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# Wynagrodzenie za ustanowienie tzw. służebności przymusowej

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## Streszczenie:

Artykuł poświęcony jest analizie charakteru wynagrodzenia, które może być przyznane w sytuacji, gdy właściciel nieruchomości (względnie w przypadku służebności przesyłu przedsiębiorca) może żądać ustanowienia szczególnego rodzaju służebności. Chodzi o tzw. służebności przymusowe, tj. takie, których ustanowienia można dochodzić na drodze sądowej. Ich ustanowienie wiąże się każdorazowo z obowiązkiem przyznania ekwiwalentu w postaci odpowiedniego (stosownego) wynagrodzenia. Odplata taka może mieć postać świadczenia jednorazowego, choć nie musi być ono wyrażone w pieniądzu. Wynagrodzenie nie jest postacią odszkodowania, lecz w istocie rodzajem ceny uiszczanej w zamian za nabycie ograniczonego prawa rzeczowego. Zasądzenie kompensaty okresowej z uwagi na charakter i długotrwałość obciążenia byłoby bardziej zasadne, jednak jest w obecnym stanie prawnym niedopuszczalne. W tym zakresie celowe jest dokonanie odpowiednich zmian w Kodeksie cywilnym, w tym przywrócenie instytucji ciężarów realnych.

**Słowa kluczowe:** służebność, wynagrodzenie, odszkodowanie, nieruchomości, prawo rzeczowe

## Remuneration for establishing a so-called compulsory easement

### Abstract:

The article examines the nature of remuneration which may be due when a real estate owner (or, in the case of the so-called "transmission easement", an entrepreneur) is entitled to demand the establishment of a special type of easement, known as "compulsory easement". The establishment of a compulsory easement may be enforced in court and is always associated with an obligation to grant an equivalent in the form of an appropriate remuneration. Such remuneration may take the form of a one-off payment, although it does not need to be expressed in money. The remuneration is not a form of compensation for damages, but in fact a kind of price paid in exchange for the acquisition of a limited property right. Due to the nature and duration of the encumbrance, an award of periodic remuneration would be more reasonable, but it is inadmissible in the current legal environment. In this regard, it would be advisable to make appropriate modifications to the Civil Code, including the restoration of the institution of land rent.

**Keywords:** easement, remuneration, compensation for damages, real estate, right *in rem*

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## 1. Introduction – general principles

A limited right *in rem* may arise on the basis of a legal transaction, by operation of law (cf. Article 292 of the Civil Code for an example), or through a valid resolution of a relevant public authority.

The most frequent method of establishing such a right is by way of contract. As a rule, when a right to use a property owned by another is established contractually, the statute refers to the transfer of ownership (Article 155-156 in connection with Article 245 of the Civil Code) as a model of disposal.<sup>2</sup> In consequence, provisions concerning contractual obligations are also applied to the establishment of a contractual relationship (which results in the obligation of the owner of a thing to establish on their property a right for the benefit of another party).

From the viewpoint of the cause of the obligation, that is the obligating agreement, the property right (right *in rem*) to be established is a future gain. This is because the right arises upon occurrence of an event directly causing the dispositive (*in rem*) effect, this being a legal transaction or – in cases specified by statute – an entry in the land and mortgage register. Such cause may be any agreement that contains an obligation to establish a limited property right, similar to an agreement under which ownership may be transferred (including in particular sale, exchange or donation).<sup>3</sup> In such case, the acquisition of a right *in rem* takes place *causam solvendi*, i.e. resulting from such an agreement.

However, regardless of the legal basis a limited property right arises when all necessary prerequisites provided for by statute or in the content of the legal transaction have been fulfilled. In rare cases, these include in particular an entry in the land and mortgage register that is not a component of the legal transaction itself but a necessary legal condition (*conditio legis*) for the material effect to take place.

Occasionally, when the prerequisites specified by statute are fulfilled, the statute provides for a possibility of demanding the establishment of a limited property right. When these prerequisites are materialised, it is usually the case that the current owner of a particular real estate can claim an encumbrance on an asset belonging to another party.

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<sup>2</sup> Zob. szerzej: K. Zaradkiewicz, *Konstrukcja umowy o ustanowienie i przeniesienie ograniczonego prawa rzeczowego - węzłowe problemy i uwagi de lege ferenda*, [w:] *Zaciąganie i wykonywanie zobowiązań. Materiały III Ogólnopolskiego Zjazdu Cywilistów (Wrocław, 25-27.9.2008 r.)*, red. E. Gniewek, K. Górską P. Machnikowski, Warszawa 2010, s. 509 i n.; M. Warciński, *Stużebności gruntowe według kodeksu cywilnego*, Warszawa 2013, s. 174 i n.

<sup>3</sup> Zob. np. K. Zaradkiewicz [w:] *Kodeks cywilny*, t. 1, *Komentarz. Art. 1-449<sup>10</sup>*, red. K. Pietrzykowski, Warszawa 2020, s. 786; postanowienie Sądu Najwyższego z 8 września 2016 r., II CSK 804/15.

In both cases – either when it is possible to demand the establishment of a limited property right and when such right is typically established under a contract – the right may arise in exchange for a consideration provided by the entitled person, most commonly in the form of pecuniary remuneration. The purpose of this article is to review the long-standing doubts concerning the nature of remuneration that serves as a form of consideration for the establishment of an encumbrance over a real estate.<sup>4</sup>

To date, most of the literature and case law paid attention to the issue of the remuneration for establishing a right of way easement and the majority of views cited in this article refer, in fact, to this kind of compulsory easement. It should be recognised, however that, as a rule, this issue takes a similar course also in other instances in which the statute makes it possible to exercise a claim to establish an appropriate compulsory easement (Article 151 and Article 305<sup>2</sup>(2) of the Civil Code). The difference in the approach can be, in essence, reduced to the obviously different prerequisites for establishing the amount of remuneration, since – as noted by the Supreme Court – the legislator in Article 145 (1) of the Civil Code did not require, unlike as is required in the case of the transmission easement (Article 305<sup>2</sup>(1) of the Civil Code), that remuneration for establishing a right of way easement must be appropriate. Only the word “remuneration,” without the adjective “appropriate” appended, was used there.<sup>5</sup> It should be noted, however, that because fuzzy expressions were used, this distinction has no major importance in practice. Since in the analysed cases the remuneration is either agreed by the parties or is to be fixed by the court, the circumstances of an individual case will in each instance decide on the detailed criteria for determining the remuneration, regardless of whether the granted recompense is supposed to be “appropriate” (Article 305<sup>2</sup>(1) of the Civil Code) or “suitable” (Article 151 of the Civil Code). This position is also confirmed by the case law.<sup>6</sup>

Accordingly, an assessment related to the nature and scope of the remuneration for establishing a compulsory right of way easement under Article 145 of the Civil Code will usually remain viable also in other cases, i.e. when an easement is established under Article 151 and Article 305<sup>2</sup>(2) of the Civil Code.<sup>7</sup>

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<sup>4</sup> Zob. M. Warciński. *Wynagrodzenie za ustanowienie służebności drogi koniecznej*, „Państwo i Prawo” 2010, nr 65 (7), s. 57-67.

<sup>5</sup> Postanowienie Sądu Najwyższego z 9 października 2013 r., V CSK 491/12.

<sup>6</sup> Postanowienie Sądu Najwyższego z 5 kwietnia 2012 r., II CSK 401/11: „Z uwagi na brak ustawowych »wskazówek«, według których należy ustalić wysokość wynagrodzenia za ustanowienie służebności przesyłu można tu per *analogiam* sięgnąć do dorobku orzecznictwa i doktryny dotyczących wynagrodzenia należnego właścicielowi nieruchomości obciążonej za ustanowienie służebności drogi koniecznej”; zob. też np. postanowienie Sądu Najwyższego z 27 listopada 2020 r., V CSK 250/20.

<sup>7</sup> Zob. np. M. Balwicka-Szczyrba, *Korzystanie z nieruchomości przez przedsiębiorców przesyłowych - właścicieli urządzeń przesyłowych*, Warszawa 2015, s. 141.

## 2. The statute as the legal basis for a claim to establish a property right

The possibility of requesting that a limited property right be established for the benefit of a party who – as the statute puts it – “may demand” such favour from the owner of a thing (real estate) depends on the occurrence of prerequisites mentioned in the statute which, if met, give rise to a claim to dispose of real estate in a specific way, i.e. to establish the limited property right.

