contract due to a breach of the tenant's obligation (art. 17.5 LAU). According to art. 17.5 LAU, the breach of the obligation to perform the agreed works allows the landlord to terminate the contract. Nevertheless, this breach is not included in the list of grounds for termination (art. 27.2 LAU), where the non-payment of the rent is one of the listed causes . We consider that art. 27.2 LAU should apply *mutatis mutandis* when the tenant does not carry out the renovations in the agreed terms, even though the current wording of art. 27 could lead to an opposed interpretation. In this last case, the landlord could terminate the contract not on the basis of art. 27.2 LAU, but on the basis of art. 1124 SCC, which requires, in any case, the impossibility of the tenant being capable of fulfilling his contractual obligation, an impossibility to satisfy the purpose of the contract or the tenant's clear lack of willingness to fulfil his

[20] Not only under Spanish tenancy law, but in other legal systems (Garcia Teruel, 2017).

obligation (GUILARTE GUTIÉRREZ, 2014c). That, together with the difficulties in controlling the state of the renovation works, could prevent a fast termination of the contract in cases where the tenant's level of compliance with his obligations is considered deficient. If parties do not agree on a maximum date to deliver the works, they need to be finished when the tenancy contract ends (art. 1127 SCC). So, while the tenant is living in the rented property, the landlord has no means of verifying that the works are being carried out appropriately, and it will not be until the end of the contractual term that he will be able to check the tenant's fulfilment. In addition, even when parties agree on a schedule to verify the works, the landlord's authorisation to enter the dwelling for inspection will always depend on the tenant's permission, since housing is protected by the inviolability of domicile stipulated in art. 18.2 of the Spanish Constitution[21]. The best option to verify the state of the works in a renovations in lieu of rent tenancy is to agree on the delivery of different parts of the works during the contract (art. 1592 SCC). Thus, if the tenant must deliver part of the works, for example, during the first or second month, then the landlord has the possibility of verifying their partial fulfilment, and so on for as many parts as the works are divided into.

3. The right to claim a three-month-rent from the relatives of the deceased tenant when they decide not to subrogate in his position (art. 16.3 LAU). As we have pointed out in the previous section, calculating the value of a three-month-rent is relatively easy; the difficulty, however, lies in another legal uncertainty : to determine if the relatives are or are not compelled to satisfy the abovementioned rent. That will depend on the state of the works: e.g. the relatives will not have to pay for living three months in the property when the tenant finished his obligation before his death . In any case, in order to determine the latter, an expert will have to assess the state of the works, which means that more difficulties appear in renovations in lieu of rent than in a regular tenancy when the contract ends as a consequence of the tenant's death.

4. The attribution of the use of the property to the spouse in case of separation, divorce or marriage annulment (art. 15 LAU). Depending on the duration of the assignment period , the spouse may or may not be subrogated into the obligations of the tenant who loses the rented housing. If the spouse does not subrogate the tenant because the term of the attribution is lower than the duration of the tenancy, the tenant who left the property may have difficulties finishing the agreed renovations while the spouse is still living in the dwelling . This fact may even be considered as a consequent impossibility (art. 1184 SCC), involving the termination of the contract and the restitution of performances.

5. The subrogation of the spouse in case of separation, divorce or marriage annulment (art. 15 LAU), when the new tenant has to finish the works in a short period of time. In contrast with the previous case, the spouse subrogates the former tenant when the attribution of the property is for a longer period than the duration of the tenancy. In principle, the subrogation is not difficult to apply in the type of lease that we are studying , because the spouse will be in charge of continuing the works. But certain issues may appear when he or she has only a

[21] Spanish Constitution. BOE No. 311, of 29.12.1978.

short time to finish them (e.g. because the former tenant decided not to start the works after the marriage crisis). This need to finish the works in such a short period of time may stop the spouse from accepting the subrogation in renovations in lieu of rent.

