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On the legitimacy of restoring the institution of the annuity real right established on real properties²

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Abstract

The article presents the basic solutions to be applied in the so-called annuity real rights. These are limited real rights (*iura in rem*), which permit obtaining certain revenues from real property on a regular basis. Their essential purpose is to establish collateral security for obtaining specific periodical benefits, primarily those of a pecuniary nature. These rights show some similarities, on the one hand, to pledge-type rights and, on the other hand, to easements. Currently, no annuity real charges of any kind have been regulated under the Polish civil law (since the entry of the Civil Code into force in 1965), as they were perceived, albeit incorrectly, as a reminiscence of the epoch of feudalism. However, they are still popular in other European civil law systems, for example in the German, Swiss, Austrian, Spanish, Czech, Estonian, Slovenian or Croatian laws. The prototype of this category of rights is the real burden (German *Reallast*). This paper presents various solutions for the latter institution as well as related institutions, such as the Swiss 'annuity letter' (German: *Gült*, French: *lettre de rente*) and the German annuity land charge (German *Rentengrundsschuld*). Different concepts for the legal nature of the annuity rights have been presented, in particular the real burden, which formed the basis for proposals of solutions in the work of the Polish Civil Law Codification Committee at the beginning of the 21st century. The potential usefulness of the real burden rights indicated in this article confirms the legitimacy of introducing this type of legal institution into the Polish law.

Keywords: property law, real burden, annuity, collateral security for receivables, land charge

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O zasadności przywrócenia instytucji rentowego prawa rzeczowego na nieruchomościach

Streszczenie

Artykuł przedstawia podstawowe rozwiązania konstrukcyjne kategorii prawnej tzw. rentowych praw rzeczowych. Są to ograniczone prawa rzeczowe (*iura in rem*), które służą uzyskiwaniu periodycznie określonych przychodów z nieruchomości. Ich zasadniczym celem jest rzeczowe zabezpieczenie uzyskania periodycznie określonych świadczeń, w tym przede wszystkim o charakterze pieniężnym. Prawa te wykazują pewne podobieństwa z jednej strony do praw zastawniczych, z drugiej do służebności. Obecnie nie zostały uregulowane w polskim prawie cywilnym (od wejścia w życie Kodeksu cywilnego w 1965 r.), bowiem były postrzegane - niefortunnie - jako reminiscencja epoki feudalizmu. Są natomiast znane innym europejskim prawodawstwom cywilnym - niemieckiemu, szwajcarskiemu, austriackiemu, hiszpańskiemu, czeskiemu, estońskiemu, słoweńskiemu czy chorwackiemu. Prototypem tej kategorii praw jest ciężar realny (niem. *Reallast*). W pracy zaprezentowano różne rozwiązania dotyczące tej ostatniej instytucji, a także pokrewnym - znanego do niedawna prawu szwajcarskiemu listu rentowego (niem. *Gült*, franc. *lettre de rente*) oraz niemieckiego długu rentowego (niem. *Rentengrundschild*). Zaprezentowano różne koncepcje dotyczące natury prawnej praw rentowych, w szczególności ciężaru realnego, które stanowiły podstawę propozycji rozwiązań w ramach prac Komisji Kodyfikacyjnej Prawa Cywilnego na początku XXI w. Wskazane w artykule możliwości wykorzystania ciężaru realnego potwierdzają zasadność wprowadzenia w prawie polskim tego rodzaju instytucji prawnej.

Słowa kluczowe: prawo rzeczowe, ciężary realne, renta, rzeczowe zabezpieczenie wierzytelności, dług gruntowy

1. Concept of annuity rights established on real property

Annuity real rights constitute the category of real rights established on a third-party property, which permit obtaining certain periodic revenues from real property. These rights, alongside pledge-type rights, may be generally included in the category of the so-called rights to the value (German: *Wertrechte*)³. Sometimes, similarly as pledge and mortgage, they are also called as rights to the satisfaction from the value of the property (German: *Recht auf Befriedigung aus dem Werte des Grundstückes*) or the right to cashing or satisfaction (German: *Verwertungsrechte*). Such perception of both indicated categories of limited real rights results from their purpose (function), which – both in the case of pledge-type rights as well as annuity rights – is in fact to establish collateral security for obtaining specific benefits. Both categories of real rights are also characterised by the fact that, as a rule, the person obliged personally or alternatively a third party (often called incorrectly limited debtor in possession) is liable on the basis of real property by the virtue of burden for obtaining such benefits by the entitled person (creditor).

Making some simplification, it may be stated that the concept category of annuity real rights includes normative solutions known to various legal systems, which consist in ‘making material’ the acquisition of specific benefits from real property or benefits for whose performance the material liability resulting from the real property is incurred. These rights do not authorise any entity, as a rule, to perform other activities in relation to the encumbered asset, e.g. to use it (i.e. to interfere in the substance)⁴. Therefore, they cannot be considered as rights belonging to the category of rights to the substance of assets (German: *Substanzrechte*)⁵.

The real burden (German: *Reallasten*) should be considered as the prototype of the annuity real right in the above meaning, constituting an encumbrance of real property. This type of limited real right, rejected by the Polish legislator, is still known to some European legal systems (e.g. the German legal system – Articles 1105-1112 of the German Civil Code – German: *Reallast*, the Swiss legal system – Articles 782-792 of the Swiss Civil Code – German: *Grundlasten*, French: *la charge foncière*, Italian: *l'onere fondiario*, Austrian – not regulated in general in the Austrian Code of 1811⁶, Czech – Articles 1303-1308 of the Czech Civil Code⁷ – Czech: *realna břemena*, as well as the Estonian legal system – Estonian:

³ German: *Weitrechte*, see e.g.: C. Crome, *System des deutsche bürgerlichen Rechts. Band III. Rechte an Sachen und an Rechten*, Tübingen 1905, p. 610; M. Ziegler, *Reallast und Rentenschuld*, Weissenburg i.E. 1912, p. 3; the division into rights to the value and rights to the substance of assets was well-established in the German doctrine by J. Kohler, see.: J. Kohler, *Lehrbuch des Bürgerlichen Rechts. Band II. Vermögensrecht. Teil 2. Sachenrecht*, Berlin 1919, p. 267 et seq., 366 et seq.; J. Kohler, *Substanzrecht und Wertrecht*, Archiv für die civilistische Praxis 1901, volume 91, p. 155 et seq.; R. Paczkowski, *Pecuniary Annuity in the Form of Real Burden and Land Charge (in the Light of Legislation of the Western Lands)*, Poznań 1936, p. 3; A. Bieranowski, *Land Development Right and Real Burdens in Works on the Civil Code Draft – Basic Constructional Assumptions*, 'Rejent' 2012, special issue, p. 48-49; also K. Zaradkiewicz [in:] K. Pietrzykowski (ed.), *Civil Code. Volume I. Commentary. Articles 1-449*¹⁰, 10th edition, Warsaw 2020, p. 735.

⁴ C. Crome, *op.cit.*, p. 610.

⁵ Use and easement can be considered as such rights.

⁶ However see e.g. patent from 7 September 1848 (on enfranchisement of land, or decrease in burdens imposed on land, German: *Grunden tlastungspatent*), Gesetze und Verordnungen im Justiz-Sache 1848, p. 658.

⁷ *Zakon č. 89/2012 Sb. ze dne 3. února 2012 Občanský zákoník*.

