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Property law in Poland

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The article discusses the basic issues of Polish property law. In particular, it briefly addresses all types of rights *in rem*, i. e., ownership, perpetual usufruct, usufruct, easements (servitudes), pledge, co-operative ownership right of real estate, and mortgages. Emphasis is given to the pluralism of the sources of property law in Poland, on the one hand, and the presence of the *numerus clausus* principle in it, on the other hand. The difference between possession as a factual state and a real right is highlighted. The objective tendency to split the single concept of ownership into various forms of this right, which are meaningfully far apart from each other is described. It is noted that there is a clear differentiation in Polish law between binding contracts and causal dispositive transactions, as well as the assumption of transactions with a double effect (both binding and dispositive), which turns the system of transfer of real estate ownership into a consensual one. At the same time, attention is drawn to the fact that the ownership right passes to the acquirer as a result of the conclusion of the contract even before the corresponding registration of the transfer of title in the public register, which, thus, has a declarative character. Attention is also given to serious legal restrictions on the acquisition of real estate by foreigners. Furthermore, the article discusses the general trends in the development of Polish property law, *inter alia* digitization of land and mortgage registers, adjusting the system of mortgage lending to the needs of a developed market economy, regulation of the rapidly expanding housing market, as well as increasing restrictions on real estate trading and regulation of legal titles to real estate on which transmission facilities are located.

Keywords: property law, immovable property, ownership, perpetual usufruct, usufruct, servitudes, pledge, mortgage, co-operative ownership right of real estate, land and mortgage registers.

Introduction

It is worth starting considerations on Polish property law by juxtaposing property law with the objective and subjective meaning. Property law in the objective sense is a set of provisions that regulate the legal forms of using things in the form of subjective rights *in rem*. Thus, it is a set of sources of law regulating the issues of content, acquisition, loss, and protection of subjective rights *in rem*[1]. The sources of Polish property law are widely dispersed. Obviously, the key role is played by the Civil Code of 1964. Within the Civil Code (hereinafter CC), its book two is devoted to proprietary issues (Art. 140–352 of the CC). Other major sources of property law are: the Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage, the Act of 24 July 1994 on the Ownership of Dwelling and Office Units, the Act of 6 December 1996 on Pledge by Registration and the Pledges Registers, the Act of 21 August 1997 on Immovable Property Management, the Act on of 15 December 2000 on Dwelling Units Co-operatives, the Act of 11 April 2003 on the Shaping of the Agricultural System, the Act of 20 February 2015 on Found Movable Property,

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[1] *Gniewek E.* Prawo rzeczowe. Warszawa: C. H. Beck, 2018. P. 1.

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the Water Law Act of 20 July 2017[2]. The regulations contained in the Constitution of the Republic of Poland of 1997 cannot be omitted, either. This concerns in particular Art. 20, 21 and 64 of the Polish Constitution. The constitutional regulation contains the following decisions relating to the rights *in rem*. Firstly, private property is one of the pillars of the social market economy, which is the basis of the Polish economic system (Art. 20 of the Constitution). Secondly, everyone has the right to property, which is subject to equal legal protection for all (Art. 64 (1) and (2) of the Constitution). Thirdly, ownership may be limited only by statute and only to the extent that it does not infringe the essence of ownership (Art. 64 (3) of the Constitution). Fourthly, expropriation is admissible only when it is carried out for public purposes and for just compensation (Art. 21 (3) of the Constitution)[3].

Rights *in rem* are absolute rights. This means that they are effective against all persons (*erga omnes*)[4]. For this reason, the Polish legal system constructs a closed list (*numerus clausus*) of property rights[5]. It includes the following: ownership (Art. 140 et seq. of the CC), perpetual usufruct (Art. 232 et seq. of the CC), and limited property rights (Art. 244 et seq. of the CC). The latter includes such rights as: usufruct, easements (servitudes), pledge, co-operative ownership right to an apartment, and mortgage[6]. As a rule, the object of rights *in rem* are things, i. e. material objects distinguished from nature (Art. 45 of the CC)[7]. However, quite often the Polish legislator includes among the rights *in rem* also rights having as their object other property rights. We should mention here: the usufruct of rights (Art. 265 of the CC), a pledge on rights (Art. 327 of the CC), a mortgage on perpetual usufruct, a mortgage on a co-operative ownership right to an apartment, or a mortgage encumbering a mortgage claim (subintabulat) (Art. 65 of the Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage)[8]. However, in any case rights *in rem* having as their object other property rights exist as parallel forms to the basic forms of rights *in rem*, i. e. usufruct of things, pledge on movables and mortgages on immovable property. There are never rights *in rem* having as their object other rights without the prototype in the form of rights *in rem* having things as their object[9].

At the end of the introductory part of the elaboration on Polish property law, it should be added that, apart from the regulation of subjective rights *in rem*, property law also covers institutions such as public registers of rights *in rem*, in particular land and mortgage registers and the pledges register, as well as possession (Art. 336 et seq. of the CC). Possession is not a subjective right *in rem*, but a state of actual possession of a thing and does not have to be accompanied by any subjective right to a thing[10].

1. Ownership

Ownership is the core of the property law system. Ownership is the most complete right, encompassing the widest range of powers that can be held over a thing[11]. The content of the ownership right is set out in Art. 140 of the CC, which states that: “Within the

[2] Ibid. P. 4.

[3] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. Warszawa: Wolters Kluwer Polska, 2012. P. 43–44; *Sokołowski T.* Property law // Handbook of Polish law / eds W. Dajczak, A. J. Szwarc, P. Wiliński. Warszawa; Bielsko-Biała: Wydawnictwo Szkolne PWN, 2011. P. 451.

[4] *Gniewek E.* Prawo rzeczowe. P. 7.

[5] *Sokołowski T.,* Property law. P. 450.

[6] *Gniewek E.* Prawo rzeczowe. P. 2.

