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Functions of easement (servitude)- *de lege lata* and *de lege ferenda*

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Abstract:

The Polish Civil Code provides for three types of easements (servitude), namely easement in gross (personal servitude), easement appurtenant (praedial servitude) and transmission easement (transmission servitude), each with a specific function within the legal system. The first two types of easements have emerged out of Roman law tradition. It should be pointed out that the traditional understanding of the purpose of easement is not sufficient or optimal, considering the changing social and economic realities of today. This would justify a renewed debate as to the purpose of establishing and maintaining particular types of easement on property. Also, easement could see more extensive use in legal practice once its definition is fixed. This paper presents *de lege lata* conclusions and *de lege ferenda* postulates, speculating on the most desirable future directions in which the functions of easement could evolve in order to best serve the needs of various civil-law transactions.

Keywords: functions of easement (functions of servitude), easements (servitude), personal easement (personal servitude), transmission easement (transmission servitude)

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1. Introduction

There are no doubts about the importance of easements in civil law transactions. These rights over property, which derive from the Roman tradition, fit well with the current needs of the economy and society. While granting wider or narrower rights in rem in relation to real estate,² they do not deprive the owner of their ownership title (since they belong to the category of *iura in re aliena*). As a consequence, the rights of the owner in relation to the property are only subject to broader or narrower restrictions, depending on the substance of the easement.

Having noted the legal significance of establishing the limited rights in rem discussed in this paper, it is appropriate to give consideration to the functions served in legal transactions by specific types of easements. 'Function' means both the purpose for which the easement is created and the maintenance of the easement as an encumbrance on property. These considerations are relevant, if only because scholars note that the purposiveness of an easement represents its natural and intrinsic feature.³ It should be emphasised that the three types of easements regulated by the Civil Code, i.e. easements appurtenant, easements in gross and transmission easements, have different functions in the legal system, serving purposes of both economic and personal nature. Thus, easements are characterised, on the one hand, by the diversity of their functions and, on the other hand, by the fact that the purpose of the easement determines its substance and affects whether it is legally acceptable.

In view of the changing social and economic realities of today, the thesis that the traditional understanding of the purpose of easement, including references to Roman tradition, is not sufficient or optimal is worthy of consideration. The determination of the function of easements should make it possible to use these limited rights in rem more widely in practice. This paper is only a small contribution to a further discussion of this important issue. It will present directions for a possible discussion, including *de lege lata* proposals and conclusions concerning *de lege ferenda*, with regard to the functions of

² Nie jest dopuszczalne ustanowienie ograniczonego prawa rzeczowego, jakim jest służebność, na części nieruchomości. Oznaczenie w umowie sposobu korzystania z rzeczy, w tym ograniczenie tego korzystania do oznaczonej części rzeczy, nie jest jednak obejściem powyższego wymogu, mamy tu bowiem do czynienia z treścią ustanowionego prawa – zob. m.in. postanowienie Sądu Najwyższego – Izba Cywilna z dnia 29 maja 2015 r. V CSK 416/14.

³ Zob. M. Warciński, *Służebności gruntowe według kodeksu cywilnego*, Warszawa 2013, s. 114 i literatura tam przywołana.

easements appurtenant, easements in gross and transmission easements, in the context of the optional possibility of increasing their use in legal transactions.

2. Types of easements provided for in the Civil Code and the basic distinguishing criteria.

Until 2008, the Civil Code, which is the primary source of regulations relating to easements,⁴ distinguished two types of easements, i.e. easements appurtenant and easements in gross. The amendment of 30 May 2008⁵ introduced into the Code a new type of easement previously unknown to the Polish legal order – transmission easement.⁶ There are two basic criteria for distinguishing between different types of easements: the entity to whom the right has been granted, and the substance of the right.