A “demand” is tantamount to having an *ex lege* claim to establish an easement.<sup>8</sup> The claim may be actualised in two ways: either by the interested parties entering into an agreement establishing such limited property right, or by court proceedings. This solution is special, since the statute itself allows that a demand can be made to limit a property right through the permanent encumbrance over a thing. Such limitation is justified by the need to eliminate anomalies<sup>9</sup> when a party, usually the owner of another real estate, cannot exercise their right in the necessary and economically justified scope due to the existence of a special relationship between neighbours. In such a situation, the interest of the handicapped owner is important enough to limit the ability of owners of neighbouring estates to exercise their rights, in particular with respect to their own property. Their benefits must, therefore, give way to ensuring that any impairments suffered by their neighbour are made up for.

In various legal systems, eliminating such an atypical state and taking account of a specific interest of a real estate owner who merits to be protected is effected through various statutory methods. For the present, it suffices to state that in the case of compulsory easements the claim, as a rule, forms a component of the ownership right vested in the party who, as part of widely understood relationships between neighbours, may demand that such relationships be shaped in a suitable manner.<sup>10</sup>

In Polish law, the said anomalies are eliminated by easements, and more specifically by granting the interested party an opportunity to demand the establishment of a limited property right on the thing of another. Such a solution has been provided for in Article 145 (1), Article 151 and Article 305<sup>2</sup>(2) of the Civil Code.

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<sup>8</sup> Zob. np. A. Kubas, *Ustanowienie służebności drogi koniecznej*, „Nowe Prawo” 1966, nr 3, s. 345; E. Gniewek, *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz*, Kraków 2001, s. 105, 120; *eadem*, [w:] *System Prawa Prywatnego*, t. 3, *Prawo rzeczowe*, red. E. Gniewek, Warszawa 2013, s. 418; E. Skowrońska-Bocian, M. Warciński, [w:] *Kodeks cywilny*, t. 1, *Komentarz. Art. 1-44910*, red. K. Pietrzykowski, s. 550; G. Karaszewski [w:] M. Balwicka-Szczyrba, *Kodeks cywilny. Komentarz*, red. A. Sylwestrzak, Warszawa 2022, s. 350; J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warszawa 2022, s. 278.

<sup>9</sup> Zob. np. S. Breyer, *Droga konieczna*, „Nowe Prawo” 1972, nr 5, s. 732.

<sup>10</sup> J. Wasilkowski [w:] *System Prawa Cywilnego*, t. 2, *Prawo własności i inne prawa rzeczowe*, red. J. Ignatowicz, Wrocław-Warszawa-Kraków-Gdańsk 1977, s. 135; M. Warciński, *Służebności gruntowe...*, s. 383 i powołane tam wcześniejsze piśmiennictwo; E. Skowrońska-Bocian, M. Warciński, *op. cit.*, s. 551.

These provisions allow to demand the establishment of a suitable (land or transmission) easement due to the existence of a special economic interest that merits protection.

Due to the potential special method of establishing such limited property rights and the effect related thereto (mentioned further in the article), such rights are sometimes designated as "compulsory easements".<sup>11</sup> These rights may in fact arise on the basis of a constitutive court verdict,<sup>12</sup> because in the light of the cited provisions a designated person (the owner of the real estate or the transmission operator, as the case may be) may demand the establishment of a suitable or necessary easement in exchange for remuneration.

In all analysed cases, the encumbrance of the real estate by an easement should each time involve an order for the party interested in the establishment of the easement to pay suitable consideration to the party whose rights were restricted under the easement.

In current legislation, doubts are engendered by the fact that none of the provisions mentioned above (Article 145(1), Article 151 and Article 305<sup>2</sup>(1), of the Civil Code) resolves whether an easement may be considered established on the basis of such provisions only when the relevant court verdict is passed, or also when it is created following a contract between the parties.

This issue, although it may at first glance appear auxiliary due to the main course of the present discussion, does in fact raise doubts, and its resolution may be of essential importance for assessing further consequences of establishing a suitable limited property right as a so-called compulsory right. This right, established pursuant to Article 145(1), , Article 151 or Article 305<sup>2</sup>, (1) of the Civil Code, is treated as subject to special rules when the encumbered thing is transferred or subject to other disposals. Pursuant to Article 7, points 4 and 5 of the Land and Mortgage Registers Act of 6 July 1982,<sup>13</sup> the principle of public credibility of land and mortgage registers cannot be invoked against right of way easements or other easements established due to crossing a boundary when erecting a building or other structure, nor against transmission easements. In addition, when a decision awarding ownership in court enforcement proceedings becomes final, such easements do not expire, but remain effective (Article 1000(2), points 3 and 4 of the Code of Civil Procedure).

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<sup>11</sup> K. Zaradkiewicz, [w:] *Kodeks cywilny...*, s. 888, 926, 984, E. Skowrońska-Bocian, M. Warciński, *op. cit.*, s. 551; M. Warciński, *Służebności gruntowe według kodeksu cywilnego*, s. 22, 174, 301.

<sup>12</sup> Zob. np. R. Czarniecki [w:] *Kodeks cywilny, Komentarz*, t. 1, Warszawa 1972, s. 397; J. Wasilkowski, *op. cit.*, E. Gniewek, [w:] *System Prawa Prywatnego*, t. 3, *Prawo rzeczowe*, red. E. Gniewek, s. 424; *eadem*, *Prawo rzeczowe*. Warszawa 2020, s. 85.

<sup>13</sup> Tekst jedn.: Dz.U. z 2022 r., poz. 1728.

In theory, the allowed method of establishing a compulsory right affects the assessment of the amount of suitable (appropriate) remuneration that should be due to the owner of the encumbered real estate. It is, therefore, important for assessing the potential amount of such remuneration and perhaps also its nature (whether the remuneration can be one-off or periodic).

It should be recognised that an easement whose content and purpose are mentioned in Article 145(1), Article 151 and Article 305<sup>2</sup>(1) of the Civil Code may arise pursuant to a contractual agreement.<sup>14</sup> After all, there are no obstacles for the parties to establish such a right without involving a court. One may then defend the position that the easement will then not be a compulsory easement with all consequences related to such an easement under special provisions. The following assumption should, however, be made: if it is recognised that due to the content and purpose of the easement lack of its contractual form would not only eliminate, but on the contrary would make it necessary to enforce its establishment through the courts, the provisions on the consequences of establishing compulsory easements should also be applied to those created by contractual agreements. It would be difficult to rationally assume that different legal solutions should be applied to either of these rights, given their identical content and purpose, and merely due to the basis on which they were established. Accordingly, no approval can be granted to the position advanced by Stefan Breyer back in the era of the Property Law decree of 1946,<sup>15</sup> according to which the provision on compulsory rights may only apply when they are established following a court decision.

### 3. Demand for remuneration

All provisions that provide for easements to arise as a compulsory right (Article 145(1), Article 151 and Article 305<sup>2</sup>(1) of the Civil Code), allow them to be established for remuneration. As mentioned above, the amount due for establishing a suitable compulsory easement is either not defined (Article 145(1) of the Civil Code) or

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<sup>14</sup> Zob. np. Z.K. Nowakowski, *Prawo rzeczowe*, Warszawa 1980, s. 74; Z.K. Nowakowski, *Służebności*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1968, nr 3, s. 148; A. Kubas, *Ustanowienie służebności...*, s. 34; A. Kubas, *Glosa do orzeczenia SN z dn. 28 maja 1971 r.*, III CRN 109/71, OSPiKA 1972, nr 10, poz. 177; R. Czarnecki [w:] *Kodeks cywilny, Komentarz*, t.1, Warszawa 1972, s. 395; W. Katner, *Ustanowienie drogi koniecznej*, Zeszyty Naukowe Uniwersytetu Łódzkiego, z. 99, „Prawo”, Łódź 1973, s. 130 i n; W.J. Katner, *Wynagrodzenie za ustanowienie drogi koniecznej*, „Nowe Prawo” 1974, nr 9, s. 1156; W. Kocon, *Droga konieczna*, Warszawa 1977, s. 51; J. Wasilkowski, *op. cit.*, s. 126; S. Rudnicki, *Sąsiedztwo nieruchomości*, Kraków 1998, s. 54; E. Gniewek, *Kodeks cywilny. Księga druga...*, s. 120; *eadem* [w:] *System Prawa Prywatnego*, red. E. Gniewek, t. 3. *Prawo rzeczowe*, s. 423; *eadem*, *Prawo rzeczowe...*, s. 85.