[7] *Radwański Z., Olejniczak A.* Prawo cywilne — część ogólna. Warszawa: C. H. Beck, 2015. P. 111.

[8] *Gniewek E.* Prawo rzeczowe. P. 6.

[9] Ibid. P. 7.

[10] Ibid. P. 2.

[11] Ibid. P. 63; *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 42–43.

limits set by the law and the principles of community life, an owner may, to the exclusion of other persons, use a thing in accordance with the social and economic purpose of his right, and may, in particular, collect the profits and other revenues from said thing. Within the same limits, he may dispose of the thing"[12]. As can be seen, the content of the ownership right has been designated from two perspectives: a positive and a negative one. In the positive aspect, ownership includes attributes such as the right to use the thing and the right to dispose of the thing. The right to use thing traditionally includes rights to possess a thing (*ius possidendi*), to use a thing (*ius utendi*), to collect profits (fruits) and other revenues from a thing (*ius fruendi*), and to have actual disposal such as processing thing, consumption, and even the destruction of a thing (*ius abutendi*)[13]. The right to dispose of a thing includes the right to dispose of ownership, in particular by transferring it to another person, as well as the right to encumber the thing. As for the negative side of ownership, it is expressed in the statement that the owner can exercise their right to a thing "to the exclusion of other persons". This means that other legal entities are obliged not to interfere in the sphere of the owner's rights[14]. In the context of reflection on the content of ownership, it is also worth mentioning its constraints determined by factors such as statutory acts, principles of community life and social and economic purpose of ownership.

When describing the general model of ownership in Polish law, it is worth pointing out, following Edward Gniewek, that analysis of contemporary legislation provides evidence for the stratification (decomposition) of ownership[15]. As the author notes, there has been a significant diversification in the Polish legal system of ownership for objective reasons (e. g. "agricultural" property) or for subjective reasons (state property, communal property). Therefore, in practice it is difficult to discern a uniform ownership model since the universal ownership rights defined in the Civil Code are subject to many different limitations provided for in specific acts[16].

A crucial issue from a practical perspective is the transfer of ownership by contract. On the one hand, the position of Polish law is that there is a clear distinction between obliging and disposing agreements. For this reason, it creates a contract of ownership transfer, which is purely disposable, and its effect is merely the transfer of ownership from the seller to the acquirer. On the other hand, in order to meet the intuitive understanding of trade in goods, the Civil Code constructs double-effect contracts, i. e. contracts with an obliging and disposing effect[17]. This is set out under Art. 155 (1) of the CC: "A sale, exchange, donation, real estate alienation or another contract creating an obligation to transfer the ownership of goods *in specie* transfers the ownership to the acquirer unless a specific regulation provides otherwise or the parties decide otherwise"[18]. As an exception to the above rule, if movables are the subject of a contract creating an obligation to transfer ownership, a transfer of possession is required to reassign the ownership of movables. The same applies if the subject of the contract creating an obligation to transfer ownership is future things (Art. 155 (2) of the CC), as well as when a person not entitled to dispose of a movable disposes of it for the *bona fide* acquirer (Art. 169 (1) of the CC)[19]. Summing up, the transfer of ownership in Polish law is generally consensual in nature, in the broad sense of the term. Importantly, just the conclusion of the contract transferring the ownership of immovable property causes the transfer of ownership to the acquirer, regardless of the

[12] Translation cited: *Kucharska E.* The Civil Code. Kodeks cywilny. Warszawa: C. H. Beck, 2019. P. 79.

[13] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 66.

[14] Ibid. P. 67.

[15] *Gniewek E.* Prawo rzeczowe. P. 71.

[16] Ibid. P. 72.

[17] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 88–89.

[18] Translation cited: *Kucharska E.* The Civil Code. Kodeks cywilny. P. 85.

[19] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 90.

entry of the latter's right in the land and mortgage register. According to the general rule this entry is declarative.

In Polish law the transfer of ownership is of causal nature. This means that the validity of the contract transferring ownership depends on the existence of the obligation to transfer ownership. This obligation may result from a previously executed contract creating an obligation to transfer ownership, from a particular legacy, unjust enrichment or another event. The principle of causality applies to the transfer of immovable property as well as to the transfer of movables. The only difference is that in the case of a transfer of immovable property the obligation must not only exist but must also be mentioned in the content of the contract that transfers ownership.

The rules governing the transfer of immovable property ownership are stricter in other respects as well. First of all, it should be pointed out that a contract creating an obligation to transfer the ownership of immovable property should be executed in the form of a notarial deed. The same rule applies to a contract transferring ownership which is executed in order to perform an earlier obligation to transfer the ownership of immovable property (Art. 158 of the CC). Furthermore, the ownership of immovable property cannot be transferred on a condition or subject to a time limit (Art. 157 (1) of the CC). Therefore, if a contract creating an obligation to transfer the ownership of immovable property is executed on a condition or subject to a time limit, an additional agreement between the parties containing their unconditional consent to the immediate transition of ownership is required to transfer ownership (Art. 157 (2) of the CC)[20].