With regard to the first of these criteria, it needs to be pointed out that easements appurtenant are established for the benefit of each and every subsequent owner of the dominant estate. Consequently, these are rights associated with the ownership of that estate. Easement in gross, on the other hand, is established in favour of a designated natural person as a right which corresponds in substance with easement appurtenant (Article 296 of the Civil Code), and therefore it is characterised by a different entity component. Similarly, in the case of transmission easement the differentiating characteristic also falls within the scope of the entity criterion. The entity benefiting from this easement is a utility enterprise, which should be inferred from the fact that the easement becomes a component of an enterprise within the meaning of Article 55¹ of the Civil Code. Since, under Article 305¹ of the Civil Code, transmission easement grants its beneficiary the right to use the real estate in accordance with the intended purpose of the transmission equipment, the company in favour of which the easement was granted must carry on its business activity in a manner consistent with the function of such equipment.⁷

Another important distinction between different types of easements is the criterion of substance, and this distinction basically differentiates transmission

⁴ Nie jest to źródło jedyne. Przykładowo, unormowania szczególne dot. służebności drogowej i przesyłu zawarte są w art. 39a Ustawy z dnia 28 września 1991 r. o lasach.

⁵ Służebność przesyłu została wprowadzona z dniem 3 sierpnia 2008 r., na podstawie Ustawy z dnia 30 maja 2008 r. o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw (Dz. U. 2008 nr 116 poz. 731).

⁶ Zagadnienie kwalifikacji służebności przesyłu na początku obowiązywania regulacji z art. 305 (1) k.c. było sporne. Istniały głosy uznające służebność przesyłu za rodzaj służebności gruntowej – tak m. in. G. Bieniek, *Urządzenia przesyłowe. Problematyka prawna*, Warszawa 2008, s. 55. Ugruntował się jednak pogląd, iż służebność przesyłu jest nowym, odrębnym od służebności gruntowych i osobistych, rodzajem służebności – tak m.in. już w tamtym okresie: M. Godlewski, *Zasiedzenie służebności przesyłu*, „Monitor Prawniczy” 2010, nr 7, s. 389; A. Stępień-Sporek, *Status prawny urządzeń wskazanych w art. 49 k.c.*, „Monitor Prawniczy” 2008, nr 4, s. 741; M.J. Kondek, *Służebność przesyłu. Nowe ograniczone prawo rzeczowe*, „Przegląd Sądowy” 2009, nr 3, s. 22; M. Balwicka-Szczyrba, *Służebność przesyłu*, „Gdańskie Studia Prawnicze” 2009, t. XXI, s. 50–51.

⁷ Zob. szerzej M. Balwicka-Szczyrba, *Korzystanie z nieruchomości przez przedsiębiorców przesyłowych – właścicieli urządzeń przesyłowych*, Warszawa 2015, s. 129

easements from other types of easements. The substance of easements appurtenant consists in the fact that the owner of the dominant real estate is able to use the servient real estate to a specified extent, or that the owner of the servient real estate is restricted in their ability to carry out certain activities in relation to it, or that the owner of the servient real estate is prohibited from exercising certain rights which they hold with respect to the dominant estate on the basis of provisions on the substance and exercise of ownership (Article 285(1) of the Civil Code). In light of Article 296 of the Civil Code easement in gross corresponds in substance to easement appurtenant; in consequence both easement types can be the same in substance.⁸ The only difference between the two will be the entity component.

The substance of transmission easement differs from the substance of both easements appurtenant and in gross. It consists in the right to build transmission equipment (if the easement is established for newly constructed equipment), to install such equipment on the property, to maintain and operate it, as well as to modernise, service and repair it. In certain cases, the transmission easement will also contain the right to expand the transmission equipment. This right, however, shall not apply if the expansion of the transmission equipment entails a change in their type and characteristics, if those circumstances have been laid down in the agreement for the establishment of the transmission easement or arise from another source forming the basis for the creation of the transmission easement.⁹

Apart from the basic distinctions discussed above between easement types provided for in the Civil Code, specific regulations concerning easements introduce other differences, e.g. with regard to the way in which the easement may be acquired or the principles (or admissibility) of its transferability. The issue of the function of easements, which is the subject of these considerations, is another important element that impacts the legal status of the aforementioned types of easements and, consequently, the possibility to use them in civil law transactions.