<sup>15</sup> Por. S. Breyer, *Glosa do orzeczenia SN z dn. 4.VII.1960 r.*, I CR 347/60, OSPiKA 1962, nr 3, poz. 70; *eadem*, *Droga konieczna...*, s. 738.

designated as appropriate (Article 151(1) of the Civil Code) or suitable (Article 305<sup>2</sup>(1) of the Civil Code). Apart from that, the statute does not provide any guidelines on the nature or manner of determining the remuneration.

A claim for remuneration in exchange for establishing a compulsory easement is a relative subjective property right. It is meant to constitute, as a rule, a normative form of claim for payment.<sup>16</sup> Similar to the claim to establish an easement, a claim for payment is vested in each current owner of the real estate or the operator who owns the equipment and is for this reason a special relative right “attached to a thing”, and hence a quasi-property right (*obligatio propter rem*).<sup>17</sup> It is not, however, a form of real estate obligation in the strict sense.<sup>18</sup> Contrary to opinions sometimes advanced in legal theory,<sup>19</sup> such right may not be an object of a separate disposal (transfer). This would be contrary to its nature and the character of the underlying legal relationship (final part of Article 509(1) of the Civil Code).

Since one may demand remuneration in exchange for establishing an easement, this means that such payment may be granted on the basis of the same event that caused a limited property right to arise. In this case, remuneration is given in exchange for a future right whose disposal is yet to occur (cf. Article 555 of the Civil Code).<sup>20</sup> When a limited property right is established contractually, the remuneration is an essential element of the binding agreement. The conclusion that such claim arises only when the easement is established based on a suitable contractual agreement or court decision, and in the latter case, in the moment when the decision establishing the relevant compulsory easement becomes final, is not accurate.<sup>21</sup> In fact, a claim for remuneration is also awarded by statute in the circumstances that justify establishing such an easement.

It may be inferred from the above that what is involved each time is a consideration of financial nature, in particular in the form of the transfer of money or goods designated as to their kind, or by establishing another property right (this time

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<sup>16</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 58.

<sup>17</sup> Zob. W.J. Katner, *Wynagrodzenie za ustanowienie* s. 1153; M. Warciński, *Wynagrodzenie za ustanowienie...* s. 58; M. Warciński, *Służebności gruntowe...*, s. 454-455; zob. też E. Skowrońska-Bocian. M. Warciński, *op. cit.*, s. 551; szerzej z bogatego piśmiennictwa dotyczącego ogólnej kategorii zobowiązań realnych np.: A. Kubas, *Rozszerzona skuteczność wierzytelności*, „*Studia Cywilistyczne*” 1969, t. XIII-XIV, s. 211 i n.; Z. Radwański, *Najem mieszkań w świetle publicznej gospodarki lokalami*. Warszawa 1961, s. 204-205; H. Aberkane, *Essai d'une théorie générale de l'obligation, propter rem' en droit positif*, Paris 1957; G. de Castro Vitores, *La obligación real en el derecho de bienes*, Madrid 2000; J. Scapel, *La notion d'obligation réelle*, Aix-en-Provence 2002.

<sup>18</sup> Zob. M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 59.

<sup>19</sup> Zob. *ibidem*, s. 58; M. Warciński, *Służebności gruntowe...*, s. 455.

<sup>20</sup> K. Zaradkiewicz, *Konstrukcja umowy...*, s. 512, 513, 522.

<sup>21</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 58.

on the real estate of the future rightholder), the value of which is to be, as a rule, equivalent to establishing a relevant easement. It is, however, doubtful whether the remuneration may take the form of a service.<sup>22</sup>

Conclusions concerning the allowed forms of remuneration in exchange for establishing a limited property right are certainly applicable to remuneration given in exchange for establishing an easement contractually. On the other hand, when such remuneration arises due to a constitutive decision of the court, the allowed range of recompenses may cause doubts. Since the statute does not make a distinction in this matter, the court may in this respect grant the appropriate claim to the party entitled to remuneration, which does not need to be limited solely to a fixed amount of money.<sup>23</sup> As aptly pointed out by Waclaw Kocon, there are no grounds to recognise that the nature of such remuneration is solely pecuniary, because it may be provided not only in money, but also in kind.<sup>24</sup> It can rightly be admitted, however, that when the parties do not request otherwise, the court is obliged to fix the remuneration in monetary terms.<sup>25</sup>

Both in case of establishing a limited property right under an agreement and by exercise of the claim vested in the entitled party by operation of law, it is possible not only to stipulate remuneration in favour of the owner of the encumbered thing, but also to establish a limited property right free of charge. There can be no doubt that remuneration should be granted only when demanded by the interested party. Use of the expression “in exchange for remuneration” does not mean that the party in whose favour the easement is to be established is bound to accept the need to provide consideration. If no indications, for example an appropriate statement to the contrary, are given, it should be understood that the interested party is requesting appropriate remuneration to be awarded in their favour.<sup>26</sup> On the other hand, when a compulsory easement is established, awarding a remuneration is the obligation of the court.<sup>27</sup> In turn, when the future holder of the property right states their wish to “waive” such equivalent, it should be recognised – regardless of the basis for seeking a claim to

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<sup>22</sup> Zob. też na ten temat: G. Karaszewski, *op. cit.*, s. 361.

<sup>23</sup> Tak W. Kocon, *op. cit.*, s. 66; odmiennie: M. Warciński, *Wynagrodzenie za ustanowienie...* s. 65-66.

<sup>24</sup> W. Kocon, *op. cit.*, s. 65; zob. też np. W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1161; E. Gniewek, *Kodeks cywilny. Księga druga...* 124, 125; G. Karaszewski, *op. cit.*, s. 358, 361; M. Balwicka-Szczyrba, *op. cit.*, s. 139-140.

<sup>25</sup> G. Karaszewski, *op. cit.*, s. 361.

<sup>26</sup> Zob. też: W. Kocon, *op. cit.*, s. 74; A. Kubas, *Ustanowienie służebności...*, s. 349; zob. też postanowienie Sądu Najwyższego z 28 stycznia 1999 r., III CKN 145/98.

<sup>27</sup> W. Kocon, *op. cit.*, s. 74; A. Kubas, *Ustanowienie służebności...*, s. 349.



establish a limited property right – that the claim for remuneration has been waived,<sup>28</sup> which however requires the consent of the future party entitled under the easement in order to be valid (Article 508 of the Civil Code).<sup>29</sup>

The above conclusions seem to be confirmed by the formula according to which the remuneration should be appropriate or suitable (Articles 151 and 305<sup>2</sup>(2) of the Civil Code). The words “appropriate” or “suitable” do not mean, however, that the amount of remuneration, when fixed by the court, cannot in some cases be adjusted in relation to the actual market value of the right to encumber the real estate of another. Any deviations in this respect should be an exception and apply in situations when a potential adjustment of the market value is justified by special circumstances of the case. Moreover, the above criteria may not lead to a conclusion that it is allowed for a court to establish a right, against the will of the owner of the encumbered real estate, for free or for a purely symbolic remuneration.

#### **4. Remuneration awarded in connection with encumbrance with a compulsory easement.**

##### **1) Amount of remuneration**

In light of the comments made so far, it is of key importance to establish the criteria allowing to determine the amount of remuneration awarded by the court in each case. The statute does not provide any guidance in this respect.<sup>30</sup> In case of contractual remuneration, which is basically a price, the issue is left to the discretion of the parties.<sup>31</sup> The problem becomes more complex when the remuneration needs to be fixed by the court.

To provide a starting point for the determination of the amount of the remuneration due one needs to note that it should be determined on a case by case basis.<sup>32</sup> This does not mean, however, that it is not possible to define certain general, abstract principles and criteria to be taken into account by the court each time.

First and foremost, the remuneration awarded in each case should theoretically correspond to the possibility of using the real estate encumbered by the right in a

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<sup>28</sup> Zob. też S. Rudnicki, *Sąsiedztwo nieruchomości*, Kraków 1998, s. 56; E. Gniewek, *Kodeks cywilny. Księga druga...* s. 124; postanowienie Sądu Najwyższego z 28 stycznia 1999 r., III CKN 145/98.