Real estate trading is subject to many specific restrictions. First of all, the limitations resulting from the Act of 24 March 1920 on the Acquisition of Immovable Property by Foreigners should be mentioned[21]. Pursuant to Art. 1 of this Act, the acquisition of immovable property by a foreigner (except for citizens or entrepreneurs of the states-parties to the agreement on the European Economic Area or the Swiss Confederation) requires a permit. The permit is issued, by way of an administrative decision, by the minister responsible for internal affairs, if the Minister of National Defence does not raise an objection, and in the case of agricultural immovable property — if no objection is raised by the minister responsible for rural areas development. A foreigner within the meaning of this Act is: 1) a natural person who does not have Polish citizenship; 2) a legal person established abroad; 3) a company of persons mentioned in point 1 or 2 above without legal personality, established abroad in accordance with the legislation of foreign countries; 4) a legal person and a commercial company without legal personality, established in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies listed in points 1, 2 and 3 above (Art. 1 (2) of the Act on Acquisition of Immovable Property by Foreigners)[22]. It should be added here that obtaining a permit is also required for the acquisition or taking up by a foreigner of shares or stocks in a commercial company with its registered office in the territory of the Republic of Poland, as well as any other legal action regarding shares or stocks, if as a result the company being the owner or perpetual user of immovable property in the territory of Poland will become a foreign-controlled company. This rule does not apply to cases when the company's shares are allowed to be traded on a regulated market (Art. 3e (1) of the Act on Acquisition of the Immovable Property by Foreigners, see also Art. 3e (2) of this Act)[23]. Among the many exemptions from the obligation to obtain a permit to acquire immovable property, one should mention the acquisition of an autonomous apartment, as well as the acquisition of undeveloped land immovable

[20] See: Ibid. P. 87–97.

[21] See: *Gniewek E.* Nabycie i utrata własności // System prawa prywatnego: in 26 vols. Vol. III / ed. E. Gniewek. Warszawa: C. H. Beck, 2020. P. 378–387.

[22] Ibid. P. 379.

[23] Ibid. P. 381.

property located in the city by a foreign-controlled legal person or a commercial company without legal personality with its registered office in the territory of the Republic of Poland for their statutory purposes, provided the area of the land immovable property does not exceed 0,4 ha[24]. The Act provides for a severe sanction for violating its requirements, because the acquisition of real estate by a foreigner in contravention of the provisions of the Act is invalid (Art. 6 (1) of the Act on Acquisition the Immovable Property by Foreigners)[25].

From a practical point of view, other significant and also stringent restrictions on immovable property transactions are provided for in the Act on the Shaping of the Agricultural System. Pursuant to the principle expressed in this Act, only an individual farmer may be the acquirer of an agricultural immovable property (Art. 2a (1) of this Act)[26]. An individual farmer is a natural person who is the owner, perpetual usufructuary, autonomous possessor or lessee of agricultural immovable property, the total area of his agricultural land does not exceed 300 ha, he has agricultural qualifications and has been resident for at least 5 years in the commune where one of the agricultural immovable properties that are part of his farm is located and he has run the farm personally for this period (Art. 6 (1) of the Act on Shaping of the Agricultural System). The Act on the Shaping of the Agricultural System provides for various exceptions to the above rule. In particular, the provisions of this Act do not apply to agricultural immovable property of less than 0,3 ha in area or transactions between relatives. As for entities not covered by statutory exclusions, they may acquire agricultural immovable property only with the consent of the General Director of the National Agricultural Support Centre in the form of an administrative decision (Art. 2a (4) of the Act). The contract concluded against the prohibition of purchasing agricultural immovable property provided for in the Act on Shaping of the Agricultural System is invalid (Art. 9 (1) of the Act)[27].

Moreover, it should be pointed out that the Act on Shaping the Agricultural System also provides for restrictions on the disposal of agricultural immovable property. They take the form of: 1) the obligation of the acquirer of an agricultural immovable property to run a farm for a period of at least 5 years (Art. 2b of this Act); 2) the pre-emption right of the lessee of agricultural immovable property or subsequently the pre-emption right of the National Agricultural Support Centre operating for the State Treasury (Art. 3 (1) and (4) of the Act); 3) the right of repurchase of the National Agricultural Support Centre arising in the event that the acquisition of agricultural immovable property takes place under a title other than the contract of sale (Art. 4 of the Act)[28].

Special rules for trading in immovable property owned by the State Treasury and local government units are set out in the Act on Immovable Property Management. In this case, an important restriction of the freedom of contract is the obligatory tendering procedure for the disposal of real estate owned by the State Treasury or local government (Art. 37 (1) of this Act; however, there are exceptions to this rule). Therefore, we are dealing here with a restriction of the freedom to choose a contractor and determine the content of the contract in terms of price[29]. In addition, the admissibility of gratuitous disposal of State Treasury and local government immovable property is limited. It is admissible only for public purposes or between the State Treasury and a local government unit (Art. 13 (2) of the Act on Immovable Property Management)[30].

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[24] *Gniewek E.* Nabycie i utrata własności. P. 382.

[25] Ibid. P. 386.

[26] *Gniewek E.* Prawo rzeczowe. P. 135.

[27] Ibid. P. 136.

[28] Ibid. P. 136–137.

[29] Ibid. P. 138.

[30] Ibid. P. 135.

Another important institution of property law is co-ownership. Under Polish law, co-ownership is either fractional or joint. Joint co-ownership (non-share) is regulated by the provisions on the relations from which it stems (e. g. provisions on matrimonial property regimes or on a civil partnership). Fractional co-ownership is regulated in the CC (Art. 195–221). Among the rules determining the legal regime of fractional co-ownership, several most important should be mentioned. First of all, each co-owner may dispose of their share without the other co-owners' consent. As to the management of the common thing, the disposition of a co-owned thing and other acts which exceed the scope of ordinary management require the consent of all co-owners. In the absence of such consent, the co-owners whose shares are equal to at least one half may demand that the court make a decision, taking into account the purpose of the intended act and the interest of all the co-owners. The consent of the majority of the co-owners is required for ordinary management of a joint thing. In the absence of such consent, each of the co-owners may demand court authorization to perform an act. However, each co-owner may perform any actions and pursue any claims aimed at preserving the joint right[31].

Each co-owner may at any time demand that co-ownership be cancelled. This is because a claim for cancellation of co-ownership is not subject to the statute of limitations. The fractional co-ownership may be cancelled in a court or via a contract procedure. Manners of cancelling co-ownership are as follows: 1) physical division of things, 2) sale of things and division of the amount acquired from the sale (civil division), 3) granting the joint thing exclusive to one of the current co-owners combined with the obligation to repay the other co-owners[32].