3. The function of easements appurtenant

Easements appurtenant – the oldest easement type¹⁰ – vary in substance, due to the general regulation of Article 285(1) of the Civil Code. This

⁸ Istnieją jednak wyjątki. Służebność mieszkania, stanowiąca odmianę służebności osobistych, nie może być konstruowana jako służebność gruntowa A. Bieranowski, *Służebność mieszkania*, Warszawa 2011, s. 81.

⁹ M. Balwicka-Szczyrba, *Korzystanie ...*, p. 135.

¹⁰ Najstarszymi spośród służebności znanymi prawu rzymskiemu są służebności gruntów wiejskich (*servitutes praediostrum rusticorum*), dopiero w późniejszym okresie pojawiły się służebności gruntów miejskich (*servitutes praediostrum urbanorum*) – zob. szerzej W. Litewski, *Prawo rzymskie prywatne*, Warszawa 2003, s. 236.

regulation does not specify in detail the rights of the owner of the dominant estate. The legislator does not directly regulate what are the specific rights of the owner of the dominant estate with regard to the use of the servient estate, or what is the specific obligation of the owner of the servient estate with regard to not taking certain actions, depending on whether the easement is active or passive in nature.¹¹

The above-described essence of easements appurtenant has implications for their functions. As it follows from the above, easements appurtenant are servitudes for the benefit of the dominant estate. This principle is reinforced by Article 285(2) of the Civil Code, which provides that the only purpose of an easement appurtenant is to increase the usefulness of the dominant estate or its designated part.¹² This attribute of 'being servient' in relation to a specific real estate determines the possibility of establishing an easement appurtenant in a specific case. The purpose of establishing this easement is to benefit the dominant estate and, therefore, it must be advantageous to it.¹³ The prevailing view is that the needs of the dominant estate are determined by the social and economic purpose for which it is used,¹⁴ and the establishment of an easement is necessary to make better use of the dominant estate or its part in terms of its utilisation.¹⁵ Consequently, it is generally accepted that easements cannot be created merely for the convenience of the owner of the dominant estate or to satisfy the owner's aesthetic needs.¹⁶

At the same time, one should agree with the view expressed in the literature, namely that the increase in the usefulness of the dominant estate or its part may also follow as a future effect of the establishment of the easement, to be achieved only after some time from its establishment, and may also constitute an indirect effect. *De lege lata*, the content of Article 285(2) of the Civil Code does not require that the purpose of establishing the easement be achieved already at the time of its establishment.¹⁷

¹¹ Przykładowo, okoliczność, iż przepisy Kodeksu cywilnego nie regulują wyraźnie służebności czerpania wody i przeprowadzenia wodociągu, nie oznacza, że ustanowienie takiej służebności nie jest dopuszczalne. Taka służebność spełnia cechy służebności gruntowej określone w art. 285 § 1 KC – zob. postanowienie Sądu Najwyższego – Izba Cywilna z dnia 25 lutego 2016 r. III CSK 108/15.

¹² Z orzecznictwa zob. m.in. postanowienie Sądu Najwyższego – Izba Cywilna z dnia 13 grudnia 2012 r. V CSK 3/12.

¹³ Zob. szerzej M. Balwicka-Szczyrba [w:] M. Balwicka-Szczyrba, G. Karaszewski, A. Sylwestrzak, *Sąsiedztwo nieruchomości. Komentarz*, Warszawa 2014, s. 213 i. in..

¹⁴ Zob. m.in. J. Pazdan, *O zakresie i sposobie wykonywania służebności gruntowej*, [w:] *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, Warszawa 2010, s. 441 i literatura tam podana. Z orzecznictwa zob. wyrok SN z dnia 11 października 2007 r., IV CSK 169/07, LEX nr 488985.

¹⁵ Tak m.in. J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warszawa 2004, s. 209.

¹⁶ Przeciwnie jednak Z.K. Nowakowski, *Służebności*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1968, z. 3, s. 138.