*reaalkoormatise*⁸, the Croatian legal system – Croatian: *stvarni teret*⁹, the Slovenian legal system – Slovenian: *stvarno breme*¹⁰ and the Spanish legal system – Spanish: *carga real*¹¹. In all these legal systems real burdens are regulated as limited real rights, although the annuity known to the Spanish Codification, despite being treated as a limited real right, was regulated in the chapter on obligations of the Spanish Code (Spanish: *censos*, Articles 1604-1664 of the Spanish Civil Code)¹². As a limited real right, the annuity was explicitly indicated in the Catalan Civil Code from 2002¹³ (Article 565-1 et seq. of the Catalan Civil Code), which regulates its two forms – emphyteutic (Catalan: *el cens emfitèutic*, Article 565-14 et seq.) and lifelong (Catalan: *el cens vitalici*, Article 565-29 et seq.). The category of subjective rights corresponding to current real burdens (*onus reale*) was not known to the Roman law¹⁴. Their prototype may be traced to medieval solutions¹⁵. They include the land rent (*census reales*, *Grundzins*)¹⁶, as well as the purchase of annuity (Latin: *emptio annuorum reddituum*, German: *Rentenkauf*)¹⁷, consisting in the obligation to pay the land owner a specific amount together with imposing the obligation to repay periodically specific benefits (in principle of a pecuniary nature). Various forms of rent as an encumbrance imposed on assets were known to e.g. former Polish law¹⁸.

Due to this fact, real burdens are also nowadays perceived incorrectly as a relic of feudalism. They are allegedly a reminiscence of that epoch¹⁹, and

⁸ Article 229 et seq. of the Estonian Property Law Act of 1993 (*Asjaõigusseadus* of 9 June 1993, Riigi Teataja I 1993, 39, 590, as amended).

⁹ Article 246 et seq. of the Croatian Act on ownership and other real rights of 1996 (*zakon o vlasništvu i drugim stvarnim pravima*, Národné Noviné 91/96).

¹⁰ Article 249 of the Slovenian Property Law Code of 2002 (*Stvarnopravni zakonik*, Ur.l. RS, št. 87/2002).

¹¹ A. Bieranowski, *Land Development Right and Real Burdens...*, *op.cit.*, p. 48.

¹² More about this topic can be found in: CL. Álvarez, *Principios de Derecho Civil. Tomo Cuarto. Propiedad y derechos reales. Primera parte*, 3rd edition, Madrid 2000, p. 393 et seq. This code treats, as a specific form of annuity, the emphyteutic annuity (Spanish: *censo emfitéutico*, Article 1628 et seq.), registered (Spanish: *censo consignativo*, Article 1657 et seq.) and reserved (Spanish: *censo reservativo*, Article 1661 et seq.).

¹³ *Llei 29/2002, de 30 de desembre. Primera llei del Codi civil de Catalunya*, (DOGC num. 3798,13-01-2003, p. 486; BOE num. 32, de 06-02-2003, p. 4912).

¹⁴ See e.g.: R.V. Jhering, *Passive Wirkungen der Rechte*, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1871, volume X, p. 554 et seq.; *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich. Band III. Sachenrecht*, Berlin-Leipzig 1888, p. 572; O. v. Gierke, *Deutsches Privatrecht. Bd. II, Sachenrecht*, Leipzig 1905, p. 700; H. Dernburg, *Das Sachenrecht des Deutschen Reichs und Preußens*, 4th edition, Halle 1908, p. 648; M. Ziegler, *op.cit.*, p. 4 et seq.; E. Koch, *Die rechtliche Natur der Reallasten*, Norden ham 1925, p. 3; J. Wasilkowski, *An Outline of the Property Law*, Warsaw 1957, p. 302; F. Gschnitzer, Ch. Faisten-berger, H. Barta, G. Call, G. Eccher, *Österreichisches Sachenrecht*, 2nd edition, Wien-New York 1985, p. 180; U. Flossmann, *Österreichische Privatrechtsgeschichte*, 5th edition, Wien-New York 2005, p. 185; see also: J. Kohler, *Lehrbuch des Bürgerlichen Rechts...*, *op.cit.*, p. 476-477; E. Levy, *West Roman Vulgar Law. Law of Property*, Philadelphia 1951, p. 58, 59; J. Mayer, *Einl zu §§ 1105-1112 BGB*, [in:] W. Wiegand (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungsgesetz und Nebengesetzen. Buch 3, Sachenrecht (Erb- bauRG, §§1018-1112 (Erbbaurecht, Dienstbarkeiten, Vorkaufsrecht, Reallasten)*, Berlin 2009, par. no. 1; A. Bieranowski, *Land Development Right and Real Burdens...*, *op.cit.*, p. 47.

¹⁵ See e.g.: C. Crome, *op.cit.*, p. 615; H. Amann [in:] W. Wiegand (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Drittes Buch. Sachenrecht. ErbbVO; §§ 1018-1112*, 13th edition, Berlin 1994, p. 673; W. Brehm, Ch. Berger, *Sachenrecht*, 2nd edition, Tübingen 2006, p. 332.

¹⁶ J.W. Bandtkie Stężyński, *Polish Private Law, Work published after the author's death*, Warsaw 1851, p. 300; see also: P. Dąbkowski, *Polish Private Law. Volume II*, Lviv 1911, p. 273; A. Bieranowski, *Land Development Right and Real Burdens...*, *op.cit.*, p. 47.

¹⁷ More about this topic can be found in: B. Lesiński, *Purchase of the Annuity in Medieval Poland: in the Light of the Doctrine and the Western European Practice of that Time*, Poznań 1966.

¹⁸ P. Dąbkowski, *op.cit.*, p. 274 et seq.

¹⁹ See e.g.: J. Wasilkowski, *An Outline of ...*, *op.cit.*, p. 301; see also: A. Bieranowski, *Land Development Right and Real Burdens...*, *op.cit.*, p. 47.

associated with obligations imposed in feudal relationships, which in turns led to their gradual elimination in different European legal systems, starting from the end of the 18th century. As an instrument of economic exploitation, in most cases they were abolished for the first time together with the exclusion of feudal relationships during the French Revolution (with the same justification also in the Civil Code of the People's Republic of Poland of 1964, see below). First legal regulations eliminating the so-called feudal burdens were introduced in 1789 (*'abolition des droits féodaux'*)²⁰ in the French Rural Code of 1789 (French: *Code rural*). Such institutions considered as feudal were not regulated in the Napoleonic Code (1804), which in Article 530 stated that 'any annuity established perpetually as the estimate of real property or condition for selling encumbered immovable property, is subject intrinsically to purchase'²¹. Perpetual annuities and other feudal encumbrances were treated as solutions aimed at restricting human freedom, while the revolutionary motto stated that 'the territory of France is free in the same manner as people who live there' (*'Le territoire de France, dans tout son étendu, est libre comme les personnes qui l'habitent'*)²².

²⁰ K. Sójka-Zielińska, *Great Civil Codifications of the 19th Century*, Warsaw 1973, p. 90 and 111.

²¹ According to the translation [in:] E. Muszalski, *Civil Codes in force in the Central Territories of Poland together with the Code of Obligations*, Warsaw 1936, p. 276, see also: K. Sójka-Zielińska, *op.cit.*, p. 111.

²² See e.g.: J. Wasilkowski, *An Outline of ...*, *op.cit.*, p. 302.

2. Real burdens in the Polish law

Real burdens were known, as mentioned, both in the I Republic of Poland as well as in the law applicable during the partitions, including the law of the Kingdom of Poland, as rights subject to disclosure in mortgage registers (Articles 43 and 44 of the Act of 14(26) April 1818 on the establishment of ownership titles to immovable properties, privileges and mortgages²³)²⁴. In the last case, they were 'fees, charges or fixed obligations, consisting in special titles entered into mortgage registers as debts'. By the Act of 1/13 June 1825 amending the provision of Article 530 of the French Civil Code, with regard to perpetual leases and rents, the application of the indicated provision of the Napoleonic Code was excluded in relation to perpetual leases and rents if the repurchase condition had not been agreed²⁵. Therefore, it was allowed, contrary to the above-mentioned code, to establish annuities and perpetual rents (in the strict sense)²⁶ related to, e.g., the transfer of land for emphyteusis or perpetual lease, although the last forms were unknown to the French legislation.

Real burdens were also known to the Prussian legislation²⁷. Part of them was abolished in the mid-1800s.²⁸ On the Polish territories under the Austrian partition, the Civil Acts for Eastern and Western Galicia of 1797 provided for the possibility to encumber land with land rent or annual income (part II, Article 214, 220-221).