6. Obligation to pay a rent equivalent to fifteen days or a month in the event that the tenant's spouse or legal partner does not subrogate when the latter terminates the contract or abandons the property (art. 12 LAU). The difficult issue when applying this section of the legislation to renovations in lieu of rent is to determine whether the spouse or partner has the obligation to pay this amount, since the state and value of the performed works need to be checked by an expert, as in the case of the payment of the rent by the relatives of the deceased tenant (art. 16 LAU).

7. The responsibility of the tenant's spouse or partner to finish the works in the case of subrogation following a due notice of termination by the tenant or by his abandonment of the housing (article 12 LAU), when the spouse or partner must complete the work in a short period of time. In this case, the same problem mentioned in the subrogation of the spouse due to separation, divorce or marriage annulment may appear (article 15 LAU).

5. Group 3. Provisions which are difficult to apply to renovations in lieu of rent

A greater complexity exists in those situations foreseen in LAU where a restitution of performances must necessarily take place. The restitution has retroactive effects (MONTFORT FERRERO, 1999), that is to say, that parties must, in these cases, return the performances already delivered or, if that is not possible (such as the return of the renovations or the time that the tenant has used the property), its equivalent economic value. An exception to retroactivity appears in contracts of a consecutive nature, as is the case of tenancies with a rent in money, because each payment is usually equivalent to one month of use of the dwelling. However, this does not happen when the tenant's obligation consists of performing works .

For example, the contract may terminate when the tenant has not started the works but he has been living at the property for eight months. Due to the requirement for restitution, he will have to pay the equivalent to eight months of rent to the landlord. A similar situation may happen when the tenant has finished the works but not enjoyed the use of the housing for the whole period. For example, if the contract terminates when the works are fulfilled, but the tenant only lived there for one year (when the contract was agreed for two), the landlord will have to pay the tenant the equivalent to one year of rents, given that the restitution of half of the works is not possible.

Thus, in the following LAU situations, parties to a lease with renovations in lieu of rent need to assess the state of the works (a process that may entail, at the very least, the hiring of an expert or even a dispute at a judicial level), and, in many cases, they also entail one party paying the other party an amount of money to compensate the imbalance in the restitution.

1. The unilateral right of withdrawal (termination by ordinary notice) of the tenant (art. 11 and 12 LAU, when the spouse or partner does not subrogate). It is

possible for the tenant to terminate the tenancy agreement without any justified grounds, only for her own convenience (art. 11). For contracts concluded from 6th June 2013, the tenant may withdraw at any time, provided that a minimum duration of six months has elapsed since the conclusion of the contract, giving notice at least thirty days in advance. In renovations in lieu of rent, the tenant may terminate the contract but this will necessarily involve the restitution of the works and the time she has used the property (subjected to arts. 1303 and 1295 SCC[22]).

2. The termination of the contract by the tenant due to improvement works being conducted by the landlord (art. 22 LAU). The tenant shall bear improvement works by the landlord if these cannot be deferred (art. 22 LAU). These improvement works must be compulsory and urgent for the landlord (RODRÍGUEZ MORATA, 2013). Art. 22 LAU establishes that, when these works significantly affect the rented property, the tenant has one month to terminate the contract. This termination will cause, in the same way as the unilateral withdrawal, the restitution of performances.

3. The termination of the contract by the tenant due to the absence of acceptable living conditions in the dwelling (art. 26 LAU), when this situation is caused by maintenance work that the landlord carries out.

4. The termination of the contract when the landlord loses his right to rent (art. 13 LAU), and the tenancy is not registered in the Land Register. When the landlord loses his property rights due to the a conventional redemption, the compulsory sale of the property derived from a mortgage enforcement, a judicial decision or the exercising of a right that grants an option to purchase the rented property, the tenancy contract will not be binding for third parties, unless the contract had been registered in the Land Register before the event that caused the lose of property rights . Thus, the new acquirer may terminate the contract, however he must comply with the restitution of performances.