¹⁷ Tak K. Zaradkiewicz [w:] K. Pietrzykowski (red.), *Kodeks cywilny. Komentarz do artykułów 1–449(10)*, t. 1, Warszawa 2011, s. 1023; M. Balwicka-Szczyrba, [w:] M. Balwicka-Szczyrba, G. Karaszewski, A. Sylwestrzak, *Sąsiedztwo nieruchomości...*, s. 216. Przeciwnie jednak M. Warciński, *op.cit.*, s. 130.

As a consequence of the use of the term "only" in Article 285(2) of the Civil Code by the legislator, an easement appurtenant cannot be established for a purpose other than that of increasing the usefulness of the dominant estate or its designated part.¹⁸ Because of this, the possibility of using easements in certain cases may be questioned, for example with regard to the institutions of security easement appurtenant and non-competition easement appurtenant, cited by some authors.¹⁹ Security easement over land would consist in stipulating by the parties to the agreement establishing the easement the purpose for which the right is to be created – to secure a specific obligation, e.g. arrangements concerning competing economic activity, securing a monetary claim.²⁰ In the other case, establishing an easement appurtenant would consist in a prohibition to carry on business activities at all or a specified type of business activity, a prohibition to sell a specific type of products, or ensuring terms of delivery or terms of sale of specific goods.²¹

Despite the issue being still a disputable one, it needs to be emphasised that the examples cited above indicate that there is a need in society to use the institution of easements appurtenant more extensively in practice. To address these needs, arising from changing social realities, we should seek legal solutions to extend the use of the construct of easement, discussed here. As part of the *de lege lata* proposals, it seems acceptable, in my opinion, that the phrase "usefulness of the dominant estate" should be construed more broadly, not only in relation to the use directly related to the property but also as the use that has only an indirect relationship with the property, including a relationship existing only in connection with its each and every subsequent owner. The proposed broader approach to the function of easement appurtenant, while retaining the characteristic relationship with the dominant real estate, would allow to expand the possibilities to use this legal institution in civil-law transactions. The proposed interpretation of Article 285(2) of the Civil Code seems acceptable, if only because, as recorded in case law, judicial decisions have sometimes applied the provision of Article 285 of the Civil Code in a definitely liberal manner in cases where such approach was specifically justified. In particular, there are known cases of establishing easements appurtenant without identification of the

¹⁸ M. Balwicka-Szczyrba [w:] M. Balwicka-Szczyrba, G. Karaszewski, A. Sylwestrzak, *Sąsiedztwo nieruchomości...*, s. 216.

¹⁹ Rozważania w tym temacie podjął K. Zaradkiewicz, uznając, iż dopuszczalne byłoby ustanowienie tzw. izolowanej służebności gruntowej celu zabezpieczającego bez jednoczesnego zawarcia umowy zabezpieczającej. Autor zaznaczył, że dopuszczalność służebności gruntowej zakazu konkurencji jest sporna – K. Zaradkiewicz [w:] *Kodeks cywilny. Komentarz...*, s. 1016–1017. Odnośnie służebności zakazu konkurencji zob. też M. Warciński, *op.cit.*, s. 123–128.

²⁰ Zob. K. Zaradkiewicz [w:] *Kodeks cywilny. Komentarz...*, s. 1016.

²¹ *Ibidem*.

dominant real estate, where the easement was corresponding – in its substance and scope – to transmission easement.²²

The proposed approach does not change the essence of the easement appurtenant, which plays a servient role in relation to the dominant estate, but only allows for the existence of a broader relationship between the established easement and the dominant estate.

4. The function of easements in gross

The purpose of an easement in gross is to meet the personal needs of its holder over a period of time determined by the lifespan of the person concerned.²³ By their very nature, easements in gross are not transferable (nor can the right to exercise them be transferred to another person). Pursuant to Article 299 of the Civil Code, an easement in gross expires at the latest on the death of the beneficiary, so it cannot last beyond the beneficiary's lifetime.