<sup>29</sup> Zdaniem G. Karaszewskiego, pominięcie obowiązku uiszczenia wynagrodzenia w treści umowy należy poczytywać za rezygnację z niego, G. Karaszewski, *op. cit.*, s. 359.

<sup>30</sup> Zob. p.. W. J. Katner, *Wynagrodzenie za ustanowienie...* s. 1158; S. Rudnicki, *op. cit.*, s. 56; E. Gniewek, *Kodeks cywilny. Księga druga...*, s. 125; G. Karaszewski, *op. cit.*, s. 358.

<sup>31</sup> Zob. np. W. Kocon, *op. cit.*, s. 71.

<sup>32</sup> *Ibidem*.

definite scope determined by the content of the relevant easement.<sup>33</sup> Similarly as in the case of a contractually established limited property right, the remuneration is to represent an equivalent for the use of the property, namely the price for a future right (Article 555 of the Civil Code). Andrzej Kubas notes that:

“the remuneration should be the higher the greater the benefit derived from an easement over another's real estate and (...) the greater the inconvenience and difficulty of use that result for the owner from establishing the easement over that person's real estate.”<sup>34</sup>.

Of course, this also means that remuneration is due even if no detriment is caused.<sup>35</sup>

In particular, judicial decisions correctly recognise that the lack of criteria for determining the extent of suitable remuneration in Article 305<sup>2</sup>(2) of the Civil Code means that the legislator has granted the courts the freedom to make individual assessments in this respect. Such assessments are made as part of juridical discretion and based on actual circumstances, but may also result from general principles of the legal system.<sup>36</sup> With respect to the remuneration for establishing a transmission easement, the Supreme Court points out that it should be determined each time on a case-by-case basis and adjusted to the circumstances, including the scope, nature and permanency of the encumbrance, its inconvenience, impact on the restriction of the use of the property by its owner, and the decrease in the value of the real estate. The remuneration should be fixed in proportion to the degree of interference with the content of the ownership right, taking into account the value of the real estate.<sup>37</sup>

When establishing an easement, the court should grant remuneration in the amount equivalent to fair market prices (provided that they can be determined). In doing this, the court is obliged to be guided by its determination of a potential change

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<sup>33</sup> Zob. też np. postanowienia Sądu Najwyższego: z 15 maja 2020 r., IV CSK 469/19; z 23 czerwca 2020 r., IV CSK 729/19; z 9 września 2020 r., II CSK 62/19; z 14 kwietnia 2021 r., V CSKP 32/21.

<sup>34</sup> A. Kubas, *Ustanowienie służebności...*, s. 349.

<sup>35</sup> *Ibidem*.

<sup>36</sup> Postanowienia Sądu Najwyższego z 27 lutego 2013 r., IV CSK 440/12; z 9 października 2013 r., VCSK491/12; z 9 czerwca 2021 r., IV CSKP 35/21; z 9 lipca 2021 r., II CSKP 138/21.

<sup>37</sup> Zob. np. postanowienia Sądu Najwyższego: 5 kwietnia 2012 r., II CSK 401/11; z 27 lutego 2013 r., IV CSK 440/12; z 8 lutego 2013 r., IV CSK 317/12; z 20 września 2012 r., IV CSK 56/12, „Monitor Prawniczy” 2015, z. 3. s. 143; z 18 kwietnia 2012 r., V CSK 190/11; z 20 kwietnia 2017, II CSK 505/16; z 5 grudnia 2019 r., III CZP 20/19; z 27 listopada 2020 r., V CSK 250/20; z 9 lipca 2021 r., II CSKP 138/21; z 11 sierpnia 2022 r., I CSK 2308/22.

of use of the property or a designated part thereof and also, in particular, whether the encumbrance decreases the value of the real estate and if so, to what extent.<sup>38</sup>

The case law also recognises that the remuneration for establishing a (transmission) easement should take into account the entire impairment resulting from establishing that right, including also the decrease in the property value. The assessment of the compensable impairment should be based on the nature of the event that created the easement, by which the impairment would become permanent and irreversible. The remuneration may be calculated on the basis of the difference between the value of the unencumbered real estate and its impaired value taking into account the encumbrance caused by establishment of the easement.<sup>39</sup>

This issue has been more thoroughly analysed with respect to remuneration for establishing a transmission easement in a decision of the Supreme Court of 22 March 2017<sup>40</sup> where it was noted that suitable remuneration in the meaning of Article 305<sup>2</sup>(2) of the Civil Code does not need to be a financial equivalent of all limitations and losses resulting from encumbering the land with a transmission easement. In the view of the Supreme Court, since remuneration “for establishing” an easement is meant, it appears reasonable not to limit the amount due to the owner of the land to simply accounting for the value of the “use” of the real estate by the transmission operator. This is because, for the owner of the land, the effects of “establishing an easement” are usually more significant than the mere fact that they must put up with other party's entry that consists of direct actions exercising the easement, such as installing transmission equipment, conducting maintenance activities or reacting to distribution network failures. Such effects need also include other inconveniences and losses suffered by the owner of the real estate, including the impairment in the value of land, resulting from permanent, usually multi-annual, restriction of the landowner's ability to use the real estate in the full scope of their former title.

## 2) Remuneration versus compensation

Doubts arise in legal theory and case law as to whether the impairment in value which the remuneration corresponds to also includes repairing the damage which may be caused due to the establishment of an easement or to the use of the real estate.

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<sup>38</sup> Zob. np. W. Kocon, *op. cit.*, s. 72.

<sup>39</sup> Zob. uchwały Sądu Najwyższego z 20 lutego 2013 r., III CZP 101/12, OSNC 2013, Nr 7-8, poz. 89 i z 8 września 2011 r., III CZP 43/11, OSNC 2012, Nr 2, poz. 18, wyrok Sądu Najwyższego z 15 września 2011 r., II CSK 681/10; postanowienia Sądu Najwyższego: z 20 września 2012 r., IV CSK 56/12; z 8 lutego 2013 r., IV CK 317/12, IC 2014, Nr 10, s. 47; z 11 czerwca 2015 r., V CSK 468/14; z 18 maja 2016 r., V CSK 531/15, OSNC - ZD 2018, Nr A, poz. 14; z 28 maja 2019 r., II CSK 585/18.

<sup>40</sup> IV CSK 430/17.

Consequently, a question appears whether the remuneration mentioned in the analysed provisions is not, in fact, a kind of compensation.

In analysing this issue, attention is often paid to the difference in approach and terms used in the 1964 Civil Code and in earlier uniform provisions of the Property Law decree. The decree of 11 October 1946<sup>41</sup> used the term “compensation”<sup>42</sup>, which was changed to “remuneration” in the Civil Code.

Similarly to the uniform decree of 1946, compensation is mentioned by provisions of German, Swiss and Austrian law<sup>43</sup> (the latter of which undoubtedly served as a model for the Polish legislators). Pursuant to Article 917(2), of the 1896 German Civil Code (BGB), neighbours whose real estate is crossed by a right-of-way are entitled to compensation in the form of a pecuniary rent (German: *durch eine Geldrente zu entschädigen*) The rent therefore serves as compensation (damages)<sup>44</sup> and as such permits to take into account the impairment persisting for the entire (usually unforeseeable) time for which the real estate is encumbered. It should be noted here that the German Civil Code does not regulate relationships between neighbours using the institution of easement. Similarly, Article 694(1) of the Swiss Civil Code provides that when the owner of land has no sufficient way to access a public road from their plot, they may demand a right of way from their neighbours “in exchange for full compensation” (German: *gegen volle Entschädigung*). On the other hand, the 1896 Austrian law on allowing auxiliary routes<sup>45</sup> stipulates that “an owner of land who needs an auxiliary route is obliged to pay suitable remuneration in a certain amount of money for all damage caused due to allowing an auxiliary route over the real estate affected thereby” (Article 5, item 1, German: *eine angemessene Entschädigung in einem Capitalbetrage zu leisten*)

Establishing such a route occurs by way of an easement, as in Polish law (cf. section 3: “the auxiliary route is based on an easement...”)