The institution of real burdens, although in the modern perspective modelled on German codification of 1896, was also regulated in the law unified after the Second World War – in the Decree on Property Law of 11 October 1946.²⁹ The Decree referred to solutions adopted in the period between the two World Wars in the property law draft prepared by the Property Law Subcommittee within works of the Codification Committee of the Republic of Poland (although the first original version of professors F. Zoll and J. Wasilkowski did not provide for them³⁰). This draft, in principle, drew from German solutions included in the code of 1896. The legislator after the Second World War did not adopt the specific solution of the so-called public real burdens³¹.

²³ Journal of Laws volume V, p. 295.

²⁴ According to Article XLVIII of the Decree of 11 October 1946 – Regulations introducing property law and law regarding land and mortgage registers (Journal of Laws no. 57, item 321), perpetual burdens within the meaning of Article 44 of the Act on the establishment of ownership titles to immovable properties, privileges and mortgages of 1818 became, at the time of the entry into force of the Decree on the Property Law, real burdens within the meaning of this law.

²⁵ Journal of Laws volume IX, no. 40.

²⁶ See e.g.: A. Heylman, *On the relation between the province and regional mortgage*, Warsaw Library 1852, volume 2, p. 137; see also: *idem*, *Analysis of mortgage register*, Warsaw 1858, p. 136.

²⁷ See e.g.: H. Dernburg, *Die allgemeinen Lehren und das Sachenrecht des Privatrechts Preußens und des Reichs*, 3rd edition, Halle 1881, p. 751.

²⁸ Act concerning real burdens and regulation of relationships between landowners and peasants, of 2 March 1850, Set of Laws for States of the Prussian Kingdom 1850, no. 10, p. 101.

²⁹ Journal of Laws no. 57, item 319, as amended.

³⁰ Text of the draft from September 1934, entitled 'Property Law Draft. Texts adopted by the subcommittee in first reading', typescript, AAN portfolio of the Ministry of Justice no. 2195, p. 241 et seq.

³¹ It is worth mentioning that within its works the Codification Committee of the Republic of Poland prepared a solution according to which 'taxes and other public levies due from real property, even the non-recurring ones, are considered as real burden with priority over all rights registered within the limits determined in the Polish Code of Civil Procedure' (Article 337 of the draft of 1937).

According to Article 319 of the property law draft of 1937³², the real burden was to constitute a right consisting in ‘the obligation concerning recurring benefits due from each owner of the real property to a person or each owner of another real property (benefited real property)’. Also according to the definition in Article 279 of the Decree of 1946, the content of real burdens was the obligation concerning recurring benefits for a designated person or owner of a designated real property (benefited real property, similarly above-mentioned Article 319 of the draft of 1937). It is worth underlining that as early as in the period between the two World Wars real burdens were regulated in the provisions of property law, although their nature gave rise to significant reservations also then. As F. Zoll, Jr., indicated, ‘despite the clarified (...) general concept, the draft regulates in an appropriate chapter real burdens, as well as legal effects related to entries of obligatory rights in land and mortgage registers, as these issues could not and cannot be regulated in other acts, in particular they could not be regulated in the code of obligations (...)’³³.

Similarly as in other systems that know this institution and despite numerous controversies related to their legal nature and classification, the postwar unified law included real burdens within the category of limited real rights³⁴. As S. Szer indicated in connection with this fact, ‘the legislator is not obliged to comply meticulously with traditional scientific theories and it can and should introduce derogations justified by and necessary due to socio-economic reasons’³⁵. Only a real property could be the content of real burden, and both the designated entity (natural or legal person) and each owner of the real property (benefited real property) could be the entitled entity, while only each owner of encumbered real property could be the obliged entity (see Article 279 of the Decree).

Benefits could be fulfilled only – contrary to the draft of the Property Law Subcommittee of the Codification Committee of the Republic of Poland of 1937 – in money or other exchangeable items (Article 281). Contrary to some other legal systems, the Decree of 1946 did not allow the establishment of real burdens consisting in the performance of services or work, or the performance of one-time benefit in addition to periodic benefits³⁶. The Decree also did not adopt the position from e.g. the German code that the content of real burden can be only benefits due from ‘real property’ (compare Article 1105 of the German Civil Code³⁷, German: *wiederkehrende Leistungen aus dem Grundstück*). Therefore, on the grounds of the provisions of the unified law in general the discussion held in the German literature whether only benefits and other income from real property or also benefits not originating from it can be the acceptable object of benefits was not undertaken³⁸. On the grounds of the Decree of 1946, each obligation for the benefit

³² Codification Committee. Property Law Subcommittee. Issue 1, *Property Law Draft Adopted in First Reading by the Property Law Subcommittee of the Codification Committee*, Warsaw 1937.

³³ F. Zoll, *Codification Issues from the Scope of Property Law. Essence and Types of Real Rights and the System of Norms*, ‘Notarial Review’ (Przegląd Notarialny) 1936, no. 9, p. 189; see also: L. Górnicki, *Civil Law in Works of the Codification Committee of the Republic of Poland in 1919-1939*, Wrocław 2000, p. 334.

³⁴ S. Szer, *Real Burdens according to the Polish Property Law*, ‘State and Law’ (Państwo i Prawo) 1947, issue 9, p. 60.

³⁵ *Ibidem*, p. 61.

³⁶ *Ibidem*, p. 61.

³⁷ Polish translation of the German Civil Code: Publication of the Ministry of Justice. Set of Acts of the Western Lands. Volume X. *Civil Code applicable on the Western Lands of the Republic of Poland (Official translation)*, Warsaw-Poznań 1923.

³⁸ See: L. Eberlein, *Die Stellung der Reallasten im Rechts- und Wirtschaftsleben der Gegenwart*, Heidelberg 1927, p. 20.

of the annuitant imposed on the basis of the annuity agreement was considered as real burden, regardless of the type of benefits and regardless of the fact whether the benefits are of a recurring nature (Article 281(2))³⁹. The provisions on real burdens were to be applied appropriately to the obligation imposed on the owner of real property subject to easement to maintain devices necessary to perform the easement (Article 171).

Similarly as in the German law, the Decree within the construction of real burden provided for the so-called material and personal liability. First of all, the owner of the encumbered real property bore liability resulting 'from it' for the price of the real burden repurchase. Secondly, the owner was also liable for individual benefits, and claims concerning outstanding benefits had the priority resulting from the entry of the real burden, but exclusively for the last three years before the real property auction (Article 285 of the Decree). At the same time, this person also bore personal liability for individual benefits that had become due in the period when they had been the owner of the encumbered real property. In this scope the co-owners bore joint and several liability (Article 286). It was considered that, contrary to the German law, the personal liability could not be excluded or limited⁴⁰.

As early as at the stage of codification works in the period between the two World Wars real burdens were perceived as an anachronism⁴¹. It was the basic motive justifying the decision not to regulate this institution in the Polish Civil Code, although it was included in the code draft from 1949 (Articles 1215-1225). It is worth mentioning that the Codification Committee of the People's Republic of Poland attempted to include them in the content of easement. The Polish Civil Code drafts from 1954 and 1960⁴², although they did not contain separate provisions on real burdens or provisions regulating other annuity real rights, in Article 252(2) in the edition from 1954 and Article 249(2) of the draft from 1960 indicated easement whose content corresponded, in fact, to real burden as a new specific form of personal easement. In accordance with the draft of Article 252(2) in the edition from 1954, 'also the right to benefits due to the annuitant on the basis of the annuity agreement can be the content of personal easement. The owner of the encumbered real property is personally liable for benefits that became due in the period when the real property belonged to them. The co-owners bear joint and several liability⁴³. Finally also this solution was rejected⁴⁴.

³⁹ See Article 322 of the draft of 1937, according to which 'the obligation of benefits for the annuitant, entered into the land and mortgage register on the basis of the annuity agreement, is considered as real burden, regardless of the type of benefits and regardless of the fact whether the benefits are of a recurring nature. This provision applies also to the maintenance obligation disclosed in the land and mortgage register, resulting from another legal action'.