When considering the function of easements in gross, it is generally accepted in the academic world that the legislator's reference to the "personal needs" of the beneficiary means that the easement serves the function of supporting consumption needs.²⁴ Undoubtedly, its establishment must be related to the individual concerned and their needs.

There may be some doubts, however, about viewing the purpose of establishing an easement in gross solely from the perspective of maintenance (consumption) needs. It seems that such a qualification of its objectives excessively narrows the practical application of this institution, and thus does not allow the use of this legal instrument in a wider spectrum of cases. In my opinion, narrowing the personal needs of the easement holder only to the issues falling into the consumption area is not justified on the basis of the interpretation of the provisions on easements in gross. It seems that the intention of the legislator, who used the phrase 'personal needs' in Article 298 of the Civil Code, was to link

²² W orzecznictwie uznano, że przed ustawowym uregulowaniem służebności przesyłu dopuszczalne było nabycie w drodze zasiedzenia służebności odpowiadającej treści służebności przesyłu na rzecz przedsiębiorstwa. Wskazano przy tym, że tak jak dla ustanowienia na rzecz przedsiębiorcy lub nabycia przez przedsiębiorcę w drodze zasiedzenia służebności przesyłu, tak i dla ustanowienia na rzecz przedsiębiorstwa lub nabycia przez przedsiębiorstwo w drodze zasiedzenia służebności gruntowej odpowiadającej treści służebności przesyłu bezprzedmiotowe jest oznaczenie „nieruchomości władnącej”. Zob. uchwała SN z dnia 7 października 2008 r., III CZP 89/08, LEX nr 458125; Biul. SN 2008/10/7. Zob. także: wyrok SN z dnia 12 grudnia 2008 r., II CSK 389/08, LEX nr 484715; postanowienie SN z dnia 26 czerwca 2013 r., II CSK 626/12, LEX nr 1341262; uchwała SN z dnia 27 czerwca 2013 r., III CZP 31/13, LEX nr 1324958; postanowienie SN z dnia 14 czerwca 2013 r., V CSK 321/12, LEX nr 1381040; uchwała SN z dnia 22 marca 2013 r., III CZP 18/13, LEX nr 1316046; postanowienie SN z dnia 06 lutego 2013 r., V CSK 129/12, LEX nr 1294483.

²³ G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna*, Warszawa 2013, s. 681.

²⁴ Tak m.in. w uchwale SN z dnia 29 października 1991 r., III CZP 109/91, LEX nr 3791, czy wyroku SN z dnia 23 listopada 2018 r. II CSK 682/17. Tak też m.in. E. Gniewek: E. Gniewek (red.), *System Prawa Prywatnego, Prawo rzeczowe*, t. 4, Warszawa 2012, s. 250.

the purpose of establishing an easement in gross to the needs of a specific, designated person. According to the dictionary of the Polish language, the word "personal" means "concerning a particular person", so the nature of the easement as being related only to consumption does not follow from a literal interpretation of the provision. In view of the above, it is worth putting forward a thesis that *de lege lata* the personal purpose related to the establishment of the easement in question does not have to be of merely consumption-related nature, and may be related to other needs of the beneficiary. For example, these needs may be of aesthetic or moral nature.

As a consequence of the view taken above, it should be concluded that an easement in gross serves any legally permissible purpose related to its holder's personal need, regardless of the nature of that need. If a purpose of easement in gross is defined in such a way, an exception could only result from specific regulations – in particular Article 146 of the Civil Code in connection with Article 145 of the Civil Code which stipulates that an easement by the necessity of a right of way always serves economic purposes related to the lack of access to a public road or buildings connected with the property.

Adopting the proposed position on understanding the personal function of easements in gross will increase the use of these easements in practice.