5. The termination of the contract because of the sale of the property (art. 14 LAU), when the tenancy is not registered in the Land Register. If the contract had not been registered, the property's acquirer is entitled to immediately terminate the tenancy agreement, unless otherwise agreed in the sale contract (art. 14.2 LAU, according to the *emptio tollit locatum* principle). This will entail the restitution of performances in renovations in lieu of rent leases.

6. The termination of the contract due to the tenant's death when his relatives waive the option to subrogate the lease (art. 16 LAU), the lessor and the tenant's heirs will have to calculate the value of the works and undertake a restitution process.

[22] There is no standard process for implementing restitution in the SCC, but there are several particular dispositions for the restitution due to contract annulment (arts. 1305 and 1306 SCC), for partial annulment (arts. 1307, 1308 and 1314 SCC), due to a redhibitory action (art. 1486 SCC), etc. It is not clear which one of these dispositions should be used in case of unilateral withdrawal, but art. 74 RDL 1/2007 on Consumer Protection, applies arts. 1303 and 1308 SCC.

7. The termination of the contract due to the loss of the property or its dilapidated state (art. 28 LAU), which also entails the restitution of performances.

While some of these cases might be infrequent (such as the termination of the contract due to the loss or ruin of the property ex art. 28 LAU), the unilateral withdrawal right of the tenant (art. 11 LAU) or the termination of the contract because of the sale of the property (art. 14 LAU) may be quite common . Would any landlord agree to sign a renovations in lieu of rent contract, knowing that if the tenant finishes the works within the first few months and terminates the contract by ordinary notice, she would have to pay the tenant the value of all the works? Also, what tenant would want to pay by means of performing renovations, if in the case he has to leave the property due to personal circumstances (illness, labour mobility...), he would be compelled to enter into a long and costly process of works assessment and to pay for the time he used the dwelling? The tenant is also affected by a fundamental uncertainty when the landlord sells the dwelling, thus terminating the tenancy contract (art. 14 LAU includes the principle *emptio tollit locatum* after an amendment by Act 4/2013), since the tenant has to compensate the buyer with the value of the time she lived in the property in cash, when her purpose was to pay by finishing the agreed works and not in money.

In short, the right of unilateral withdrawal of the tenant, even when it contributes to tenants' flexibility in relation to the rented dwelling (MOLINA ROIG and GARCIA TERUEL, 2015), is difficult to apply in a lease contract with renovations in lieu of rent. In this case, different mechanisms that can provide this flexibility, should be regulated. Allowing the tenant to assign the contract to a new tenant who wants to access rented housing while paying by means of renovating the property could be an option[23]. It is not easy, under current legislation, because neither the subletting or the assignment option can be freely exercised by the tenant without the express written consent of the landlord (art. 8 LAU). Also, if LAU was changed to protect the tenancy agreement in case of the sale of the property (art. 14 LAU, recovering the principle *emptio non tollit locatum*), renovations in lieu of rent would also become more common , as in this case the problems associated with restitution would be avoided.

Other cases that require restitution should not be amended, even though doubts exist with regard to their application in renovations in lieu of rent. So, in the case of the termination of the contract due to the absence of acceptable living conditions in the property (art. 26 LAU), as a result of improvement works conducted by the landlord (art. 22 LAU) or due to the loss or ruin of the housing (art. 28 LAU), the tenant may terminate the contract and demand an effective restitution because he is not receiving the agreed use of the dwelling. This does not derive from a unilateral decision by the tenant as in the withdrawal right of art. 11 LAU, as we are talking about situations where the tenant does not receive the agreed use. Thus, limiting these rights would entail more disadvantages for the tenant than the ones caused by the restitution, since he would be forced to use the property even when the landlord did not provide him with