⁴⁰ S. Szer, *op.cit.*, p. 64.

⁴¹ See: J. Bekerman, «*Real Burdens*» in the *Property Law Draft*, 'Voice of the Judiciary' (Głos Sądownictwa) 1938, issue 7-8, p. 544; A. Stelmachowski, *Issue of Real Burdens and Annuity in the Light of Codification Works*, 'New Law' (Nowe Prawo) 1951, issue 7-8, p. 53; in the justification of the civil code draft of 1954 we read: 'from real rights concerning real properties, real burdens and the so-called right of return were omitted in the draft. In practice, real burdens have certain importance as a form of securing rights to which annuitants are entitled on the basis of annuity agreements. For this purpose the draft introduces a specific type of personal easements. It allows avoiding excessive number of types of material encumbrances (in other exceptional cases the real burden can be replaced by capped mortgage)'.

⁴² *Civil Code Draft of the People's Republic of Poland*, Warsaw 1960.

⁴³ According to the text of 1960, 'rights to which annuitants are entitled on the basis of annuity agreements can also be the content of personal easement. If these rights include rights to benefits, each owner of the encumbered real property is also personally liable for benefits which became due in the period when the real property belonged to them. The co-owners bear personal joint and several liability'.

⁴⁴ See e.g.: K. Zaradkiewicz [in:] K. Pietrzykowski (ed.), *Polish Civil Code. Volume I. Commentary. Article 1-449*¹⁰, *op.cit.*, p.

Apart from the defectiveness of including real burdens in the content of the related institution of easement, their elimination was connected with criticism of this institution as a reminiscence of feudal solutions. As S. Szer noticed, '[they [real burdens - KZ] cause the reminiscence of the past epoch, as they refer to medieval relationships, when land and more precisely people assigned to it (*glebae adscript!*) were obliged to give positive benefits to their landlords⁴⁵. In recitals to the code draft from 1962 it was indicated that 'in the current structure of our socio-economic relationships, real burdens continue to be useful to a certain extent only as a legal form of securing the so-called annuity', recognising that 'the maintenance of the institution of real burdens became (...) unnecessary' due to the introduced solution making in fact the annuity a *quasi*-material institution⁴⁶ (real obligation)⁴⁷. Little usefulness of this institution in trading practice, primarily for securing contractual annuities, was also underlined⁴⁸. J. Wasilkowski indicated that 'in practice real burdens turned out not to be a vital institution, which resulted mainly from quick transformations of our economic structure'⁴⁹. As mentioned, the above conclusions were confirmed by materials of the Ministry of Justice⁵⁰.

De lege lata, due to the validity of the principle of closed catalogue of real rights (*numerus clausus*)⁵¹, the establishment of annuity rights *in rem*, as well as such formation of the content of real rights in known codifications from 1964 (mortgages, easements) which would allow 'entering' to them the construction of annuity rights (including the real burden) are inadmissible⁵².

3. Essence of real burdens

Similarly as on the grounds of the Decree of 1946, also in the majority of other European legal systems real burdens are included within the category of limited real rights. In principle only real properties, or fractional part of a real property, which differs this right from easement (which will be discussed in the further part of the work), can be their object (Article 1106 of the German Civil Code)⁵³. In

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⁴⁵ S. Szer, *op.cit.*, p. 57.

⁴⁶ If in the annuity agreement the real property purchaser undertook to fulfil towards the seller (annuitant) recurring benefits in the form of money or items determined as to their kind, such right belongs to the content of the annuity right (similarly as the established personal use and easement, see Article 908(2) of the Polish Civil Code). In accordance with Article 910(1) of the Polish Civil Code, the transfer of the ownership title to real property on the basis of an annuity agreement takes place together with simultaneous encumbrance of the real property with the annuity right, to which the provisions on limited real rights apply accordingly.

⁴⁷ *Codification Committee at the Minister of Justice, Draft of the Civil Code and Provisions introducing the Civil Code*, Warsaw 1962, p. 209; see also: W. Zabaglio, *Content of the Annuity in the Polish Civil Code*, 'New Law' (Nowe Prawo) 1966, issue 9, p. 1088; their abolition was to result – as J. Gwiazdomorski indicates – from the project initiators' tendency to ensure the maximum conciseness of the code, see J. Wasilkowski (ed.), *Discussion materials for the Civil Code Draft of the People's Republic of Poland. Materials from the Scientific Session held on 8-10 December 1954*, Warsaw 1955, p. 42.

⁴⁸ A. Stelmachowski, *op.cit.*, p. 47.

⁴⁹ J. Wasilkowski, *An Outline of ...*, *op.cit.*, p. 304.

⁵⁰ J. Wasilkowski, *Ownership and other real rights. Issues of the codification of the civil law, Part II*, 'State and Law' (Państwo i Prawo) 1951, issue 7, p. 861.

⁵¹ See more e.g. in: K. Zaradkiewicz [in:] K. Pietrzykowski (ed.), *Polish Civil Code. Volume I. Commentary. Article 1-449¹⁰*, *op.cit.*, p. 764.

⁵² K. Zaradkiewicz [in:] K. Pietrzykowski (ed.), *Polish Civil Code. Volume I. Commentary. Article 1-449¹⁰*, *op.cit.*, p. 779.

⁵³ Similarly in the case of mortgage, Article 1114 of the German Civil Code, Article 65 of the Polish Act on land and mortgage registers and mortgages.

systems that know the so-called rights equivalent to real properties (the so-called land-like rights, German: *grundstücksähnliche Rechte*⁵⁴, e.g. land development right on the grounds of the German law, see Article 1017(1) of the German Civil Code, also e.g. Article 248 of the Croatian act), a real burden can be also established on such rights.

In the model perspective, regardless of diverse detailed modifications in individual legal systems, the entity entitled under real burdens can request periodic benefits of a positive nature – in principle services, items determined as to their kind or money. Therefore, it is possible to distinguish as the content of real burdens financial benefits, benefits in kind, i.e. in exchangeable items or items determined as to their kind and benefits consisting in specific performance of the asset owner (services/work). Benefits from the last category can consist in the obligation to deliver goods that are not things (e.g. maintenance of a specific device or supply of electricity⁵⁵). However on the basis of the Swiss law it was reserved that apart from the public law burdens related to land, only such benefits that result from the economic nature of the encumbered land or are designated for economic purposes of the entitled land can be the content of the burden (Article 782(3) of the Swiss Civil Code).

Similarly as in the case of an obligatory annuity agreement, within the construction of a real burden two elements are usually distinguished⁵⁶: 1) the basic right (the 'core' of the right, German: *Stammrecht*) and 2) the obligation claim towards the real property owner. Apart from them, also third element typical for annuity real rights is sometimes distinguished. It is a claim for individual benefits 'made material'⁵⁷.

In terms of the legal construction and due to certain considerable constructional similarities, a real burden is compared primarily with (land and personal) easements. For this reason, a real burden is sometimes defined also as an 'intermediate' right between easements and pledge-type rights⁵⁸. Similarities are connected with the possibility to determine their content in such a manner that the entitled entity can in both cases obtain periodic benefits from an encumbered real property. The encumbrance both in the case of a real burden as well as easement can constitute a right of each owner of the (adjacent) real property or can be established as the so-called personal burden, hence a burden for a designated person (German: *subjektiv-persönliches Recht*, see e.g. Article 1111 of the German Civil Code; the so-called subjective and personal real burden, also called personal real burden, German: *Personalreallast* and the so-called subjective

⁵⁴ See e.g.: R. Paczkowski, *Land Development Right as 'Land'*, Poznań 1932.

⁵⁵ F. Gschnitzer, Ch. Faistenberger, H. Barta, B. Eccher, *op.cit.*, p. 182.

⁵⁶ W. Brehm, Ch. Berger, *Sachenrecht*, 2nd edition, p. 331, authors write about 'three legal relationships'.