5. The function of transmission easements

The establishment of transmission easement fulfils a purpose different from that of easements appurtenant and easements in gross, namely an economic purpose which has been narrowed by the legislator in terms of the rights arising from the substance of the easement. Pursuant to Article 305¹ of the Civil Code, the entrepreneur granted this easement may use the servient estate within a designated scope, in accordance with the purpose of transmission facilities. Consequently, it is the purpose of the transmission facilities themselves that determines the purpose for which the transmission easement is established and the function of this easement in legal transactions. The acquisition of this title to real property is in fact connected with the necessity to install equipment for the supply or discharge of certain substances, including in particular liquids, steam, gases, electricity. Although the term 'transmission equipment' has not been defined by the legislator, it should be understood – according to Article 49 of the Civil Code – as a mechanism or set of mechanisms for the transmission of

liquids, steam, gas and electricity.²⁵ When analysing the content of Article 49 of the Civil Code, it should be assumed that the equipment indicated therein serves, by its very nature, certain economic objectives.²⁶ The purpose of the equipment is the supply and discharge (transmission) of designated utilities. According to the content of Article 49(1) of the Civil Code, transmission equipment shall also include other similar mechanisms or set of mechanisms – so-called transmission facilities *sensu largo*.²⁷

Having regard to the substance of transmission easement, as well as the specialised purpose of transmission equipment, it is clearly evident that the economic function of this easement has been narrowed, which affects the practical possibility of its use. Narrowing the set of entities that may be granted transmission easement (only utility transmission undertakings) undoubtedly limits the possibility of establishing this right. In some situations, such as those related to the construction and maintenance of energy generation equipment on a real estate (photovoltaic farms, wind farms), it is not possible to obtain a permanent legal title to the real estate in a way similar to transmission easement. Acquisition of easements *appurtenant* is not always possible in the absence of a dominant property. Then, an obligation contract, which is often used in practice, is by its very nature not permanent, which is quite often at odds with the need to obtain a stable legal title.

When analysing the function of transmission easement, it is worth considering whether the above-mentioned limitation of its economic use to transmission activity is the right solution, or whether, at least as part of *de lege ferenda* postulates, it is worth considering the extension of this type of easement to other specific and justified cases. For example, the following arguments support the postulate for broadening the permissible functions and, consequently, the economic use of transmission easements.

Firstly, the concept of transmission easement, as adopted by the Polish legislator, differs from the concepts of easements established in favour of entities other than natural persons in foreign legal systems. For example, German transmission companies use personal easements (*Beschränkte persönliche Dienstbarkeiten*), which can also be granted to a legal person²⁸ (see: Section 1092(3) of BGB)²⁹. Importantly, the substance of these easements does not have to be narrowed

²⁵ W orzecznictwie przeważa szerokie rozumienie istoty tego mechanizmu – zob. m.in. wyrok SN z dnia 18 czerwca 2004 r., II CK 359/03, Legalis 81123; wyrok SN z dnia 6 maja 2004 r., II CK 258/03 Legalis 73092.

²⁶ Zob. szerzej M. Balwicka-Szczyrba, *Korzystanie...*, s. 33 i n. i lit. tam podana.

²⁷ *Ibidem*, s. 36.

²⁸ Zob. H. Prutting, *Sachenrecht*, C.H.Beck 2020, s. 410.

²⁹ Zob. szerzej M. Balwicka-Szczyrba, *Korzystanie...*, s. 111 i n. i lit. tam przywołana.

only to the rights associated with the execution of transmission projects; it is possible, for example, to apply this easement to regulate the use of property in connection with the installation of tramway or railway equipment.³⁰

Secondly, since in the past years the Polish legislators considered the possibility of a wider use of the institution of transmission easement, which was reflected in the proposed legislation, this means that they don't exclude such a solution. In particular, attention should be specifically drawn to the draft Act on amending the Civil Code (print no. 74 of 7 December 2011)³¹ prepared by the Civil Law Codification Committee. The project extended the catalogue of transmission equipment provided in Article 49(1) of the Civil Code to include telecommunications infrastructure equipment, as well as equipment intended for conducting railway traffic, tramway, cable transport and trolleybus lines. With regard to the first type of equipment it should have been concluded that telecommunications infrastructure equipment – as transmission equipment *sensu largo* – are covered in Article 49(1) of the Civil Code, therefore it is not necessary to include it in Article 49.³² There is no doubt that telecommunications equipment is "similar" to transmission equipment in terms of its function of transmitting signals.³³ On the other hand, Article 49(1) of the Civil Code makes no reference to equipment intended for conducting railway traffic and equipment for tramways, cable transport or trolleybus lines, and therefore the proposed changes significantly affected the function of transmission easement. Although the above-mentioned draft amendments to the Civil Code have not been adopted, they certainly confirm that a discussion on broadening the function of transmission easement is possible and no doubt economically justified.

