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A gloss to the judgement of 17/12/2018 of the Constitutional Tribunal, case No. P 7/17, Orzecznictwo Trybunału Konstytucyjnego ZU A/2018, item 59

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On the basis of Article 59 para. 1 item 2 of the Act of 30 November 2016 on the organisation and manner of procedure before the Constitutional Tribunal[1], that Court ruled that the proceedings be discount by refusing an answer to a question from the Poznań-Nowe Miasto and Wilda District Court. The conclusion in the tenor of the ruling of the Constitutional Tribunal should be fully supported. One can only regret that the ruling commented on is vitiated by relative invalidity caused by the defect of the staff in the adjudicating panel, which included persons who were not the judges of the Constitutional Tribunal[2].

The reason why the Constitutional Tribunal commented again on the acquisitive prescription of the transmission easement was

[1] Dz.U. ["Journal of Laws"] of 2016, item 2072.

[2] The Court ruled in the bench consisting of: J. Wyrembal (the presiding judge), G. Jędrejek (the reporting judge), Z. Jędrzejewski, J. Piskorski and J. Przyłębska.

that the Poznań-Nowe Miasto and Wilda District Court in Poznań submitted three questions of law, the content of which can be summarised as follows: does Article 292 in connection with Article 285 § 1 and 2 of the Civil Code as the basis for the acquisition, before 3 August 2008, of a real easement corresponding in its content to the transmission easement comply with Article 2, Article 21 paras 1 and 2, Article 31 paras 2 and 3, Article 32 paras 1 and 2, Article 37 paras 1 and 2 as well as Article 64 paras 1–3 of the Constitution, and with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Paris on 20 March 1952[3], and with Article 17 para. 1 of the Charter of Fundamental Rights of the European Union?[4] The District Court of Poznań referred the question of constitutionality and compliance with international agreements to the acquisition by a transmission entrepreneur or the State Treasury before 3 August 2008 of a real easement corresponding in its content to the transmission easement in a situation where no expropriation decision was issued[5]. The Court also had doubts about the constitutionality of the addition to the period of acquisitive prescription, by the transmission entrepreneur or the State Treasury, the time of using a permanent and visible device before 3 August 2008 in a manner corresponding to the transmission easement.

The acquisitive prescription of the transmission easement may pose questions about: 1) the use of *accesio possessionis*, that is the combination of the time of possession of various items remaining in the legal sequence relationship, 2) the admissibility of equal treatment, for the purposes of the calculation of the time of acquisitive prescription, of the possession before 3 August 2008 of the real

[3] Dz.U. of 1995, No. 36, item 175.

[4] OJ C 303 of 14/12/2007.

[5] The Court indicated three alternative legal grounds for expropriation: Article 35 para. 1 of the Act of 12 March 1958 on the rules and manner of the expropriation of real property (Dz.U. z 1974, No. 10, item 64, as amended), Article 75 para. 1, and then Article 70 para. 1 of the Act of 29 April 1985 on land management and on real property expropriation (Dz.U. No. 22, item 99, as amended) or Article 124 para. 1 of the Real Property Management Act of 21 August 1997 (Dz.U. of 2015, item 782, as amended).

easement corresponding in its content to the transmission easement, and of the possession of the transmission easement after 3 August 2008.

The question of *accessio possessionis* is regulated by the provision of Article 176 § 1 of the Civil Code pursuant to which, if a transfer of possession takes place while the period of acquisitive prescription is running, the present possessor may add to the time of his own possession the time of possession of his predecessor. That provision points out to two legal events resulting in adding the time of possession by another entity (entities) to the time of possession of the present possessor(s): the transfer of possession and succession[6]. In the matter commented on, the transfer of possession between entities also before 3 August 2008 was evaluated. The doctrine had formulated theses which will be applied to this case[7]. The possessor of a thing, who is not its owner, may not add the time of possession of his predecessor in possession if he was the owner of the thing at the point of the transfer of possession. In that situation the transfer of possession did not take place "while the period of acquisitive prescription was running"[8], as it is not possible to acquire one's own thing by acquisitive prescription. The