⁵⁷ J. Mayer, *op.cit.* par. no. 643 et seq.; see also e.g.: U. v. Lübtow, *Die Struktur der Pfandrechte und Reallasten*, [in:] H.C. Nipperdey (ed.), *Das deutsche Privatrecht in der Mitte des 20. Jahrhunderts. Festschrift für Heinrich Lehmann zum 80. Geburtstag, Band I*, Berlin-Tübingen-Frankfurt a.M. 1956, p. 357 et seq.

⁵⁸ See e.g.: L. Eberlein, *op.cit.* p. 22; see more e.g. in K. Przybyłowski, *From the Overlapping Areas of Easement and Real Burden*, [in:] *Memorial Book Dedicated to the Fiftieth Anniversary of Work of Adolf Czerwiński, Judge and President of the Lviv Court of Appeal, Lviv 1926*, p. 104; see also: J. Fiema, *Real Burdens*, [in:] J. Wasilkowski, F. Zoll (ed.), *Concise Encyclopaedia of Private Law volume IV*, b.d.w., p. 2019-2020; see also e.g.: H. Kozioł, R. Weiser, *Grundriss des bürgerlichen Rechts. Band I. Allgemeiner Teil, Sachenrecht, Familienrecht*, 11th edition. Wien 2000, p. 387.

and objective real burden, land real burden, German: *Prädialrealast*)⁵⁹. A burden established for each owner of another real property is the right connected with its ownership⁶⁰ (*subjektiv-dingliches Recht*, see e.g. Article 1105(2) of the German Civil Code, Article 782 of the Swiss Civil Code, Article 229(1) and (2) and Article 237(1) of the Estonian Act, Article 248 of the Croatian Act, Article 250(2) of the Slovenian Code).

Between both types of limited real rights – real burden on the one hand and easement on the other hand – there are, however, substantial differences which in practice make it impossible to treat the first right as a form of the latter one.

First of all, easements may be exercised in principle only by the entitled entity that should behave towards the encumbered real property in an active manner, e.g. they should derive specific advantages (in particular benefits) from the real property on their own. In turn, the entitled entity does not obtain from real burdens within their right the possibility to possess directly an asset in order to obtain the above-mentioned advantages because they should be delivered by the owner of the real property. This difference between real burdens and easements leads some representatives of the doctrine to the conclusion that real burdens *in faciendo* cannot be included within the category of limited real rights, as it is argued that the latter cannot consist in the obligation of the owner of the encumbered asset of a positive nature, which recognised as a benefit should be included within the group of the so-called positive benefits, i.e. benefits consisting in acting (*facere*). The essence of limited real rights is the direct possession by the entitled entity of an asset (encumbered item), which implies only a passive obligation of its owner to tolerate (*pati*), i.e. only not to impair the exercise by the entitled entity of their rights resulting from the existing encumbrance. Real rights cannot consist in imposing on any entity the obligation to perform a positive action, including a benefit (*iura in re in faciendo consistere non possunt*). In connection with the obligation of the obliged person (land owner) to perform a ‘positive’ action, it is indicated that within the construction of a real burden there are two elements – material element and personal (obligatory) element⁶¹.

In the doctrine, real burdens as a kind of a ‘foreign body’ in relation to classic Roman construction of real rights established on a third-party property are sometimes defined as the so-called easement of the Germanic law (*Servitutes iuris germanici*)⁶². The doctrine presents various theories regarding the essence of a real burden – starting from obligatory, through material, mixed, ending up with

⁵⁹ According to the terminology of German doctrine: *subjektiv-persönliche* and *subjektiv-dingliche Rechte*; this division should not be equated with the division of ownership rights, existing on the basis of the Austrian Civil Code, into the so-called real rights in the strict sense and personal-property (i.e. relative) rights, see Article 307 of the Austrian Civil Code.

⁶⁰ See e.g.: A. Bieranowski, *Land Development Right and Real Burdens...*, *op.cit.*, p. 49.

⁶¹ More about this topic can be found in: E. Koch, *op.cit.*, p. 1, *passim*.

⁶² See e.g. E. Friedlieb, *Die Rechtstheorie der Reallasten*, Jena 1860, p. 123-128; E. Fuchs, *Das Wesen der Dinglich keit*, Berlin 1889, p. 46; see also: K.A. v. Wangerow, *Lehrbuch der Pandekten. Bd. I*, 7th edition, Marburg-Leipzig 1863, p. 691; P. Burzyński, *Polish Private Law. Volume II*, Kraków 1871, p. 445; E. Till, *Interpretation of the Austrian Property Law. T. II*, Lviv 1892, p. 319, footnote 3; E. Koch, *op.cit.*, p. 17; K. Przybyłowski, *op.cit.*, p. 105; F. Zoll, *Object of Property Rights*, ‘Quarterly of Private Law’ (Kwartalnik Prawa Prywatnego) 1938, *passim*.; J. Bekerman, *op.cit.*, p. 543; C. Crome, *op.cit.*, p. 611; U. v. Lübtow, *op.cit.*, p. 363; J. Wasilkowski emphasises that the position treating real burdens as ‘specific concept of the Germanic law’ is ‘ahistorical’, see J. Wasilkowski, *An Outline of ...*, *op.cit.*, p. 302; see also M. Warciński, *Land Easements according to the Polish Civil Code*, Warsaw 2013, p. 352.

theories of 'debt and liability'⁶³. Their detailed presentation goes beyond the framework of this work. Suffice it to say that in Polish literature e.g. F. Zoll, Jr.⁶⁴, and I. Rosenblüth⁶⁵ undermine the legal and material nature of real burdens. As rights consisting in *faceré*, they are sometimes classified as a type of a real bond (German: *Realobligation*), i.e. obligation of each owner of the real property. Legal science also presents other theories explaining the essence of a real burden⁶⁶.

Similarly as in the construction of the obliged person's liability in the case of pledge-type rights, also in the case of a real burden the material liability resulting from a real property is distinguished from the personal liability (*Sachhaftung* vs. *persönliche Haftung*). The latter concerns a person who is liable for required benefits regardless of the fact to whom the encumbered real property will belong in the future (see e.g. Article 1108(1) of the German Civil Code).

However, contrary to classic pledge-type rights, a real burden is a right to the value of an independent nature (non-accessory). Seeking the satisfaction does not depend on the existence of any other subjective right or its content (value or number of benefits). However, similarly as a land charge (also in its annuity form, see below), a real burden may perform the function of a right securing receivables (the so-called securing real burdens, German: *Sicherungsreallasten*)⁶⁷. It results from the fact that under a securing agreement of a fiduciary nature (German: *Sicherungsabrede*, *Zweckbestimmungserklärung*) it may serve to secure receivables resulting from a specific obligation relationship (the so-called *schuldrechtliche Kausalverhältnis*)⁶⁸. In such a case, an additional element of personal liability arises. Due to this it is sometimes indicated in the doctrine that the establishment of a securing real burden leads to a 'liability triad'⁶⁹. Nevertheless, the execution of a securing agreement does not cause that a real burden becomes an accessory right. A similar solution is commonly used in trading practice on the grounds of the German law in the case of land charge⁷⁰.

4. German annuity debt

A special type of the annuity real right not found in other contemporary legal systems is the so-called annuity debt (German: *Rentenschuld*, *Rentengrundschuld*) regulated in the German Civil Code of 1896. Similarly as pledge-type rights and real burden, it is a limited real right. In accordance with

⁶³ See e.g.: E. Koch, *op.cit.*, p. 21 et seq.; J. Bekerman, *op.cit.*, p. 543.