The issue of co-ownership is related to the legal regulation of the autonomous ownership of an apartment. It should start with the statement that under Polish law, real estate is part of the earth's surface constituting a separate object of ownership (land), as well as buildings permanently erected on the land or parts of such buildings if, under specific regulations, they constitute an object of ownership separate from the land (Art. 45 (1) of the CC)[33]. Such specific provisions are contained i. e. in the Act on the Ownership of Dwelling and Office Units. The status of an autonomous immovable property may be determined to be residential or commercial premises, regardless of the area. The establishment of the autonomous ownership of an apartment may take place by concluding a contract, a unilateral legal act of the owner of the building or a judicial decision to cancel the co-ownership (Art. 7 (1) of the Act on the Ownership of Dwelling and Office Units)[34]. Establishing an autonomous ownership of an apartment requires an entry in the land and mortgage register[35]. As a result of establishing autonomous ownership of an apartment, its owner simultaneously becomes the co-owner of the shared parts of the property on which the apartment is located (common property)[36]. It should be also noted that if not all the apartments in the building have been legally separated, the current owner of the building remains the sole owner of independent yet not separated apartments[37]. If the number of separate and non-separated apartments is not more than three, the provisions of the Civil Code on fractional co-ownership apply to the management of a common property. However, if the number of separate and non-separated premises is greater than three, the owners of the premises are obliged to adopt a resolution on the appointment of a one-person or

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[31] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 130–134.

[32] Ibid. P. 141–142.

[33] *Radwański Z., Olejniczak A.* Prawo cywilne — część ogólna. P. 113.

[34] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 150.

[35] Ibid.

[36] Ibid. P. 152.

[37] Ibid. P. 152–153.

several-person management board[38]. In this case, the activities of ordinary management are undertaken by the management board itself. On the other hand, in order for the management board to undertake activities beyond ordinary management, a resolution of the owners of the apartments consenting to this activity and granting the management board the power of attorney to conclude contracts exceeding the scope of ordinary management in the form provided for by law is needed. The above resolutions are adopted by the majority of votes of the owners of the apartments, calculated according to the number of shares, either at a meeting or by individual collection of votes by the management board[39].

At the end of this part of elaboration, it is also worth noting that at present the housing construction market is developing very intensively in Poland. Residential investments are mostly carried out by newly established private development companies. The development of housing in the model described above, on the one hand, revealed a multitude of legal and administrative constraints to the investment process. On the other hand, it highlighted the threats and risk borne by buyers of apartments, especially consumers, and by the general public. These issues are a serious challenge for the Polish legislator. The remedial measures they take are acts that are going to regulate selected problems related to the investment process by means of instruments not only in the field of property law, but primarily in the field of obligations and administrative real estate law. This refers *inter alia* to: Act of 16 September 2011 on the Protection of the Rights of the Buyer of an Apartment or Single-Family House[40] (on 1 July 2022 this act will be replaced by Act of 20 May 2021 on the Protection of the Rights of the Buyer of an Apartment or Single-Family House and on the Development Guarantee Fund); Act of 5 July 2018 on Facilitating the Preparation of Housing Investments and Accompanying Investments; subsequent amendments of the Act on the Ownership of Dwelling and Office Units.

2. Perpetual usufruct

Perpetual usufruct occupies a special place in the system of Polish property law. It is one of the rights of someone else's property (*iura in re aliena*), but it is not one of the limited property rights[41]. The statutory regulation of perpetual usufruct is divided between the Civil Code (Art. 232–243) and the Act on Immovable Property Management. In the past, perpetual usufruct was used primarily for construction purposes and was a legal instrument of the urbanization policy[42]. Currently, it can be a flexible instrument of State Treasury and local government real estate management. From the perspective of a perpetual usufructuary, it is supposed to be an instrument of cheap and long-term use of public immovable property, which is close to the ownership. From the perspective of the land owner (the State Treasury, local government units or their associations), it is to be an alternative to sale form of immovable property disposal[43].

The content of perpetual usufruct was specified in Art. 233 of the CC, according to which: "Within the limits set by the laws and the principles of community life and by a contract on giving land owned by the State Treasury or by local government units or their associations in perpetual usufruct, the usufructuary may use the land to the exclusion of other persons. Within the same limits, the perpetual usufructuary may dispose of his

[38] *Berek M., Pisuliński J.* Własność lokalu // System prawa prywatnego. Vol. III. P. 602.

[39] Ibid. P. 578.

[40] See: *Pisuliński J.* Umowa deweloperska // System prawa prywatnego. Vol. III. P. 645–681.

[41] *Gniewek E.* Prawo rzeczowe. P. 206.

[42] Ibid. P. 200–201.

[43] Ibid. P. 201.

right”[44]. Offering land in perpetual usufruct takes place by agreement to which the provisions on immovable property ownership transfer apply. In particular, this means that the agreement establishing the perpetual usufruct requires the form of a notarial deed. However, additionally, under Art. 27 of the Act on Immovable Property Management, a relevant entry in the land and mortgage register is necessary in this case[45].

Perpetual usufruct is a transferable and hereditary right. It may also be a subject of enforcement. Just like the establishment of perpetual usufruct, the transfer of this right requires the conclusion of an agreement in the form of a notarial deed and a constitutive entry in the land and mortgage register. Perpetual usufruct is a term right[46]. Land is given in perpetual usufruct for ninety-nine years. In exceptional cases, when the economic purpose of the perpetual usufruct does not require the land to be given for ninety-nine years, the land may be given for a shorter period, though for at least forty years. In the last five years before the lapse of the period stipulated in the contract, the perpetual usufructuary may demand its extension for a further period of forty to ninety-nine years. However, the perpetual usufructuary may submit such a demand earlier if the depreciation period of the investments planned on the land held in usufruct is considerably longer than the time remaining till the end of the period stipulated in the contract. Extension may be refused only due to an important public interest (Art. 236 of the CC)[47].