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[6] The Supreme Court addressed that problem in the context of the succession of possession and admitted such a possibility in relation to facts, and not only to law, and in relation to the combination of the time of possession by the testator and a heir, and by subsequent heirs. The heir of a person who obtained the possession of real property, but did not acquire such property by acquisitive prescription until death, may demand the ascertainment of acquisitive prescription for his or her benefit with the period of the testator's possession taken into consideration in such a part in which he or she inherits the estate (the judgement of 13 July 1993 of the Supreme Court, II CRN 90/93, held by the author). Counting the possession of a thing by the legal predecessor on the basis of Article 176 § 1 in connection with § 2 of the Civil Code should take place for the benefit of each of the heirs, but only within the limits of the acquired share in the estate (the ruling of 26 April 2013 of the Supreme Court, II CSK 445/12, www.sn.pl), (access: 14.12.2018).

[7] T. Gołębiewski: *Kodeks cywilny*. Komentarz do art. 176 kc, ed. E. Gniewek, P. Machnikowski, Legalis 2017.

[8] See the ruling of 3 November 1966 of the Supreme Court, case No. III CR 223/66, Legalis, which is still relevant today.

transfer of independent possession may take place in each of the ways listed in Articles 348–351 of the Civil Code, with the reservation that possession is not independent in the case of acquisitive prescription of a real easement. It is not, however, possible to add the time of possession by another entity in the case of the independent seizure of the thing by its present owner. In each case it is therefore necessary for the entity, whose time of possession is to be added, to participate in the change of the possession of the thing. If, while the period of acquisitive prescription was running, the transfer of independent possession took place several times, the present possessor may add the time of seizure of the thing by all the "predecessors"[9].

The facts which are the basis of the questions of law are typical of disputes about the acquisitive prescription of the transmission easement with possession split before and after 3 August 2008. Ownership transformations following from the commercialisation process conducted in the 1990's and later, at the beginning of the 21st century, are the second important and typical circumstance.

In the matter in question, the application for the ascertainment of acquisitive prescription was filed by a gas company which submitted that the gas pipeline had been continuously operated by the subsequent legal predecessors of that company, that is by state-owned enterprises which came into being as a result of organisational transformations and, from upon commercialisation, by a commercial law company. The period of acquisitive prescription of the easement began, therefore, in 1975 at the latest, and such a period ended in 2005, after 30 years (as the legal predecessors of the applicant had bad faith). The participants in the proceedings, i.e. the owners of land on which the gas pipeline was located, did not agree with the applicant's arguments and filed for the dismissal of the application and indicated that the interpretation permitting acquisition by the acquisitive prescription of the real easement corresponding in its content to a transmission easement did not comply with the Constitution. In the participants' opinion, the

[9] T. Gołębiewski, *Kodeks cywilny*.

principle of legal certainty was breached, too, as a result of giving the retroactive force to the new interpretation of the regulations on the acquisitive prescription of the real easement with the content corresponding to the transmission easement. The introduction of the new kind of a limited right in property in the form of a transmission easement into the Civil Code was not accompanied by any intertemporal regulations, which means that this law should be used as late as from 3 August 2008.

It should be indicated at this point that the Constitutional Tribunal commented on the question of the constitutionality of Article 292 of the Civil Code in connection with Article 172 § 1 and Article 285 § 1 and 2 of the Civil Code by refusing a settlement[10]. Non-conformity with Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 was also the subject matter of a question to the Constitutional Tribunal under case number P 47/13[11]. In that case, the Constitutional Tribunal discontinued the proceedings, too, by stating that the question of law from the District Court in Grudziądz did not meet the objective condition and thus the functional condition, too[12].

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[10] The ruling of 17 July 2014 of the Constitutional Tribunal, case No. P 28/13, OTK ZU No. 7/A/2014, item 84.

[11] The ruling of 14 July 2015 of the Constitutional Tribunal, OTK ZU No. 7/A/2015, item 107.