⁶⁴ Already at the initial stage of works on the property law draft, the author indicated the purposefulness of the regulation of these rights, which he considered as obligatory due to the fact that they must be disclosed in an appropriate land register, because, as he wrote, 'their essence consists in the fact that the obligation is connected with the possession (ownership) of the real property, i.e. each owner of the real property is a debtor', F. Zoll, *Preparatory Paper for Works on Codification of Uniform Law of Land Registers*, the Codification Committee of the Republic of Poland. Subsection II of the Civil Law. Volume I. Issue 1, Warsaw 1930, p. 40; see also: F. Zoll, *On the Basic Concept for the Codification of Property Rights established on Real Properties*, 'Themis Polska' 1928/29, volume IV, p. 18-19; *idem*, *Codification Issues from the Scope of Property Law...*, *op.cit.*, p. 188; *idem*, *Object of Property Rights*, *op.cit.*, p. 214.

⁶⁵ I. Rosenblüth, *Concept of Property Rights and their Object in the Property Law Draft*, 'Voice of the Judiciary' (Głos Sądownictwa) 1937, no. 12, p. 961.

⁶⁶ U.V. Lütow, *op.cit.*, p. 352.

⁶⁷ See e.g.: J. Mayer, *op.cit.*, par. no. 61 et seq.

⁶⁸ See e.g.: J. Mayer, *op.cit.*, par. no. 62-63.

⁶⁹ German: *Haftungstrias*, see: J. Mayer, *op.cit.*, par. no. 61 and literature cited there.

⁷⁰ J. Mayer, *op.cit.*, par. no. 61.

Article 1199 of the German Civil Code, the land charge can be established in such a manner that a certain determined sum of money should be paid on account of the land in regularly recurring deadlines. Similar constructions of individual German legal systems, including in particular Bavarian *Ewiggeld* (*census perpetuus, hereditarius*) and other similar ones, including – similarly as in the case of a real burden – purchase of annuity, are considered as the prototype of the annuity debt⁷¹. As Arzt emphasises, '[during] codification sessions devoted to the German Civil Code farmer circles requested the completion of forms of credit by the institution consisting in encumbering land with pecuniary annuity, provided for in the draft. This proposal was justified by economic properties of land from which it is more profitable to pay the annuity than the credit principal'. However the author further notes that '[h]opes of agriculture related to the new form of annuity credit completely failed'⁷².

The content of this right is the entitled entity's claim for a (land) annuity⁷³. Similarly as a real burden, the annuity debt consists in periodic benefits. In the German law both rights are encumbrances which are realised by benefits 'resulting from land'⁷⁴ (Articles 1105, 1199 of the German Civil Code). It is to mean that 'the annuity debt is only on land. Therefore, the owner (...) is liable only on the basis of this land'⁷⁵. Nevertheless, it is indicated that a benefit resulting from land may mean the necessity to deliver certain goods 'directly' from the encumbered asset.

While establishing an annuity debt in an agreement, parties are obliged to indicate an amount which the owner of the encumbered real property should pay in order to repurchase this right. The amount of repurchase is subject to disclosure in the land register (Article 1199(2) of the German Civil Code). The so-called repurchase right (German: *Ablösungssumme*) is of a tie-in nature, as it is reserved – in accordance with Article 1201 of the German Civil Code – exclusively to the owner of the encumbered real property⁷⁶. In accordance with the code, the payment of the so-called repurchase sum 'has the same effect as the payment of the principal of the land charge' (Article 1200(2) of the German Civil Code). The owner may exercise the repurchase right after the termination (Article 1202 sentence 1 of the code).

The annuity debt is considered as a special form of land charge (German: *Grundschuld*, Article 1191 of the German Civil Code)⁷⁷. Pursuant to the dominant

⁷¹ E. Gelling, *Die Reallasten nach dem Bürgerlichen Gesetzbuche insbesondere im Verhältnisse zur Rentengrundschuld auf dogmatischer Grundlage unter Berücksichtigung ihrer historischen Entwicklung*, Erlangen 1915, p. 25-27; see also: M. Ziegler, *op.cit.*, p. 17 et seq.

⁷² Z. Arzt, *Annuity Debt*, [in:] F. Zoll (ed.), *Concise Encyclopaedia of Private Law volume IV*, b.d.w., p. 2058.

⁷³ M. Wolff, L. Raiser, *Sachenrecht, Tübingen 1957*, p. 648; F. Baur, R. Stürmer, *Sachenrecht*, 17th edition, München 1999, p. 552; O. v. Gierke, *op.cit.*, p. 915; C. Crome, *op.cit.*, p. 803.

⁷⁴ R. Paczkowski, *Pecuniary Annuity...*, *op.cit.*, p. 3.

⁷⁵ Z. Arzt, *op.cit.*, p. 2059.

⁷⁶ J.W. Hedemann, *Sachenrecht des Bürgerlichen Gesetzbuch*, Berlin-Leipzig 1924, p. 432. However, the author indicates that this difference is blurred to a certain extent in the case of permissible establishment not subject to the termination of the annuity debt.

⁷⁷ See e.g.: C. Crome, *op.cit.*, p. 672; M. Greift, [in:] E. Strohal (ed.), *Planck's Kommentar zum Bürgerlichen Gesetz buch nebst Einführungsgesetz, Dritter Band. Sachenrecht*, 4th revised edition, Berlin und Leipzig 1920, p. 756; M. Wolff, L. Raiser, *op.cit.*, p. 648; F. Baur, R. Stürmer, *op.cit.*, p. 552; Wolf, p. 392; W. Brehm, Ch. Berger, *Sachenrecht*, Tübingen 2000, p. 320; H.J. Wieling, *Sachenrecht*, 4th edition, Berlin-Heidelberg-New York 2001, p. 469; H. Wolfsteiner [in:] W. Wiegand (ed.) *J. von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch...*, *op.cit.*, p. 741; F. Wieacker, *Bodenrecht*, Hamburg 1938, p. 233; M. Wolff, L. Raiser, *op.cit.*, p. 648.

opinion, similarly as the basic form of land charge (the so-called capital land charge), it constitutes a pledge-type right on real property⁷⁸. The annuity debt, similarly as the capital debt, may have two forms – the accounting form (as encumbrance whose turnover is subject to disclosure in the land register) or the letter form (the transfer of the right takes place through trading in the document of the annuity letter, German: *Renten brief*)⁷⁹. However, contrary to traditional pledge-type rights, including mortgages, the annuity debt in both forms is a non-accessory right as the encumbrance in the scope of obtaining an appropriate monetary value, which this right usually represents, is not related in content (normatively) to the collateral. Therefore, there is no normative relationship between the occurrence, change or cancellation of specific receivables and the duration and content of this limited real right.

Several essential features distinguish the annuity debt from real burdens⁸⁰. First of all, it may occur exclusively for the benefit of a strictly defined person. Moreover, the benefit from the annuity debt is always of a monetary nature (the so-called pecuniary annuity, see Article 1199 of the German Civil Code)⁸¹, hence it cannot consist in obtaining goods (benefits) of other types. Pursuant to the content of Article 1200 of the German Civil Code, ‘individual benefits are governed by relevant provisions on mortgage interest, while the sum of repurchase is governed by the provisions on the principal of the land charge’. Moreover, it is indicated that in the case of the annuity debt ‘the recurrence of benefits’ is not sufficient because they must be realised ‘regularly’, and furthermore the personal liability related to it is excluded. It is also disputable whether it is possible to establish the annuity debt as a perpetual right⁸². Contrary to the real burden, it may have the character of right on own asset (ownership right, *ius in rem suam*), as well as it may be changed (transformed) into another pledge-type right on real property – land charge or mortgage⁸³.

The annuity debt, however, proved to be of little or just minimal practical usefulness⁸⁴. The reason for rejecting this institution in trading is – contrary to real burdens being as a consequence a real alternative for this institution – absence within the analysed institution of two constructional elements: personal liability of the owner of the encumbered real property and unilateral repurchase right⁸⁵. J.W. Hedemann almost one hundred years ago emphasised that the annuity debt is a dead letter⁸⁶. Also in Polish literature it was pointed out that in practice it had not taken root⁸⁷. Certainly it affected the decision of legislators of other countries to

⁷⁸ O. v. Gierke, *op.cit.*, p. 915.