The establishment of perpetual usufruct is payable. The perpetual usufructuary is obliged to pay the first fee, and then the annual fees (Art. 77 of the Act on Immovable Property Management), the amounts of which depends on the value (price) of the land (Art. 72 of the Act on Immovable Property Management)[48]. It should also be added that the amount of the annual fee is gradually updated if the value of the land changes (Art. 77 (1) of the Act on Immovable Property Management)[49].

Characteristic of the legal structure of perpetual usufruct is that buildings and other facilities erected on land by a perpetual usufructuary become their property. The same applies to buildings and other facilities which the perpetual usufructuary acquired at the time the contract for giving land in perpetual usufruct was executed. The perpetual usufructuary’s ownership of buildings and facilities on land used is a right related to perpetual usufruct (Art. 235 of the CC)[50].

To conclude this part of the elaboration, it should be noted that the institution of perpetual usufruct has been the object of criticism in Poland for many years. However, the main objection is that it is a right of “socialist origin”[51]. As a result, we are currently observing the process of eliminating perpetual usufruct from legal reality. First of all, under the Act of 29 July 2005 on the Transformation of the Right of Perpetual Usufruct into the Right of Ownership of Real Estate, such conversion was allowed at the request of the perpetual usufructuary, in the cases specified in this act[52]. The legislator took a much more radical step by adopting the Act of 20 July 2018 on the Transformation of the Perpetual Usufruct of Land Built for Housing Purposes into the Ownership of such Land. The act provides that as of 1 January 2019, the right of perpetual usufruct of land developed for housing purposes was transformed by virtue of law into ownership of this land.

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[44] Translation cited: *Kucharska E.* The Civil Code. Kodeks cywilny. P. 111.

[45] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 194.

[46] *Gniewek E.* Prawo rzeczowe. P. 208.

[47] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 191.

[48] *Gniewek E.* Prawo rzeczowe. P. 209.

[49] Ibid. P. 209.

[50] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 190–191.

[51] *Gniewek E.* Prawo rzeczowe. P. 201–202.

[52] Ibid. P. 202, 216–217.

3. Limited property rights

It should be recalled that the following types of limited property rights are known under Polish law: usufruct, easements (servitudes), pledge, co-operative ownership right to an apartment, and a mortgage. The Civil Code (Art. 244–251) formulates general principles relating to all limited property rights[53]. First of all, it is necessary to point to Art. 245 (1) of the CC, according to which the provisions on ownership transfer apply accordingly to the establishment of a limited property right. This means that, as a rule, limited property rights arise through an agreement between the owner of the encumbered thing and the acquirer of the limited property right (the agreement establishing the limited property right)[54]. However, the provisions on inadmissibility of a condition or period do not apply to the establishment of a limited property right on immovable property. Furthermore, a notarial deed is required only for the declaration of the owner establishing the right (Art. 245 (2) of the CC). Besides, if several limited property rights encumber the same thing, the right which was established at a later date cannot be exercised to the detriment of the right which was established earlier (priority) (Art. 249 (1) of the CC). The priority of limited property rights may be changed by virtue of an agreement. The change does not prejudice the rights which have lower priority than the right which yields priority and higher than the right which takes priority over the right which yields priority (Art. 250 of the CC). The general provisions on limited property rights also set out specific grounds for the expiry of these rights. First, if an entitled person waives their limited property right, the right is extinguished. A declaration on the waiver should be made to the owner of the thing encumbered. However, if the law does not provide otherwise and the right is entered in the land and mortgage register, in order for it to be extinguished it has to be deleted from the land and mortgage register (Art. 246 of the CC). Second, a limited property right is extinguished if it is transferred to the owner of the thing encumbered or if the person holding such a right acquires the ownership of the thing encumbered (it is called consolidation or confusion) (Art. 247 of the CC)[55].

Moving on to the consideration of individual types of limited property rights, it is appropriate to begin with usufruct. The content of usufruct includes the right to use the encumbered thing and to collect its profits (fruits) (Art. 252 of the CC). The scope of the usufruct may be limited by designated profits being excluded from the thing. Exercising a usufruct of immovable property may be limited to its designated part (Art. 253 of the CC). A usufruct is non-transferable (Art. 254 of the CC). The object of usufruct may be not only things, but also rights (Art. 266 of the CC)[56].

Polish law distinguishes between three types of easements (servitudes): easement appurtenant (predial servitude), easement in gross (personal servitude) and transmission easement[57].

The predial servitude are defined in Art. 285 (1) of the CC, according to which: “Real estate may be encumbered in favour of the owner of other real estate (dominant estate) with a right under which the owner of the dominant estate may use the servient estate for a specified purpose, or the owner of the servient estate becomes limited in taking certain actions with respect to it, or under which the owner of the servient real estate is not allowed to exercise certain rights which he holds with respect to the dominant estate on the basis of provisions on the substance and exercise of ownership”[58]. The sole purpose of

[53] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 198–211.
[54] Ibid. P. 204.
[55] Ibid. P. 209–210.
[56] See: Ibid. P. 212–230.
[57] *Gniewek E.* Prawo rzeczowe. P. 246.
[58] Translation cited: *Kucharska E.* The Civil Code. Kodeks cywilny. P. 129.

a predial servitude is to increase the usefulness of the dominant estate or its designated part.

Personal servitudes are, in turn, rights with the content corresponding to the content of predial servitudes, however, established for the benefit of a specific natural person (not for the benefit of each owner of a dominant estate). Personal servitudes and the right to exercise them are non-transferrable. Personal servitude expires at the latest at the death of the beneficiary[59].