[12] Pursuant to Article 193 of the Constitution, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court. The formal requirements imposed on a question of law were laid down in Article 52 of the Act of 30 November 2016 on the organisation and manner of procedure before the Constitutional Tribunal (Dz.U. of 2016, item 2072). Pursuant to that article, a question of law shall have the form of a ruling and contain the following: the name of the court before which proceedings are pending and the case number, the name of the official body to have issued the challenged normative act, the name of the challenged normative act or its part, the objection regarding the non-conformity of the challenged normative act with the Constitution, a ratified international agreement or statute, the statement of reasons for the objection (with supporting arguments or evidence), the explanation of the extent to which a reply to the question may influence

The Supreme Court voiced an opinion on the transmission easement, also with regard to the acquisitive prescription of the easement, many times as well. In 2015–2017, the Supreme Court pronounced 25 judgements in matters related to the transmission easement[13]. The Supreme Court used its previous finding with regard to *includendi in tempore possindendii* by legal persons before 1 February 1989 and their legal successors after that date. A legal person who, before 1 February 1989, while having the status of a state-owned legal person, was unable to acquire limited rights in property also by acquisitive prescription may, until the period of independent possession exercised after 1 February 1989, add the period of possession by the State Treasury before that date. That attitude was expressed, in particular, precisely in relation to utility enterprises and other transmission enterprises which took advantage of real easements until 1 February 1989 as part of state asset management for and on behalf of the State Treasury, while being, as a matter of fact, the dependent holders for the purposes of Article 338 of the Civil Code[14]. The Supreme Court expressed many times its properly justified position in the matters related to the acquisitive prescription of the real easement. First of all, the resolution of 17 January 2003 of the Supreme Court should be

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the settlement of the matter before the court. The effective initiation of constitutional control in the manner of a question of law, and the admissibility of its substantive consideration, invariably depends on compliance with the following conditions: 1) the objective condition which requires that only the court be the entity initiating constitutional control by submitting a question of law; 2) subjective, which limits the control only to the evaluation of the hierarchical compliance of normative acts with the Constitution, a ratified international agreement or statute; 3) functional, which requires that the settlement of a matter before the court depends on the answer to the question of law.

[13] P. Lewandowski, *Glosa do postanowienia Sądu Najwyższego z 2 marca 2017r., V CSK 356/16*, „Państwo Prawne" 2017, nr 1, p. 191.

[14] P. Lewandowski, *Służebność przesyłu w prawie polskim*, Warszawa 2014, pp. 13 and 159, and the rulings of the Supreme Court referred to there, i.e. the ruling of 25 January 2006, I CSK 11/05; of 10 April 2008, IV CSK 21/08; of 17 December 2008, I CSK 171/08, and of 10 December 2010, III CZP 108/10, and the judgements of 8 June 2005, V CK 680/04, and of 31 May 2006, IV CSK 149/05.

pointed out[15]. Based on the extensive interpretation of the scope of a necessary road easement, the resolution expresses a view that it is possible for a utility enterprise to acquire a real easement under a contract for the purpose mentioned in Article 285 § 2 of the Civil Code also where such an enterprise trades in electric energy transmission but is not the owner of the adjacent dominant property. In its previous judgements[16], the Supreme Court formulated the correct conclusion that since it is possible to acquire such an easement under a contract, then it is also admissible to acquire the easement by acquisitive prescription on the basis of Article 292 of the Civil Code. Another view that should be considered as consolidated in judicial decisions is the view that it is possible to acquire, by acquisitive prescription, an easement with the content corresponding to the transmission easement, established for the benefit of a transmission enterprise, also before Articles 305^1–305^4 of the Civil Code became effective[17].

In EU legislation, in Article 295 of the Treaty Establishing the European Community (TEC), the principle of non-interference regarding ownership system regulations in the provisions of the national law of the Member States has been adopted. It was assumed in Poland that the prohibition in the Treaty also comprises the transmission easement[18]. However, the legal order of the European

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[15] Case No. III CZP 79/02, OSNC 11/2003, item 142.

[16] The resolution of 9 August 2011 of 7 judges of the Supreme Court (case No. III CZP 10/11, OSNC 12/2011, item 129) and the resolution of 27 June 2013 (case No. III CZP 31/13, OSNC 2/2014, item 11), referred to after P. Lewandowski, *Glosa,* p. 194.