⁷⁹ C. Crome, *op.cit.*, p. 672-673; Z. Arzt, *op.cit.*, p. 2059.

⁸⁰ See more e.g. in: E. Gelling, *op.cit.*

⁸¹ See: C. Crome, *op.cit.*, p. 671; M. Wolff, L. Raiser, *op.cit.*, p. 649; F. Baur, R. Stürner, *op.cit.*, p. 552; Z. Arzt, *op.cit.*, p. 2060.

⁸² Z. Arzt, *op.cit.*, p. 2061.

⁸³ *Ibidem*.

⁸⁴ F. Baur, R. Stürner, *op.cit.*, p. 552; W. Brehm, Ch. Berger, *Sachenrecht*, [1st edition], p. 321; H.J. Wieling, *op.cit.*, p. 469; see also: F. Wieacker, *op.cit.*, p. 233; H. Westermann, H.P. Westermann, K.-H. Gursky, D. Eickmann, *Sachenrecht*, 7th edition, Heidelberg 1998, p. 831; D. Eickmann, [in:] M.E. Rinne (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 6. Sachenrecht*, Articles 854-1296, 4th edition, München 2004, p. 2134.

⁸⁵ D. Eickmann, [in:] M.E. Rinne (ed.), *Münchener Kommentar...*, *op.cit.*, p. 2134.

⁸⁶ J.W. Hedemann, *Sachenrecht*, *op.cit.*, p. 431.

⁸⁷ Z.Arzt, *op.cit.*, p. 2058.

refrain from the introduction of its annuity form while adopting land charge regulations.

5. Swiss annuity letter

The Swiss institution of the annuity letter (German: *Gült*, French: *lettre de rente*, former Articles 847-853 of the Swiss Civil Code) existing until 2011 was similar to the German annuity debt letter and belonged to the category of pledge-type rights on real property (see Article 793 of the Swiss Civil Code)⁸⁸. The letter was treated as a special right, i.e. in fact as receivables encumbering real property as a burden related to land. It could be established only on real properties for which the land register was kept (Article 796(1)), agricultural real properties, residential houses and building land (former Article 847(1) and (2) of the Swiss Civil Code). The content of this right comprised: principal of the annuity letter – the so-called letter receivables (German: *Gültforderung*) and letter interest (German: *Gültzinse*). It was the right incorporated in a document (registered securities or bearer securities). As an assumption, it was to be used for the realisation ('mobilisation', German: *Bodenmobilisierung*, *Mobilisierung der Bodenwerte*, French: *mobilisation du sol ou du crédit immobilier*)⁸⁹ of the value of real property⁹⁰, in particular it was to constitute an instrument of securing credits in agricultural economy⁹¹, however in practice, similarly as the German annuity debt, contemporarily it does not have special importance⁹². The necessity to make long-term investments related to this right is considered as the reason for lack of this institution attractiveness⁹³. In connection with insignificant application in practice (*wirtschaftlich bedeutungslos*)⁹⁴ the provisions of the Swiss Civil Code on annuity letters were repealed in 2011 ('cutting off the old plait')⁹⁵.

⁸⁸ See more in: E. Rubinstein, *Die Grund- und Rentenschuld des deutschen Bürgerlichen Gesetzbuches und die Gült des schweizerischen Zivilgesetzbuches*, Leipzig 1934.

⁸⁹ The 'mobilisation' in the narrow sense is connected with the issue of facilitating and making available collateral securities on real properties and trading in them. In fact, its purpose was to facilitate trading in the value of real property through the possibility of 'subdivision' of the value of land as a consequence of the establishment on land real rights aimed at securing the credit. In this case the 'mobilisation' is to consist in simplification and acceleration of trading in collateral (rights to the value) through their embodiment in documents, giving them the feature of circularity similarly as in the case of securities, see more in Polish literature: A. Cieszkowski, *On Credit and Circulation. Notes on the Current State of English Finance*, Poznań 1911; see also e.g.: J. Challamel, *Étude sur les cédules hypothécaires, (Handfesten - bons fonciers)*, Paris 1878; G. Rondel, *De la mobilisation du sol en France*, Paris. 1888; M. Tourolle, *la cédoule hypothécaire*, Paris 1912, p. 6 et seq.; L. Estivant, *Étude sur la mobilisation de la propriété foncière dans l>act Torrens*, Paris 1899; J.W. Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert. Zweiter Teil: Die Entwicklung des Bodenrechts von der französischen Revolution bis zur Gegenwart*, I. Hf., Berlin 1930, p. 95.

⁹⁰ Eugen Huber, author of the Swiss Code, indicated in recitals to the code draft: '*Die Gült, d.h. die Belastung des Bodens mit einem Gläubigeranspruch auf Zins und Kapital, ohne persönliche Forderung an den Schuldner und demgemäss mit blosser Bodensicherung, bestimmt für den besten Teil des Bodenwerts, als sozusagen absolut sichere Anlage*'; see also e.g.: B. Swaczyna, *Swiss Schuldbrief as Possible Model for the Polish legislator*, 'Studies on Private Law 2009' (Studia Prawa Prywatnego 2009), 2(13), p. 144.

⁹¹ See: H. Leemann, *Kommentar zum Schweizerischen Zivilgesetzbuch. Sachenrecht, II Abteilung. Articles 730-918*, Bern 1925, p. 948, 960-961.

⁹² H.M. Riemer, *Grundriss des schweizerischen Sachenrechts. Band II., Die beschränkten dinglichen Rechte*, 2nd edition, Bern 2000, p. 143; P. Tuor, B. Schnyder, J. Schmid, *Das Schweizerische Zivilgesetzbuch*, 11th edition, Zürich 1995, p. 869; D. Staehelin [in:] H. Honsell, N.P. Vogt, Th. Geiser (ed.), *Basler Kommentar. Zivilgesetzbuch II, Articles 457-977 ZGB, Articles 1-61 SchIT ZGB*, 2nd edition, Basel-Genf-München 2003, p. 1770.

⁹³ P. Simonius, Th. Sutter, *Schweizerisches Immobiliarsachenrecht. Band II, Die beschränkten dinglichen Rechte*, Basel-Frankfurt a.M. 1990, p. 284.

⁹⁴ *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Register-Schuldbrief und weitere Änderungen im Sachenrecht)*, BBl 2007, 5283.

⁹⁵ *Schweizerisches Zivilgesetzbuch (Register-Schuldbrief und weitere Änderungen im Sachenrecht) Änderung vom 11. Dezem*

6. Usefulness of the institution of annuity real rights and *de lege ferenda* comments

The general juridical category of annuity real rights may be distinguished due to their special features. Annuity rights, to which the above-presented types – German annuity debt, Swiss annuity letter and real burdens known to some legal systems – belong, are real rights that allow obtaining annuity from assets (in the economic sense). The possession of an asset in the scope of deriving them originally belongs to the owner. The independent possession occurs established by them for their own benefit or for the benefit of another person in the scope of certain value of real property – a right absolutely connected with the obligation relationship, which form one whole⁹⁶. In general annuity rights may be divided – depending on the amount of individual benefits – into constant and variable (German: *feste, wechselnde Reallasten*), depending on the regularity of realisation of individual benefits – into permanent and non-permanent (regular and irregular, German: *ständige, nicht ständige Reallasten*), while depending on their duration – into temporary and perpetual (German: *zeitliche, ewige Reallasten*)⁹⁷.

The unpublished justification of the property law draft of 1946 indicated certain vital needs that spoke in favour for the regulation in the Polish legislation of real burdens. It was aimed at securing rights within the annuity agreement (Articles 599-609 of the Code of Obligations) and at securing claims of the State Treasury, referred to in Article 13 of the Decree of 6 September 1944⁹⁸. On the example of real burdens, various purposes of a securing nature, whose needs annuity real rights serve, may be indicated. They include in particular: 1) securing in general obligatory annuities (Article 903 et seq. of the Polish Civil Code), 2) securing the annuity and similar relationships (benefits related to maintenance, e.g. in the case of an illness, alimony obligation, etc., or in order to meet other personal needs, to deliver (hot) water⁹⁹, electricity¹⁰⁰, thermal energy¹⁰¹ (German: *Heizungsreallaster*¹⁰²), food, clothes¹⁰³, to ensure transport to the doctor, etc.¹⁰⁴, within the so-called housing real burdens consisting in providing the entitled person with housing of an adequate standard (German: *Wohnungsreallasten*¹⁰⁵, 3) maintaining specific assets (securing the obligation to maintain animals, perform periodic inspections and repairs of buildings or their parts or other devices, etc.¹⁰⁶),

ber 2009.