[23] This option is possible under certain conditions in German, Austrian and Swiss tenancy law. In Germany and Switzerland, it is not possible to give ordinary notice in a fixed-term tenancy agreement (§575a BGB and 266g Code of Obligations of Switzerland). However, §540 allows the tenant to ask the landlord for permission to totally sublet the dwelling. If the landlord does not accept , the tenant can terminate the contract. Also art. 264.1 Code of Obligations allows the tenant to assign the contract under certain conditions. In art. 11 Austrian *Mietrechtgesetz* (BGBl. n. 520/1981), the landlord can only deny the subletting of the rented property if there are grounds for it, such as overcrowding.

the agreed use, e.g. in the case of dilapidated housing. The same would occur with the termination of the contract because of the tenant's death (art. 16 LAU): due to the importance and transcendence of this provision, parties should always have the possibility of terminating the contract due to the death of the tenant, even when the restitution of performances is unavoidable in this case.

6. Conclusions

The main purpose of this article was to determine if the new type of lease contract under art. 17.5 LAU (renovations in lieu of rent) could be, from a legal perspective, a real and affordable alternative for those households that cannot gain access to rental housing by means of paying a rent in money. From our point of view, we consider that the features of this scheme may contribute to resolving this housing problem because, on the one hand, a tenant can access the rental market without money, which is especially beneficial for those with construction skills; and, on the other hand, a landlord has the chance to repair his property, and all this in only one contract. However, as renovations in lieu of rent is a type of urban lease, the provisions of the LAU are applicable, nevertheless a more functional environment for this scheme should be created.

In view of the previous analysis, one may say that the majority of LAU provisions can be applied quite favourably in renovations in lieu of rent, provided that the equivalent rent that is replaced by the works is determined (art. 17.1 LAU). Other provisions require some level of interpretation and adaptation, but they may cause detrimental effects to the parties as a consequence of the nature of the tenant's obligation (consisting of works instead of money). Finally, some LAU provisions should be amended, especially those in which one party decides to terminate the contract whereas the other party wants to continue it: the unilateral withdrawal right of the tenant (art. 11 LAU) and the termination of the contract due to the loss of the lessor's right to rent (art. 13 LAU) or to the sale of the property (art. 14 LAU), even when the third party purchaser has prior knowledge of the existence of the tenancy agreement despite not being registered in the Land Register.

Thus, we believe that this scheme can become a real alternative to homeownership and to rental agreements with rent in money as long as the two main shortcomings are remedied by : applying minimal amendments to the Spanish tenancy law and drafting an adequate contract that allows us to avoid some of the detected problems (e.g. dividing the works in different phases to control their fulfilment on a regular basis).

Bibliography

BERCOVITZ RODRÍGUEZ-CANO, R. (coord.); MORALEJO IMBERNÓN , N. (coord.) and QUICIOS MOLINA , M.S. (coord.) (2009). *Tratado de contratos. Tomo II*. Valencia, Tirant lo Blanch.

CARRASCO PERERA, A. (2012) "Comentarios al proyecto de ley de reforma de los arrendamientos de viviendas", in *CESCO*, núm. 4.

EUROSTAT (2016). *Population by tenure status, type of household and income group*.

EUROSTAT (2016a). *Total population living in a dwelling with a leaking roof, damp walls, floors or foundation, or rot in window frames of floor*.

FUENTES-LOJO LASTRES, A. (2013). *Ley de Arrendamientos Urbanos*. El Derecho, Madrid.

GARCIA TERUEL, R.M. (2018). "La naturaleza jurídica de la rehabilitación por renta en la Ley de Arrendamientos Urbanos" in MUÑIZ ESPADA, Esther (dir.). NASARRE AZNAR, Sergio (dir.). RIVAS NIETO, Estela (dir.) and URQUIZU CAVALLÉ, Ángel (dir.). *Reformando las tenencias de la vivienda*. Valencia, Tirant lo Blanch.

GARCIA TERUEL, R. M. (2017). "Renovation of residential housing stock under tenancy law: a comparative perspective between Southern and Central European countries", in BARGELLI and HEITKAMP, Book series *New Developments in Southern European Housing. Pisa University Press*.