Using historical interpretation, certain authors argue that such change leads to necessity of drawing a different conclusion concerning the nature of the consideration to be granted.<sup>46</sup> The Supreme Court likewise recognised that “the notion of

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<sup>41</sup> Dz.U. Nr 57, poz. 319 ze zm.

<sup>42</sup> Podobnie jak projekty przygotowane w latach 1937 i 1939 w ramach prac Komisji Kodyfikacyjnej RP w okresie międzywojennym.

<sup>43</sup> Zob. np. W. Kocon, *op. cit.*, s. 61.

<sup>44</sup> Zob. np. P. Rüdemberg, *Das Notwegrecht*, Bonn 1905, s. 117 i n.

<sup>45</sup> *Gesetz vom 7. Juli 1896, betreffend die Einräumung von Nothwegen*, RGBl. Nr 140.

<sup>46</sup> Zob. np. A. Kubas, *Ustanowienie służebności...*, s. 349; W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1155; zob. też R. Czarnecki [w:] *Kodeks cywilny...*, s. 397.

remuneration in the meaning of Article 145(1) of the Civil Code (and hence also, as may be supposed, other provisions related to remuneration for establishing a so-called compulsory easement) is wider than compensation granted in formerly applicable law. Pursuant to Article 33 of the Property Law decree, a prerequisite for awarding compensation was causing damage due to establishing a right of way. However, under Article 145 of the Civil Code the term “compensation” was replaced by “remuneration”, which in turn causes courts to conclude that such benefit is due for establishing a right of way even if no damage to property is being caused.<sup>47</sup>

Similarly, in the opinion of A. Kubas, compensation includes only situations in which damage has occurred, while remuneration has a more flexible application.<sup>48</sup> Likewise, Wojciech J. Katner offers a view that the notion of “remuneration” encompasses “compensation” and is “wider” than it.<sup>49</sup> Legal theory also notes that remuneration should be awarded even if no damage has occurred, although it may also act as a repressive measure due to the fact that the person entitled to the easement caused its establishment to be necessary.<sup>50</sup> W. Kocon stresses that remuneration “may not, because of its nature, include the notion of compensation as a form of consideration for damage caused”, even though at the same time it is possible to include specific elements contributing to an impairment in the value of the property.<sup>51</sup> In his opinion: “to determine the kind and amount of remuneration for establishing a right of way easement it may not be proper to use the provisions regulating the manner of repairing the damage and assessing its amount.”<sup>52</sup> On the other hand, S. Rudnicki points out that such remuneration does not represent compensation.<sup>53</sup>

Similarly court decisions predominantly follow the approach that remuneration is not identical to compensation. For example, in a decision of 14 December 2018 it was stated that:

“the nature of the obligation from which the duty to pay the remuneration stems has not been decided, however merely recognising that establishing an easement occurs in exchange for “remuneration,” and not

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<sup>47</sup> Uchwała Sądu Najwyższego z 8 września 1988 r., III CZP 76/88, OSNCP 1989, Nr 11, poz. 182.

<sup>48</sup> A. Kubas, *Ustanowienie służebności...*, s. 349; podobnie postanowienie Sądu Najwyższego z 14 grudnia 2018 r., I CSK 706/17.

<sup>49</sup> W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1155.

<sup>50</sup> A. Kubas, *Ustanowienie służebności...*, s. 349; por. jednak R. Czarnecki [w:] *Kodeks cywilny...*, s. 397.

<sup>51</sup> W. Kocon, *op. cit.*, s. 61.

<sup>52</sup> *Ibidem*, s. 70.

<sup>53</sup> S. Rudnicki, *op. cit.*, s. 56.

“compensation,” allows an assumption that the legislator wanted not solely to balance the impairment suffered by the property of the owner of the encumbered real estate due to establishing a right of way easement. The notion of remuneration is wider and more flexible.”<sup>54</sup>

More recent legal writings also advance the view that remuneration is basically compensation “for compulsory encumbrance of real estate.”<sup>55</sup> It is stressed that “establishing an easement impairs the value of the encumbered real estate, and the remuneration should correspond to such impairment.”<sup>56</sup> Michał Warciński stresses that “the legislator uses the notion of remuneration, and not compensation, to emphasise that the notion to make up for an impairment does not result from contractual or tort liability.”<sup>57</sup>

Adopting the view about the compensatory nature of remuneration has important effects. It leads to the conclusion that prerequisites of compensatory liability need to be verified each time, that general provisions on compensatory liability must be applied directly (and not, as sometimes argued, by way of analogy<sup>58</sup>), and that the scope of claim should perhaps include, as a rule, not only the damage sustained (*damnum emergens*), but also lost profits (*lucrum cessans*).<sup>59</sup> Moreover, legal writings suggest that not only tangible but also intangible impairment in value can be considered.<sup>60</sup> This shows that assessing the nature of remuneration in the light of analysed provisions is not without bearing on the manner of determining and amount of the remuneration. It is not, therefore, a purely theoretical question, even though given the bounds of discretion granted to the courts in determining the above circumstances as a result of the general character of statutory expressions, the problem remains basically barely apparent in practice.

The view on the compensatory nature of remuneration, although isolated, is also sometimes present in Supreme Court decisions. This was the case in the decision of 13 December 2012,<sup>61</sup> whose justification concluded that “the remuneration mentioned

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<sup>54</sup> I CSK 706/17.

<sup>55</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 62; zob. też G. Karaszewski, *op. cit.*, s. 360.

<sup>56</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 62-63; zob. też M. Warciński, *Służebności gruntowe...*, s. 453.

<sup>57</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 63.

<sup>58</sup> G. Karaszewski, *op. cit.*, s. 361.

<sup>59</sup> Odmienne co do tego ostatniego G. Karaszewski, *op. cit.*, s. 361.

<sup>60</sup> *Ibidem*, s. 360.

<sup>61</sup> V CSK 3/12.

in Article 145(1) of the Civil Code is essentially, to put it simply, synonymous with compensation, and therefore any remuneration awarded by the court pursuant to that provision should not exceed the amount of compensation.”

Certain legal authors recognise that even though remuneration (in case of establishing a transmission easement) is not strictly compensation, nevertheless “it serves similar objectives and hence should compensate the owner for the limited ability of using their real estate (...).<sup>62</sup>”

On occasion, it is argued that establishing an easement by a court is a form of expropriation “not so much due to an important public interest, but a private one.<sup>63</sup>” This view is presented not only in theory, but also in court decisions. As stressed in the justification of the Supreme Court decision of 5 April 2012:<sup>64</sup>

“establishing a right of way easement in court proceedings is, speaking simply, a form of expropriation, not so much due to an important public interest, but a private one. A consequence of establishing such easement is essentially depriving the former owner of the ability to use the land designated as the access route, while a consequence of establishing a transmission easement is solely a limitation of use that grants the operator the ability to utilise the encumbered real estate to a specific extent.”

It is recognised that the purpose of establishing an easement is, as in case of expropriation under the provisions of the Real Estate Management Act, compulsory limitation of ownership of real estate “for a justified, but individual interest of a party that did not enter into an agreement with the owner of the encumbered real estate.”<sup>65</sup> As a consequence, the payment due for establishing an easement under compulsion should be recognised as occurring on the same terms, and hence the remuneration mentioned to Article 145 of the Civil Code (and also, following this trail of thought, in other cases of establishing a compulsory easement which this article analyses) is synonymous with compensation. At the same time, however, it is stressed that replacing the term “compensation” adopted in the uniformised decree with

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<sup>62</sup> M. Balwicka-Szczyrba, *op. cit.*, s. 142.

<sup>63</sup> M. Warciński, *Wynagrodzenie za ustanowienie...* s. 63; zob. też W. Kocon, *op. cit.*, s. 14-15 z powołaną tam teorią Labanda.

<sup>64</sup> II CSK 401/11.

<sup>65</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 64.