⁹⁶ See: C. Crome, *op.cit.*, p. 612.

⁹⁷ F. Gschnitzer, Ch. Faistenberger, H. Barta, B. Eccher, *op.cit.*, p. 182; see also: J. Fiema, *op.cit.*, p. 2021.

⁹⁸ *Journal of Laws of 1945*, no. 3, item 13.

⁹⁹ H. Koziol, R. Weiser, *op.cit.*, p. 387; H.M. Riemer, *op.cit.*, p. 182; K. Preißmann, *Die Realfast*, Bonn 1995, p. 9.

¹⁰⁰ H. Koziol, R. Weiser, *op.cit.*, p. 387; H.M. Riemer, *op.cit.*, p. 182; H. Amann [in:] W. Wiegand (red.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch...*, *op.cit.*, p. 674, 675.

¹⁰¹ H. Amann [in:] W. Wiegand (red.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch...*, *op. cit.*, p. 674. 675, 683.

¹⁰² K. Preißmann, *op.cit.*, p. 9 et seq.

¹⁰³ See: J. Kohler, *Beiträge zum Servitutenrecht*, Archiv für die civilistische Praxis 1897, volume 87, p. 191.

¹⁰⁴ F. Gschnitzer, Ch. Faistenberger, H. Barta, B. Eccher, *op.cit.*, p. 184.

¹⁰⁵ See more in: K. Preißmann, *op.cit.*, p. 38 et seq.

¹⁰⁶ H. Koziol, R. Weiser, *op.cit.*, p. 386.

4) securing claims for compensation, income, etc.¹⁰⁷, 5) securing delivery of raw materials, semi-finished products (German: *Industriereallasten*¹⁰⁸), agricultural products (e.g. milk, other agricultural produce)¹⁰⁹, as well as other benefits in kind from the real property¹¹⁰, 6) securing the price from the sale agreement or benefits from the exchange agreement¹¹¹ and benefits on account of periodic delivery of different goods (for a company providing utilities, such as cable TV signal, disposal of waste, telephony signal, etc.).

In the scope of solutions known to the civil law, the annuity real right could in particular serve to secure the obligation to maintain devices by the owner of land of a servient nature (see Article 171 of the Decree – Property Law¹¹²), as well as to remunerate for the establishment of obligatory easement – right-of-way easement, transmission easement or easement resulting from crossing the land border (Article 145, Article 151 and Article 305¹ et seq. of the Polish Civil Code)¹¹³. In the scope of the use in trading, literature sometimes indicates also the possibility to establish a real burden as a right serving to limit competition (e.g. ‘acceptance’ burdens, German: *Abnahmereallasten*, imposing on the owner of the encumbered real property the obligation to accept specific benefits only from specific entrepreneur¹¹⁴). However, the admissibility of the use of the institution of annuity rights for this purpose is disputable.

The act draft amending the Civil Code prepared by the Polish Civil Law Codification Committee and introducing the institution of the land development right provided for the possibility to establish the right to periodic benefits under the name ‘annuity burdens’¹¹⁵. This solution was modelled to a significant extent on the provisions of the Decree of 1946 on real burdens.

The above-indicated possibilities to use the real burden, including within periodic security of remuneration for the establishment of a limited real right, confirm the legitimacy of introducing the institution of an annuity real right into the Polish law¹¹⁶. We should agree with the view that initially real burdens according to the Decree of 1946 should become the model for such a solution, which could

¹⁰⁷ J. Fiema, *op.cit.*, p. 2021.

¹⁰⁸ F. Wieacker, *op.cit.*, p. 234-235; see more in: K. Preißmann, *op.cit.*, p. 10 et seq.; term based on: Ph. Heck, *Grundriß des Sachenrechts*, 3 Neudruck der Ausgabe Tübingen 1930, Aalen 1994, p. 437.

¹⁰⁹ See e.g.: F. Gschnitzer, Ch. Faistenberger, H. Barta, B. Eccher, *op.cit.*, p. 183; P.-H. Steinauer, *Les droits réels, Volume III*, 2nd edition, Berne 1996, p. 85; H.M. Riemer, *op.cit.*, p. 182.

¹¹⁰ S. Szer, *op.cit.*, p. 62.

¹¹¹ See Article 2(2) of the Decree of 8 August 1946 on entering the ownership title to real properties taken over for the purposes of the agricultural reform into mortgage (land) registers (Journal of Laws no. 39, item 233, as amended); see also Article 6(2) of the Decree of 28 October 1947 on legal validity of land and mortgage registers in the Recovered Territories and former Free City of Gdańsk (Journal of Laws no. 66, item 410).

¹¹² See e.g.: H.M. Riemer, *op.cit.*, p. 182; H. Amann [in:] W. Wiegand (ed.), *J. von Staudmgers Kommentar zum Bürgerlichen Gesetzbuch...*, *op.cit.*, p. 674, 675.

¹¹³ See e.g.: K. Zaradkiewicz [in:] K. Pietrzykowski (ed.), *Polish Civil Code. Volume I. Commentary. Articles 1-449*¹⁰, *op.cit.*, p. 928 and literature referred to therein.

¹¹⁴ More about this topic can be found in: K. Preißmann, *op.cit.*, p. 21 et seq.; The tangible obligation of the owner of a sawmill or mill to realise benefits for residents on favourable terms is of a similar nature. H.M. Riemer, *op.cit.*, p. 182.

¹¹⁵ See: K. Zaradkiewicz, *Basic Assumptions concerning the Proposal to Regulate the Land Development Right*, ‘Legislative Review’ (Przegląd Legislacyjny) 2006, no. 2, p. 74; see also A. Bieranowski, *Development Right and Real Burdens...*, *op.cit.*, p. 50 et seq.

¹¹⁶ See also: A. Bieranowski, *More on the Legal Nature of the Annuity Relationship – de lege lata and de lege ferenda comments*, ‘Rejent’ 2013, no. 2, p. 35.

serve in particular the depreciation purposes¹¹⁷. However, works on the new solution should take into account not only advantages of the real burden, but also certain solutions concerning other annuity rights known to some European legal systems. The limited real right introduced in the future legislation should cover not only the possibility of material satisfaction of the entitled person, but also personal liability of the owner of the encumbered real property, together with its dispositive determination (the possibility of exclusion or limitation)¹¹⁸ or e.g. the possibility to indicate various values of annuity amounts by the introduction of the so-called 'basic measuring instrument'¹¹⁹. At the same time it is justified to consider the admissibility to establish the annuity right not only in an agreement for another person, but also – similarly as in the case of the German annuity debt – to establish and to transfer it as the 'ownership' right, i.e. for own benefit of the real property owner (as the so-called right on own asset, *ius in rem suam*, i.e. as an exception to the consolidation principle provided for in Article 247 of the Polish Civil Code)¹²⁰, as well as to transform this right into mortgage and vice versa, while maintaining the original priority of the right¹²¹.

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¹¹⁷ R. Paczkowski, *Pecuniary Annuity...*, *op.cit.*, p. 138.

¹¹⁸ *Ibidem*, p. 139, he points out in this context that 'if the act provided for absolute necessity of personal liability of the real property owner, this point could be sometimes double-edged for the institution of the real burden as in many cases the exclusive material liability could be taken into account, also in the pecuniary annuity'.

¹¹⁹ *Ibidem*.

¹²⁰ *Ibidem*, p. 139-140.

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