The real revolution was the setting of transmission easement into the Polish legal system. Transmission easement is a right encumbering real estate, establishing in favour of an entrepreneur who intends to construct or which owns the transmission facilities for supplying or discharging liquids, steam, gas, electricity and similar facilities, under which the entrepreneur may use the servient estate within a designated scope, in accordance with the purpose of the facilities (Art. 305[1] of the CC). If the real estate owner or an entrepreneur refuses to execute a contract establishing a transmission easement and the easement is required for the proper operation of the transmission facilities, the other party may demand that an easement be established against appropriate remuneration (Art. 305[2] of the CC). As can be seen, the provisions on transmission easement are aimed not only at creating a legal framework for future infrastructure investments, but also at regulating the existing and long-standing problem of unclear proprietary status of transmission facilities[60], which during the socialist period were often built without adequate legal title to the land. Enactment of provisions on transmission easement significantly intensified the process of regulating, especially in court proceedings, legal titles to real estates through which transmission facilities runs. In practice, it has become the basis for countless and very complicated cases heard by Polish courts.

There are several types of pledge in Polish law. Those are: pledge (referred to as ordinary); registered pledge; tax lien; financial pledge[61]. Ordinary pledge is a right established in order to secure a given claim, encumbering a movable or other transferable right, under which the creditor may seek satisfaction from a thing regardless of whose property it has become and with priority over the personal creditors of the owner of the thing, save for those who under the law hold special priority. An ordinary pledge may also be established for the purpose of securing a future or conditional claim (Art. 306 and 326 of the CC). In order to establish a pledge, a contract is required between the owner and the creditor as well as the hand-over of the thing to the creditor or a third party, to which the parties agreed. If the thing is actually held by the creditor, the contract is sufficient to establish an ordinary pledge (Art. 307 of the CC)[62]. In the case of an agreement establishing a pledge on a right, it is necessary to observe the form that is required to transfer this right, with the proviso that a contract on pledge should be executed in writing with an authenticated date, even if the contract on transferring the right does not require such form (Art. 329 (1) of the CC). In the event that the claim is encumbering right and at the same time a pledge on a claim is not created by the hand-over of a document or by endorsement, a written notification of the debtor by the pledgor is required in order for the pledge to be created[63].

Due to the necessity for the pledgor to rid the actual control of the encumbered thing, the contractual ordinary pledge on movable property is of marginal importance in practice. It is different in case of an ordinary pledge on rights. Due to the growing importance of intellectual property rights, shareholding rights in companies, as well as various finan-

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[59] *Gniewek E.* Prawo rzeczowe. P. 258–259.

[60] *Dziczek R.* Służebność przesyłu i roszczenia uzupełniające. Warszawa: LexisNexis, 2013. P. 9.

[61] *Widło J.* [Untitled] // Kodeks cywilny. Komentarz: in 6 vols. Vol. II / eds M. Habdas, M. Fras. Warszawa: Wolters Kluwer Polska, 2018. P. 753–754.

[62] See: *Gniewek E.* Prawo rzeczowe. P. 274–275.

[63] Ibid. P. 287.

cial instruments, ordinary pledges on rights occupy an important place among security interests in Poland. For example, the ordinary pledge on rights is used to secure the interests of a creditor awaiting entry of a registered pledge in the pledges register. Importantly, in many cases Civil Code provides for a pledge arising by virtue of law (e. g. the pledge encumbering a tenant's movables brought into the rented object, securing claims for rent and additional performances in which the tenant defaults — Art. 670 of the CC). The practical significance of this type of pledge becomes evident especially when the debtor has been declared bankrupt.

Registered pledge was formed as a limited property right, the content of which is essentially the same as that of the ordinary pledge. It includes the pledgee's right to seek satisfaction from the encumbered thing, regardless of the owner of that thing, with priority over personal creditors. However, registered pledge shows a number of differences from ordinary pledges. It is especially about the fact that the thing encumbered with a registered pledge remains as a rule in the possession of the pledgee (Art. 2 (2) and Art. 11 (1) of the Act on Pledge by Registration and the Pledges Registers) and the fact that a relevant entry in the public register (pledges register) replaces handing-over of the thing as a condition for the creation of a pledge. Due to the fact that the object of the pledge has been left in the possession of the pledgor, the registered pledge, unlike the ordinary pledge, does not exclude the encumbered thing from the production processes. Its attractiveness is further strengthened by a wide catalogue of non-enforcement methods of satisfying the debt secured by it. As a result, registered pledge is an effective instrument of securing a production credit and thus plays a significant role in the practice of economic life[64].

Registered pledge may relate not only to movables but also to transferable rights, with the exception of rights that may be the subject of a mortgage, receivables on which a mortgage has been established, sea-going ships and ships under construction that may be the object of a maritime mortgage (Art. 7 (1) of the Act on Pledge by Registration and the Pledges Registers)[65].

In addition to the satisfaction of the pledgee under court enforcement proceedings (Art. 21 of the Act on Pledge by Registration and the Pledges Registers), it is admissible to define in the pledge agreement also other methods of satisfying the pledgee. The formal condition for obtaining satisfaction under the enforcement procedure is that the pledgee has an enforcement title against the pledgor. On the other hand, in the non-enforcement procedure, the pledgee may obtain satisfaction from the encumbered object even if he does not have this title. The Act provides for three non-enforcement methods of satisfaction: 1) taking over the object of the pledge; 2) sale of the object of the pledge by way of a public tender; and 3) collection by the pledgee of the income generated by the enterprise covering the object of the pledge[66].

Until 2008, a registered pledge could only be established in favour of selected professional entities (banks, State Treasury, communes). Currently, a registered pledge is the securing instrument available to everyone.

The content of the co-operative ownership right to an apartment includes the rights to: 1) possession of the apartment; 2) use of the apartment; 3) use of premises and devices intended for common use of the residents of the building; 4) collecting profits (fruits) and other revenue from the apartment; 5) factual disposition, e. g. installing devices in the apartment[67]. This right encumbers the entire immovable property, but its execution is

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[64] *Szadkowski K.* [Untitled] // Kodeks cywilny. Komentarz: in 3 vols. Vol. I / ed. M. Gutowski. Warszawa: C. H. Beck, 2018. P. 1624.