"remuneration" is justified due to the possibility of establishing such an easement contractually, in which case payment may exceed the amount of damage sustained.<sup>66</sup>

Legal theory offers a view that remuneration for establishing a right of way easement should be equivalent to the impairment in the value suffered by the owner of the encumbered real estate on the date of establishing the easement. As an equivalent, a consideration is recognised as having the function of a price, and hence as remuneration for using a thing.<sup>67</sup>

In the assessment of the Supreme Court, if there's been an impairment in value, it must be taken into account when determining the amount and kind of remuneration. Likewise with respect to provisions regulating remuneration for establishing a transmission easement court decisions stress that such remuneration should be fixed taking into account the value of the real estate and in this context have regard to the damage suffered by the owner due to limiting their right of ownership.<sup>68</sup> It is also argued that, if an impairment arises, this fact must be taken into account in fixing the amount of remuneration, even though such remuneration is due to the owner of the encumbered real estate also in the case when no damage has been suffered.<sup>69</sup>

One should approve of the view that under the analysed provisions the notion of remuneration may not be made equivalent to compensation understood as a recompense (in whatever form) for a loss or impairment in value suffered. This conclusion is not altered by the fact that virtually any encumbrance with compulsory limited property right may be treated as an "impairment," since it usually affects both the determination of the value of the encumbered real estate and the ability of the owner to exercise their rights.<sup>70</sup>

Moreover, compulsory easements actually affect the bounds and content of the right of ownership, and not only the manner in which it is exercised. This does not mean, however, that any encumbrance or its consequences for the property of the real estate owner should be considered a damage. On the contrary, a damage means only that sorts of impairment which generate a compensatory obligation pursuant to statute; in other words, losses that entitle the party affected by them to seek claims of

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<sup>66</sup> *Ibidem*, s. 65.

<sup>67</sup> Zob. m. in. uchwała Sądu Najwyższego z 8 września 1988 r., III CZP 76/88; postanowienia Sądu Najwyższego z 19 listopada 2010 r., III CSK 32/10, OSNIC2011, Nr 11, s. 36; z 30 września 2008 r., III CSK 232/08, niepubl.; 12 października 2000 r., IV CKN 172/00; z 8 maja 2000 r., V CKN 43/00, OSNC 2000 r., Nr 11, poz. 206; z 7 października 2020 r., V CSK 551/18.

<sup>68</sup> Zob. np. postanowienia Sądu Najwyższego z 20 kwietnia 2017, II CSK 505/16; z 18 kwietnia 2012 r., V CSK 190/11; z 11 sierpnia 2022 r., I CSK 2308/22.

<sup>69</sup> Postanowienia Sądu Najwyższego z 9 października 2013 r., V CSK 491/12.

<sup>70</sup> Zob. też np. W. J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1157; G. Karaszewski, *op. cit.*, s. 361.



compensatory nature. Not all losses may be considered damage, but only those which the law links to specific consequences. In this sense, damage is a normative term, and repairing it is allowed only in cases listed by statute.

Establishing an easement does not have to be the consequence of an act or omission of illegal nature. In the latter case, the question remains open whether establishing an easement is possible at all (according to the maxim “no one shall be heard who invokes his own guilt.”)<sup>71</sup> If a compulsory easement is established, no recourse is had to either provisions on tort liability, liability for failure to perform or improper performance of an obligation, or liability for so-called legal damage or damage caused by exercising a subjective right. These, as examples of damage subject to repair, are also expressly allowed only in cases listed in relevant provisions (cf. from example Article 142(1), and Article 182(1), second sentence of the Civil Code, Article 129(1) of the Environmental Protection Law Act of 27 April 2001).<sup>72</sup> In light of the general assumption, an impairment caused due to exercising a subjective right is not subject to indemnity for damages, except as directly stipulated in applicable provisions (according to the maxim “no injury is done by one exercising his right”).<sup>73</sup> The legal nature of a damaging event prevents “classifying cases of this kind under the regime of liability for failure to perform or improper performance of an obligation.”<sup>74</sup> The course of action that results in the occurrence of so-called “legal damage” is on the other hand undertaken in public and not private interest.<sup>75</sup>

Of course, with respect to remuneration for establishing a compulsory easement one should take into account the economic situation of the interested parties, including also the owner of the encumbered real estate, however the provisions on repairing damage (Article 361 et seq. of the Civil Code) are not applied with respect to determining the amount of recompense due. The Supreme Court, referring to the notion of “impairment,” notes that its source should be derived from the emergence of the right that caused the impairment in question, and not from other actual or legal occurrences or provisions of law.<sup>76</sup>

To summarise, the view that remuneration should constitute recompense for impairment in the value of property, or even be a form of compensation due to the

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<sup>71</sup> G. Karaszewski, *op. cit.*, s. 357.

<sup>72</sup> Tekst jedn.: Dz.U. z 2021 r., poz. 1973.

<sup>73</sup> *Fragment*. 55. 151. 155. § 1. D. 50.17.

<sup>74</sup> M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2008, s. 33.

<sup>75</sup> *Ibidem*, s. 39.

<sup>76</sup> Wyrok Sądu Najwyższego z 15 września 2011 r., II CSK 681/10; postanowienie z 10 kwietnia 2019 r., IV CSK 42/18.

encumbrance of real estate, cannot be approved. In particular, it is not accurate to assert that establishing an easement on the basis of a court verdict is an expropriation in the meaning of constitutional provisions (Article 21(2) of the Constitution of the Republic of Poland), and even less so in the meaning of statutory provisions. Expropriation is an act of authority that serves to achieve public objectives and is subject to compensation. The kind and purpose of the act and the obligation to recompense are not, however, a condition (prerequisite) of considering a specific property transfer as expropriation, but are rather its constitutive elements.<sup>77</sup> This means that not every compulsory deprivation or restriction of a property right is tantamount to expropriation in its constitutional meaning. On the other hand, setting the bounds and content of ownership rights with the use of easement as an institution of law is one of the possible forms of regulating relationships between the entitled parties, defined by the mechanisms of civil law that affect the determination of the scope and content of subjective (property) rights. A recompense for impacting the sphere of mutual impacts and bounds of ownership or other property rights in this way cannot therefore constitute compensation due for expropriation.

### 3) One-off versus periodic remuneration

At first sight, using the general term “remuneration” in the analysed provisions appears to suggest that its form or manner of determination may be chosen freely. In particular, a question arises whether such remuneration should be granted once, or whether it is possible to award consideration paid periodically (in the form of rent, annuity etc.)

Legal theory does not seem to object to the possibility of granting a one-off consideration.<sup>78</sup> Despite appearances, the question is not clear-cut, considering that a relevant limited property right may be established for an indefinite time. In case of passage or transmission easements this means in particular that an equivalent remuneration would frequently be impossible to estimate in advance because of the inability of determining the time for which the right was to endure. In practice, the indefinite duration of the right combined with the possibility of abolishing it, with rare exceptions, only by means of a unilateral statement of will of the rightholder (Article 246(1) of the Civil Code) means that an (infinitely long) limitation of ownership arises, apparently in perpetuity. Such a solution may lead to distorting the original bounds of

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<sup>77</sup> Szczegółowo na ten temat: K. Zaradkiewicz, *Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym*. Warszawa 2013, s. 491-492.

<sup>78</sup> W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1161; M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 66.

the content of ownership right, and in case of easements established on the basis of Article 151 or Article 305<sup>1</sup> of the Civil Code make that right merely formal (or “naked”) with respect to at least a portion of the real estate. Such ownership, due to the content of easement, would then not be fit for exercising. Consequently, no matter how much of the original one-off remuneration was granted, its amount should even at the start be assessed as not equivalent to the scope of possible exploitation of the encumbered real estate by the party in whose favour the relevant easement was established. In such cases, one should rather consider the possibility of buying out the real estate or its occupied portion. Such an option was offered only in Article 151 of the Civil Code, last part of the second sentence, but not when installing transmission equipment is necessary (Article 305<sup>2</sup>(1) of the Civil Code).

Accordingly, one may accurately note that awarding one-off remuneration involves the need to answering the question about the time for which such remuneration is to be awarded and whether it is potentially allowed to be indexed.<sup>79</sup>

Article 164(2) of the Code of Obligations stipulated that if a court awarded a one-off remuneration instead of an annuity, its amount cannot exceed ten years of such annuity, unless the parties agreed to a higher amount. Recognising that currently applicable provisions do not allow granting an annuity in exchange for establishing an indefinite limited property right means that it is not possible to determine the extent of future benefits on one hand and the limitation of ownership on the other, and therefore to grant a remuneration that will ultimately match that extent. This, in turn, reveals a major gap in the current shape of legislative regulations that prevents the court from awarding remuneration with the nature of an annuity.