GONZÁLEZ PACANOWSKA, I. (2013) "El pacto de reemplazar la obligación de pago de la renta por el compromiso del arrendatario de reformar o rehabilitar el inmueble", in BERCOVITZ RODRÍGUEZ-CANO, R. (coord.). *Comentario a la Ley de Arrendamientos Urbanos*. Cizur Menor, Thomson Reuters Aranzadi.

GUILARTE GUTIÉRREZ, V. (2014a) "Capítulo III. De la renta", in GUILARTE GUTIÉRREZ, V. (dir.) and CRESPO ALLUÉ, F. (dir.). *Comentarios a la Ley de Arrendamientos Urbanos*. Thomson Reuters, Cizur Menor.

GUILARTE GUTIÉRREZ, V. (2014b). "Art. 18. Actualización de la renta", in GUILARTE GUTIÉRREZ, V. (dir.) and CRESPO ALLUÉ, F. (dir.). *Comentarios a la Ley de Arrendamientos Urbanos*. Thomson Reuters, Cizur Menor.

GUILARTE GUTIÉRREZ, V. (2014c). "Incumplimiento de obligaciones", in GUILARTE GUTIÉRREZ, V. (dir.) and CRESPO ALLUÉ, F. (dir.). *Comentarios a la Ley de Arrendamientos Urbanos*. Thomson Reuters, Cizur Menor.

IDAE (2015). *Rehabilitación energética: una prioridad y una oportunidad para todos*. 28.7.2015.

KEMP, P. (2011). "Low-income Tenants in the Private Rental Housing Market", in *Housing Studies*, 26,7-8/2011, pp. 1019-1034.

LAMBEA LLOP, N. (2016). "Social Housing Management Models in Spain" in *Revista catalana de dret públic*, No 52, p. 115-128.

MOLINA ROIG, E. and GARCIA TERUEL, R.M. (2015). "El abandono de la vivienda por el inquilino: ¿cómo afecta a su acceso al mercado de alquiler?", in *Quaderns d'inclusió social*, No. 4, pp. 41-86.

MONFORT FERRERO, M. J. (1999). *La restitución en la resolución por incumplimiento de los contratos traslativos del dominio*. Valencia, Tirant lo Blanch.

NASARRE AZNAR, S. and GARCIA TERUEL, R.M. (in press). "Evictions and homelessness in Spain 2010-2015", in KENNA, P. (ed.). *Evictions and homelessness in Europe*. Camberley Surrey, Edward Elgar.

NASARRE AZNAR, S. (2014). "La eficacia de la Ley 4/2013, de reforma de los arrendamientos urbanos, para aumentar la vivienda en alquiler en un contexto europeo", in *RCDI* , No. 747, pp. 205-249.

O'CALLAGHAN, X. (dir.) (1995). *Comentarios a la Ley de Arrendamientos Urbanos*. Madrid, Editorial de Derecho Financiero.

PADILLA RUIZ, P. (2013). "Comentarios a la Ley 4/2013, de medidas de flexibilización y fomento del mercado de alquiler de viviendas", in *Revista Aranzadi Doctrinal*, No. 4.

QUICIOS MOLINA, S. (2012). "La reforma de los arrendamientos urbanos, según el Proyecto de Ley de medidas de flexibilización y fomento del mercado del alquiler de viviendas, de 31 de agosto de 2012", in *Aranzadi civil-mercantil. Revista doctrinal*, núm. 8, pp. 31-74.

RODRÍGUEZ MORATA, F. (2013) "Régimen de las obras y mejoras en la Ley de Arrendamientos Urbanos de 1994", in *Revista Doctrinal Aranzadi Civil-Mercantil vol. III parte Estudio*.

VALLADARES RASCÓN, E. and ORDÁS ALONSO, M. (2013). "Art. 1. Ámbito de aplicación", in in BERCOVITZ RODRÍGUEZ-CANO, R. (coord.). *Comentario a la Ley de Arrendamientos Urbanos.* 6ª ed. Aranzadi, Cizur Menor.