[65] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 314.

[66] Ibid. P. 318.

[67] *Pietrzykowski P.* Prawa rzeczowe do lokali w spółdzielni mieszkaniowej // System prawa prywatnego: in 26 vols. Vol. IV: Prawo rzeczowe / ed. E. Gniewek. Warszawa: C. H. Beck, 2012. P. 390.

limited to the apartment and common parts of the building, as well as the land belonging to the housing co-operative. It is a transferable and hereditary right, which may be subject of enforcement. As of the effective date of the Act of 14 June 2007 amending the Act on Housing Co-operatives and Some Other Acts (31 July 2007), the admissibility of establishment of a co-operative ownership right to an apartment was excluded. In addition, at the written request of the person entitled to the co-operative ownership right to an apartment, the housing co-operative is obliged to conclude a contract for the transfer of ownership of the apartment after that person has made: 1) repayment of the part of the co-operative's liabilities related to the construction of the building, including in particular the appropriate part of the co-operative's credit debt with interest; 2) repayment of the debt due to service charges. In light of the above, the current wording of the regulations on the co-operative ownership right to an apartment creates conditions for its gradual elimination from legal reality[68].

A mortgage is a limited property right established in order to secure a particular receivable debt arising from a particular legal relationship, under which the creditor may seek satisfaction from the immovable property, irrespective of who has become its owner, and with priority over the immovable property owner's personal creditors (Art. 65 (1) of the Act on Land and Mortgage Registers and on Mortgage). In addition to immovable property, mortgage may also cover perpetual usufruct, co-operative ownership right to an apartment or a receivable debt secured by mortgage. Mortgage may also be encumbered a fractional part of immovable property, perpetual usufruct or co-operative ownership right to an apartment, if it constitutes a share of the entitled person[69].

The main source of mortgage is the contract. Mortgage becomes effective only when a relevant entry has been made in a land and mortgage register (Art. 67 of the Act on Land and Mortgage Registers and on Mortgage). Therefore, this entry is constitutive. Mortgage may secure only pecuniary receivable debts, including future receivable debts. Mortgage secures a receivable debt up to a specified cash amount. The mortgage amount shall be denominated in the same currency as the currency of secured receivable debt, unless the parties to the contract of establishing the mortgage have agreed otherwise (Art. 68 of the Land and Mortgage Registers and on Mortgage)[70].

The satisfaction of mortgagee from the immovable property (or other encumbered object) must be made in the manner set forth in the law on court execution proceedings. Polish law does not allow for non-enforcement methods of satisfying a mortgagee[71].

It is also worth emphasizing that the legal structure of the mortgage was significantly amended in 2011, when many innovative solutions were introduced. The assumption was to make mortgage a more flexible and effective method of securing receivable debts, adapted to the economic conditions existing after the political transformation initiated in 1989[72].

First of all, as part of the amendments made in 2011, the dualism of mortgages, which appeared in two forms, i. e. ordinary mortgage and capped mortgage, was eliminated. The current, uniform model of mortgage in Polish law has the features of a capped mortgage[73]. Currently, one contractual mortgage may secure several receivables arising from various legal relationships due to the same creditor. What is more, one mortgage can be established to secure several receivable debts due to different entities, if these receiva-

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[68] *Szadkowski K.* [Untitled] // Kodeks cywilny. Komentarz. Vol. I. P. 1468–1469.

[69] Ibid. P. 1468.

[70] *Gniewek E.* Prawo rzeczowe. P. 289, 290, 299.

[71] Ibid. P. 304–305.

[72] *Kućka M., Pisuliński J., Przyborowski Ł., Swaczyna B.* Hipoteka po nowelizacji. Komentarz. Warszawa: Wolters Kluwer Polska, 2011. P. 11.

[73] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 266.

bles are used for financing the same undertaking. In this case, the creditors shall appoint the mortgage administrator. Secondly, it is now admissible to substitute a secured receivable debt with another receivable debt of the same creditor (Art. 68[3] of the Act on Land and Mortgage Register and on Mortgage) as well as to change the currency of the secured receivable debt[74]. Thirdly, a new institution was added to the construction of mortgage. This is called "Disposing of Vacated Mortgage Position" (Art. 101[1]–101[11] of the Act on Land and Mortgage Register and on Mortgage). This institution works in the event when mortgage has expired; the owner of the immovable property is then entitled, within the scope of expired mortgage, to make use of a vacated mortgage position. The owner of the immovable property may establish a new mortgage in that position or, upon the mortgagee's consent, transfer to it any of the mortgages encumbering the immovable property. If mortgage has been cancelled without entering another mortgage in its place, the owner of the immovable property may retain the right to make use of a vacated mortgage position, provided that such immovable property owner's right is entered in the land and mortgage register upon the cancelling of the mortgage entry[75].

4. Land and mortgage registers

Another issue that requires a more extensive explanation is that of land and mortgage registers. Under Polish law, district courts are in charge of land and mortgage registers. Land and mortgage registers are kept in order to establish the legal state of immovable property or co-operative ownership right to an apartment. As a rule, property rights are disclosed in land and mortgage registers. However, as regards cases provided for in statutory law, land and mortgage registers may provide evidence also about personal rights and claims (Art. 16 of the Act on Land and Mortgage Registers and on Mortgage). The following may in particular be evidenced: a right of lease or tenancy, a right of repurchase and pre-emption, a right of life annuity, an existing or future claim to convey the ownership of immovable property or perpetual usufruct or to establish a limited property right. Being entered in land and mortgage registers, a personal right or claim becomes effective in respect of the rights acquired by way of an act in law performed after it has been evidenced (Art. 17 of the Act on Land and Mortgage Registers and on Mortgage)[76].