Referring to multiples of annual value of benefits lost by the owner has the practical effect of only partially limiting the negative consequences caused by lack of an appropriate normative solution.<sup>80</sup> It cannot be ignored that at the moment of establishing an easement it is often impossible to foresee the potential benefits which the owner would not be able to reap in the future, and even more so the need to change the use of all or part of the real estate, which may be hindered by the existence of the easement. In case of compulsory easements the possibility of demanding that the easement be abolished, even for remuneration, is excluded under Article 294 of the Civil Code. According to that provision, in order for an easement to be abolished it must not only be particularly burdensome for the owner due to a change of circumstances,

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<sup>79</sup> W. Kocon, *op. cit.*, s. 72; zob. też W. J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1162-1163.

<sup>80</sup> W. Kocon, *op. cit.*, s. 72-73; zob. też E. Gniewek, *Kodeks cywilny. Księga druga...*, s. 125-126; J. Wasilkowski, *op. cit.*, s. 137.

but also no longer necessary for the proper use of the benefited real estate. Such a situation will certainly not occur with respect to compulsory easements.

It would not however be adequate, for numerous reasons, to recognise that the amount of remuneration should be equivalent to the value of the portion of the real estate occupied to exercise the easement, or that it may not exceed the value of the real estate<sup>81</sup> (which in case of easements established for an indefinite term and combined with a periodically paid remuneration would, considering the cumulative value of each remuneration, be a rule and not an exception). As in other cases of using the thing of another for a fee, the remuneration is measured by the scope and time of use, not by the value of the thing itself.

More doubt have been expressed in judicial decisions and legal writings about the permissibility of granting periodic remuneration, even though in light of the preceding observations it should be recognised as a more justified form of recompense for the future encumbrance. It is not a coincidence that a periodic form has been provided for in German law (Article 917 of the German Civil Code).

Court decisions note the possibility of awarding remuneration in the form of periodic payments.<sup>82</sup>

In a decision of 17 January 1969,<sup>83</sup> the Supreme Court decided that the Civil Code does not define the manner of determining the remuneration. In the view of the court, if the legislator intended to introduce merely a one-off remuneration, this would have been reflected in the contents of Article 145 of the Civil Code. Since this is not the case, it needs to be assumed that remuneration for an established right of way may have the nature of a periodic remuneration. Such interpretation is also supported by economic and social reasons, because a one-off remuneration may constitute a too onerous a burden which is detrimental to the benefited real estate, and hence proper designation of the manner of remuneration requires determining the economic and personal situation of the person demanding that the easement be established and the owner of adjacent lands.

On the other hand, as noted in the resolution of the Supreme Court of 8 September 1988: "remuneration for establishing a right of way, fixed in the form of periodic payments, has in fact the nature of an annuity whose purpose is to make up

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<sup>81</sup> M. Balwicka-Szczyrba, *op. cit.*, s. 144; postanowienie Sądu Najwyższego z 5 kwietnia 2012 r., II CSK 401/11.

<sup>82</sup> Orzeczenie Sądu Najwyższego z 17 stycznia 1969 r. III CRN 379/68, OSNCP 1969, z. 12, poz. 223; uchwała z 1 grudnia 1970 r. III CZP 68/70, OSNCP 1971, z. 5, poz. 81; uchwała Sądu Najwyższego z 8 września 1988 r., III CZP 76/88.

<sup>83</sup> III CRN 379/68, OSNCP 1969, z. 12, poz. 223.

for the loss suffered by the owner of the encumbered property as a result of establishing the right of way, which does not need to be a loss in economic terms.”<sup>84</sup> The Supreme Court also considered admissible to award remuneration of a periodic nature in certain cases, also when its purpose is to serve as an equivalent for establishing a transmission easement. In a decision of 29 October 2021,<sup>85</sup> it was noted that remuneration for establishing a transmission easement may have the nature of a periodic remuneration if transmission equipment is planned to be eventually removed from the real estate. The transmission easement should then be established for a definite time.

On the other hand, the resolution of 15 September 1986<sup>86</sup> assumed that it was necessary to resort to historical interpretation and take into account the intent of the legislator. The Civil Code abandoned the formerly allowed option to award an annuity (Articles 32, 33 and 34 of the Property Law decree) and introduced the uniform notion of “remuneration”. At the same time, the Supreme Court reminded that in the former legal environment an “annuity” meant an annuity imposed on a real estate as a land rent, a peculiar consideration forming part of the then system of property law and enjoying special safeguards.

The one-off nature of remuneration in case of establishing a right of way easement is supported in literature in particular by S. Breyer<sup>87</sup>, A. Kubas<sup>88</sup>, W.J. Katner,<sup>89</sup> and M. Warciński<sup>90</sup>; with respect to remuneration fixed by the court by G. Karaszewski<sup>91</sup>; and with respect to provisions on transmission easement by M. Balwicka-Szczyrba<sup>92</sup>.

An opposite view is advanced by W. Kocon who thinks awarding remuneration in the form of annuity is allowed because it is not expressly prohibited by law.<sup>93</sup> Following

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<sup>84</sup> Uchwała Sądu Najwyższego z 8 września 1988 r., III CZP 76/88.

<sup>85</sup> II CSKP 113/21; por. jednak np. postanowienie Sądu Najwyższego z 15 maja 2020 r., IV CSK 469/19.

<sup>86</sup> III CZP46/86.

<sup>87</sup> S. Breyer, *Droga konieczna...*, s. 737-738.

<sup>88</sup> A. Kubas, *Ustanowienie służebności...*, s. 349.

<sup>89</sup> W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1160-1161.

<sup>90</sup> Zob. też M. Warciński, *Służebności gruntowe...*, s. 455-456.

<sup>91</sup> G. Karaszewski, *op. cit.*, s. 358, 362.

<sup>92</sup> M. Balwicka-Szczyrba, *op. cit.*, s. 138.

<sup>93</sup> W. Kocon, *op. cit.*, s. 67.

court decisions, periodic remuneration is also considered permissible by S. Rudnicki<sup>94</sup>, J. Ignatowicz and K. Stefaniuk<sup>95</sup> and, as it appears, by E. Gniewek<sup>96</sup>.

It is the first position, rejecting the admissibility of periodic remuneration having the nature of annuity or quasi-rent is allowed, that merits approval.<sup>97</sup> This applies to instances in which compulsory easements are established in the strict sense, i.e. based on a court verdict.

Legal writings are correct in stating that the competence to impose an obligation (also granting a subjective right) on the basis of a constitutive court verdict should result directly from statute.<sup>98</sup> Such competence cannot be presumed.

Pursuant to Article 907, item 2 of the Civil Code, if the obligation to pay an annuity results from statute, each party may, in case of a change in circumstances, demand that the amount or duration of annuity be adjusted, even though such amount or duration are fixed in a court verdict or agreement. This provision does not form an independent basis for granting an annuity on the basis of a court verdict. On the contrary, it supports the assertion that the obligation to pay an annuity under statute must be the direct result of a special provision. Only then it is possible to seek adjustment of the amount or duration of the annuity.<sup>99</sup> In property law provisions, the possibility of establishing an annuity obligation has been provided for in Articles 303 and 305 of the Civil Code.

On the other hand, if an easement is established by way of a legal transaction, there are no obstacles to grant the party whose real estate is encumbered by a limited property right a remuneration other than one-off remuneration (for example by splitting it into instalments). It is, therefore, possible to establish an annuity on behalf of that party by means of a contract. In such case, however, the remuneration will not be due to the successor of the owner who was a party to the contract.<sup>100</sup> Such a contract granting an annuity (as well as the obligation to pay it) would not enjoy extended effectiveness, which can be granted only in cases expressly listed in statute (*numerus*

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<sup>94</sup> S. Rudnicki, *Sąsiedztwo nieruchomości...*, s. 57.

<sup>95</sup> J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe...*, s. 280.

<sup>96</sup> E. Gniewek, *Kodeks cywilny. Księga druga...*, s. 125.

<sup>97</sup> W istocie w każdym przypadku wynagrodzenia okresowego w zamian za ustanowienie ograniczonego prawa rzeczowego chodzi o rentę w rozumieniu art. 903 k.c. Jeżeli stanowić ma ona wynagrodzenie w zamian za ustanowienie i trwanie ograniczonego prawa rzeczowego, wówczas - zgodnie z art. 906 § 1 k.c. - do renty takiej należy stosować odpowiednio przepisy o sprzedaży.