It is worth emphasising, considering postulates for broadening the economic use of transmission easement from the point of view of *de lege ferenda*, that such a move would have to include certain types of equipment among the equipment covered by Article 49(1) of the Civil Code, but only in particularly justified cases. It is rightly noted that in such a case it will be necessary to change the description of the equipment, as well as the designation of the easement itself.³⁴ Thus, in view of the extension of the catalogue of the equipment listed in Article 49(1) of the Civil Code, terminological changes are

³⁰ Zob. szerzej H. Prutting, *op.cit.*, s. 410,

³¹ Nr druku 74 sejmiku VII kadencji, dostępny na stronie: www.sejm.gov.pl.

³² Zob. M. Balwicka-Szczyrba, *Korzystanie...*, s. 389.

³³ Tak też R. Trzaskowski, *Opinia prawna do rządowego projektu ustawy o zmianie ustawy – Kodeks cywilny* (druk nr 74), Warszawa 17.04.2012, [online:] www.ms.gov.pl.

³⁴ Problem nieadekwatności nazwy służebności wobec ewentualnych zmian jej treści został zauważony w literaturze – zob. G. Matusik, *Własność urządzeń przesyłowych a prawa do gruntu*, Warszawa 2013, s. 432; R. Trzaskowski, *op.cit.*

worth considering and, for example, the equipment should be defined, in accordance with its essential features, as "equipment not belonging to the components of real estate". This regulation is in fact qualified as an exception to the principle *superficies solo cedit*. The designation of the easement associated with the placement of equipment on the ground should also be corrected along these lines.

6. Summary

There are three types of easements provided for in the Polish Civil Code, namely easement appurtenant, easement in gross and transmission easement and each plays a specific function within the legal system. The first two types of easements have emerged out of Roman law tradition. In view of changing social and economic relations, it is legitimate to discuss the optimal form with regard to the purpose of establishing and maintaining different types of easements on real estate. The legitimacy of discussion on this topic is demonstrated, inter alia, by the addition of a new type of easement to the Civil Code in 2008 (transmission easement). In cases where the use of property was related to transmission equipment, the trigger for legislative action was undoubtedly an economic need.

The analysis presented in this paper shows that a wider use of the institution of easement in civil law transactions is needed. Due to the closed nature of the catalogue of limited rights in rem, in certain factual situations it is not possible to obtain a legal title to the real estate which is affected by the function of the easement appurtenant, easement in gross or transmission easement. Conclusions *de lege lata* and postulates *de lege ferenda* presented in this paper show possible future directions in which the functions of the institution of easement could evolve in order to meet the needs of various civil-law transactions. These are in particular:

- 1). With regard to easements appurtenant – *de lege lata* conclusion concerning the phrase "usefulness of the dominant estate" to be construed more broadly, not only in relation to the use directly related to this real estate but also as the use that has only an indirect relationship with the real estate, including a relationship existing only in connection with each and every subsequent owner of the estate.
- 2). With regard to easements in gross – *de lege lata* conclusion that the personal purpose related to the establishment of this type of easement is not of only consumption-related (alimony-related) nature, but may also be related to other needs of the beneficiary (such as aesthetic or moral needs).
- 3). With regard to transmission easement – *de lege ferenda* postulate

concerning the extension of the economic use of this institution, also with regard of other equipment erected or installed on real estate (in particularly justified cases) which must be classified by the legislator as equipment covered by Article 49(1) of the Civil Code.

Further scholarly discussion on this important issue, related to the optimal use of the institution of easement in civil law transactions, is definitely necessary.

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