The land and mortgage register has four divisions, of which: 1) division one contains the description of the immovable property and the entries of the rights appurtenant to the immovable property; 2) division two contains the entries concerning the ownership and perpetual usufruct; 3) division three contains entries concerning limited property rights, except mortgages, entries concerning restrictions on the disposals of the immovable property or of its perpetual usufruct, as well as entries concerning other rights or claims, except claims concerning mortgages; 4) division four contains entries concerning mortgages[77].

Land and mortgage registers are set up and kept in the ICT system. Under the Act of 14 February 2003 on Migration of Land and Mortgage Books, the contents of land and mortgage register books have been transferred via a process known as the "migration of land and mortgage register books". As a result, knowing the number of the land and mortgage register corresponding to a given immovable property, anyone may have ac-

[74] *Gniewek E.* Prawo rzeczowe. P. 299–301.

[75] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 298. — See also: *Stangret-Smoczyńska A.* Granice uprawnienia do rozporządzania opróżnionym miejscem hipotecznym // Przegląd Sądowy. 2011. No. 9. P. 63–71; *Makowska I.* Uprawnienie do rozporządzania opróżnionym miejscem hipotecznym // Przegląd Prawa Handlowego. 2012. No. 5. P. 33–41.

[76] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 368–369.

[77] *Gniewek E.* Prawo rzeczowe. P. 342–343.

cess to its content from anywhere in the world. Nevertheless, it is worth adding that in practice the internal structure of each division of the electronic land and mortgage register is considered unreadable. On the one hand, the internal structure enables searching for information according to particular criteria, verification of data consistency in various land and mortgage registers and in other databases[78]. On the other hand, it makes reading the contents of the land and mortgage register very difficult, which seems to violate the main principle of the land and mortgage register system, i. e. the principle of openness[79].

It is also worth noting that the idea of universality of land and mortgage registers understood as establishing a land and mortgage register book for each real estate has not been implemented in Poland so far[80]. There are, however, instruments for the dissemination of land and mortgage registers, such as the obligation imposed on notaries public who draw up notarial deeds to submit a land and mortgage register application, or the obligation of immovable property owners to disclose their rights in the land and mortgage register, secured with the owner's liability for damage[81].

From the perspective of the security of real estate transactions, the institution of the public credibility of land and mortgage registers plays a key role (Art. 5–9 of the Act on Land and Mortgage Register and on Mortgage). It is expressed in the rule according to which in the event of inconsistency between the legal state of the immovable property disclosed in the land and mortgage register with its actual legal state, the contents of the land and mortgage register decide in favour of the person who has, by performing an act in law with the person entitled under the contents of the register, acquired the right of ownership or another right *in rem*[82].

Conclusions

Summarizing the above general remarks on Polish property law, it should be noted that it is currently undergoing significant, if rather chaotic changes. On the one hand, we notice the retention of the solutions of property law characteristic of socialist law, or even those developed in the socialist system (perpetual usufruct, co-operative ownership rights to an apartment). On the other hand, there are efforts aiming to give the existing institutions of property law a form that meets the requirements of not only the market economy, but also of the digital economy (especially digitization of land and mortgage registers as well as a new model of mortgage and reformed registered pledge). A separate challenge for Polish property law is to adapt its solutions to the robust growth of housing investments in Poland. It is implemented through comprehensive regulations, located at the interface of property law, obligations and administrative real estate law. The above regulations specify the activities of development companies and the protection of apartment buyers.

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[79] *Kuropatwiński J.* Księgi wieczyste. Komentarz. Bydgoszcz: POL spółka z ograniczoną odpowiedzialnością, 2013. P. 64–65.

[80] *Gniewek E.* Prawo rzeczowe. P. 336.

[81] Ibid. P. 336.

[82] *Ignatowicz J., Stefaniuk K.* Prawo rzeczowe. P. 359–364; *Gniewek E.* Prawo rzeczowe. P. 354–359.

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Вещное право в Польше

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В статье представлены основные вопросы польского вещного права. Отмечается многообразие его источников, но подчеркивается наличие в Польше закрытого перечня вещных прав (numerus clausus). В частности, кратко рассматриваются все типы вещных субъективных прав: право собственности, бессрочный узуфрукт, узуфрукт, сервитуты, залог, кооперативное право собственности на недвижимость и ипотека. Подчеркивается отличие владения как фактического состояния от вещного права. Отмечается объективная тенденция дробления единого понятия права собственности на различные формы данного права, содержательно далеко отстоящие друг от друга. Констатируется как четкая дифференциация обязательственных договоров и каузальных распорядительных сделок, так и допущение сделок с двойным эффектом (одновременно обязательственных и распорядительных) в польском праве, что обусловлено нуждами оборота и превращает систему передачи права собственности на недвижимость в консенсуальную. Обращается внимание на отсутствие «принципа внесения», поскольку право собственности переходит к приобретателю в результате заключения договора еще до внесения в реестр соответствующей регистрационной записи, которая таким образом имеет декларативный характер. Указывается на серьезные законодательные ограничения приобретения недвижимости иностранцами. Специально рассматривается спорный вопрос допускаемой польским законодательством конструкции «права на право» (узуфрукт и залог иных

вещных прав). Подчеркивается особый статус права «постоянного узуфрукта», которое хотя и относится к «правам на чужие вещи» (iura in re aliena), однако не признается ограниченным вещным правом в собственном смысле слова, поскольку может иметь своим объектом только государственную или муниципальную земельную собственность. Также представлены основные тенденции развития польского вещного права: оцифровка земельных и ипотечных регистров, адаптация ипотечного кредитования к потребностям развитой рыночной экономики, регулирование быстрорастущего рынка жилья, а также расширение ограничений на операции с недвижимостью и ограничение правомочий собственника недвижимого имущества, на котором находятся стационарные средства связи.

Ключевые слова: имущественное право, недвижимое имущество, собственность, бессрочный узуфрукт, узуфрукт, сервитуты, залог, ипотека, кооперативное право собственности на недвижимость, земельные и ипотечные регистры.

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