<sup>98</sup> M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 66.

<sup>99</sup> *Ibidem*, s. 66.

<sup>100</sup> Odmienne - nietrafnie - W. Kocon, *op. cit.*, s. 68.

*clausus*).<sup>101</sup> Hence each change of the subject, both as regards the party entitled to receive annuity considerations and the obligated party, would result in the impossibility to fulfil such consideration in relation to existing encumbrance of the real estate.

In this instance, therefore, a deficiency of regulations is revealed, resulting from the removal from the civil law system of the institution of land rents, the purpose of which was, among others, to act as security for such kinds of periodic consideration related to ownership of real estate. In this context, it is worthwhile to cite the view of W. J. Katner who, justifying the current solution, takes the position that the change compared to the provisions of the uniformised decree of 1946 was intended to “avoid burdening the owners of the benefited property with an obligation spread over many years and having as a result the nature of annuity, an institution which is not provided for at all in the Civil Code as regards property law.”<sup>102</sup>

Allowing a limited property right to be granted in exchange for consideration of a periodic nature related to so-called compulsory easements which would be effective with respect to any currently interested party is opposed by the construction of disposal consisting in establishing a limited property right, referred to in the preliminary comments. Any potential remuneration of a periodic nature would remain causally connected to establishing a compulsory right only in the obligation sphere, in the original relationship between the obligated party and the first entitled party. It is also doubtful whether failure to pay due consideration by the party entitled to a specific easement might lead to a conclusion that the easement has expired, even when such conditional link would result from the contract. A disposal that results in the emergence of a property right cannot in such case be conditional, which means that the persistence of the property effect may not be connected to the fact that the owner of the servient real estate is to be paid a periodic consideration equivalent to the duration of the limited property right. The existence of the latter cannot be dictated by the fact that the party allowed to use the real estate in a designated scope derives benefit from the thing or satisfies its needs related to normal operation – much less operation not justified by economic reasons.

The purpose of the encumbrance is, in fact, to achieve a general interest which is closely linked to a leading individual interest, i.e. the possibility of normal use of the real estate taking into account typical relationships between neighbours. No regard is

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<sup>101</sup> Zob. np. K. Zaradkiewicz, [w:] *Kodeks cywilny...*, s. 787; E. Skowrońska-Bocian, M. Warciński, *op. cit.*, s. 559; M. Warciński, *Służebności gruntowe według kodeksu cywilnego*, s. 401; G. Karaszewski, *op. cit.*, s. 358; M. Balwicka-Szczyrba, *op. cit.*, s. 139.

<sup>102</sup> W.J. Katner, *Wynagrodzenie za ustanowienie...*, s. 1159.

paid to the person entitled to such use or their individual personal needs. For this reason, this institution has taken the shape of so-called compulsory easement with all the resulting consequences (for example in enforcement proceedings). A solution that would make the continued existence of a compulsory easement dependent on payment of a suitable periodic remuneration by the entitled party cannot be considered admissible.

## 5. Conclusions

The considerations presented above confirm that, as sometimes mentioned in legal theory, current regulations concerning remuneration in exchange for establishing a compulsory easement are defective. This defect results mainly from the terseness of Civil Code provisions concerning the nature and manner of fixing the remuneration.<sup>103</sup>

This leads to the conclusion that it would be reasonable to make existing regulations more precise and introduce a possibility of fixing a periodic consideration in exchange for establishing the relevant compulsory easement. Another conclusion is to admit that the proposal to restore the institution of land rent<sup>104</sup> that existed under the rule of the uniformised decree of 1946 is justified and was wrongly considered a relic of feudalism, abolished once the 1964 Civil Code entered into force. Work on restoring land rent had been undertaken in the 2000s by the Civil Law Codification Commission aiming to draft the provisions of a new Civil Code<sup>105</sup>, but since then has unfortunately been abandoned.

In the era of the uniformised decree, this institution was patterned after German solutions (cf. Articles 1105-1112 of the German Civil Code). A land rent was a special limited property right that consisted in positive considerations (in doing). Pursuant to Article 279(1) of the Property Law decree, the rent's contents was the obligation of every current owner of the real estate to make repeated payments on behalf of a designated person. The entitled party might be in particular – in case of the so-called objective property land rent – every current owner of a designated (benefited – Article 279(2) of the decree) property, and hence also a person obligated to suffer the encumbrance by a land easement. The contents of land rent could be only

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<sup>103</sup> Por. jednak G. Karaszewski, *op. cit.*, s. 358.

<sup>104</sup> Szerzej: K. Zaradkiewicz, *O zasadności przywrócenia instytucji rentowego prawa rzeczowego na nieruchomościach*, „Nieruchomości@” 2021, nr 3, s. 26; zob. też: M. Warciński, *Wynagrodzenie za ustanowienie...*, s. 67; E. Skowrońska-Bocian, M. Warciński, *op. cit.*, s. 559.

<sup>105</sup> K. Zaradkiewicz, *Podstawowe założenia dotyczące propozycji regulacji prawa zabudowy*, „Przegląd Legislacyjny” 2006, nr 2, s. 74; zob. też A. Bieranowski, *Prawo zabudowy i ciężary realne w pracach nad projektem kodeksu cywilnego - podstawowe założenia konstrukcyjne*, „Rejent” 2012, nr specjalny, s. 50 i n.



considerations in money or other exchangeable things (Article 281, item 1). In addition, the possibility of encumbering real estate with land rent as a kind of compensatory annuity in exchange of the right of way of easement was expressly mentioned in Article 34 of the Property Law decree. According to this article, in cases when the interested parties do not reach an agreement, the compensation provided for in the two preceding articles would, according to the circumstances, be designated either as a fixed amount or money or an annuity attached to the real estate whose owner was obliged to compensate as a land rent; such rent would, by operation of law, have priority before all other rights encumbering the real estate.

Regardless of this, it appears possible and justified to introduce this special civil law institution even now. Its usefulness is not limited to securing periodic considerations in exchange for establishing a relevant easement, including as a compulsory right on the real estate of another.<sup>106</sup>

In future legislation, one should also consider supplementing regulations on compulsory easements with norms that grant to the owner whose real estate is to be encumbered a right to demand, in certain situations, to buy out the real estate or its portion. These are instances mentioned in this article in which due to the scope and contents of the easement the ownership of the encumbered real estate would essentially be divested of its full nature (becoming a “naked” right), the real estate ceasing to have economic significance. In the current legal environment, when a transmission entrepreneur and an owner of a real estate without access to public road is granted a claim to establish a relevant compulsory easement, the owner towards whom the claim is directed does not have a possibility to demand to buy out the real estate or its portion for suitable remuneration. This is important when the potential encumbrance would make it impossible to continue to use the real estate in accordance with its former purpose or when the real estate has lost its economic significance for the owner in whole or in the relevant part due to being encumbered with a compulsory easement. On the other hand, this solution has been adopted in cases when the owner of real estate has crossed the boundary when erecting a structure (Article 151 of the Civil Code) and also in case of compulsory installation of ducts, cables and equipment (Article 124, item 1 of the Real Estate Management Act of 21 August 1997).<sup>107</sup> In such case, according to Article 124, item 5 of that act, when compulsory installation of transmission equipment prevents the owner or perpetual

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<sup>106</sup> A. Bieranowski, *Jeszcze o charakterze prawnym stosunku dożywocia - uwagi de lege lata i de lege ferenda*, „Rejent” 2013, z. 2, s. 35; K. Zaradkiewicz, *O zasadności przywrócenia...*, s. 24 i n.

<sup>107</sup> Tekst jedn.: Dz.U. z 2021 r., poz. 1899.

usufructuary from continuing to properly use the real estate in the previous manner or in accordance with its previous purpose, either of them may demand that the county head conducting government administration tasks or the party applying for a permit enter into an agreement to purchase the ownership or perpetual usufruct on behalf of the Treasury of State.

Discriminating between the situations listed above is not justified, especially with respect to a limitation consisting in having the real estate crossed by transmission equipment, merely because of the legal basis on which the limitation is to be made. After all, in this context a question arises whether it is reasonable to grant the transmission entrepreneur a claim to establish a transmission easement and the relationship between Article 305<sup>2</sup>(1) of the Civil Code and Article 124 of the Real Estate Management Act. However, a detailed analysis of these issues requires a separate study.

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