[17] Resolutions of the Supreme Court: of 7 October 2008 (case No. III CZP 89/08, „Monitor Prawniczy" 2014, no 18, item 980), of 27 June 2013 (case No. III CZP 31/13, OSNC 2/2014, item 11), of 22 May 2013 (case No. III CZP 18/13, OSNC 2013, no 12, item 139) and the judgement of 13 January 2016 of the Supreme Court (case No. V CSK 224/15, LEX No. 1977833), referred to in P. Lewandowski, *Glosa,* p. 195.

[18] The opinion of 18 May 2007 on the compatibility of the draft act on the amendment to the Civil Code Act and to the Civil Procedure Code Act issued by the Secretary of the Committee for European Integration states that the draft regulation pertaining to the transmission easement is not comprised by the law of the European Union; short-run printed material Min. EOT1158/2007/DP/ik.

Community draws on the judicial decisions of the European Court of Human Rights to Article 1 of Protocol No. 1 of the European Convention on Human Rights and thus recognises the ownership right is a human right. The judicial decisions of the European Court of Human Rights express the view that state interference is in accordance with the Convention when such interference took place without a breach of law, to pursue a public interest and with the respect for the principles of international law[19]. The law indicated as the subject matter of the prohibition of the breach is understood as national law, which is available, precise as appropriate and foreseeable[20]. Availability means the ability to become familiar with the content of the regulations applicable in a case; the precise formulation of the regulations permits the interpretation of the binding rules of action from those regulations, and their foreseeability permits one to realise the consequences of actions, if any. The scope of the term "public interest" is determined with a large margin of the freedom of the state in assessing what belongs to the public interest and what does not. Judicial decisions contain many examples of legally justified interests, which would fall within the "public interest"[21]. The condition of respect for the rules of international law means, for example, the duty to repair damage to have been caused[22], which may be more widely understood as a monetary equivalent for interference, such an equivalent agreed amicably or established by the court[23].

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[19] I. Nakielska, *Ochrona praw jednostki*, ed. Z. Brodecki, Warszawa 2004, p. 164.

[20] Case 8691/79: Malone v. Great Britain, case 6538/74; Sunday Times v. Great Britain, as referred to in I. Nakielska, *Ochrona praw*, p. 164–165.

[21] For example the promotion of agriculture rationalisation, housing needs of persons with disabilities, milk market stabilisation, ensuring common security, and the prevention of tax evasion by taxable persons, see ibidem, p. 164. Thus, the public interest comprises a wide range of the needs of a community, while referring to various kinds of politicalsocial and economic circumstances. The public interest does not have to be useful to the entire society; it is sufficient for the public interest to reflect the interests or needs of a part of the society.

[22] Ibidem, p. 165.

[23] See, for example, the judgement of 7/12/2010 of the European Court of Human Rights in re. Tarnawczyk v. Poland 27480/02 ECHR.

There is more than enough of the judicial material from the Constitutional Tribunal, Supreme Court and the European Court of Human Rights for the Poznań-Nowe Miasto and Wilda District Court to establish the facts of the case independently and decide on its merits[24]. The critical evaluation of the civilian court which is being referred to is also justified by the subject matter of control, which was wrongly specified in the question of law. The enquiring court pointed out to Article 292 of the Civil Code, pursuant to which "A real easement may be acquired by acquisitive prescription only if such an easement consists in the use of a permanent and visible device. The regulations on the acquisition of real property by acquisitive prescription shall apply as appropriate". The objections and arguments presented pertain to Article 285 § 1 of the Civil Code, however. The Tribunal also indicated that the essence of the case under analysis was not the very normative shape of Article 285 § 1 of the Civil Code containing the definition of the real easement, but the interpretation of that Article. In the Tribunal's opinion, which should be confirmed, the court must interpret Article 285 § 1 of the Civil Code if the court evaluates the application for the ascertainment of the acquisition by the State Treasury or a transmission enterprise of a real easement consisting in installing and using transmission devices located at somebody else's land. It is not, however, the task (or within the competence) of the Constitutional Tribunal to state which interpretation method is correct. Therefore, the Constitutional Tribunal does not consider on their merits the cases in which the source of the potential lack of compliance with the Constitution is not the regulations themselves, but their practical interpretation[25].

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[24] There is also voluminous literature on the subject, which approved the attitude of the Supreme Court, such literature also referred to in the statement of reasons for the ruling commented on, in particular G. Bieniek, *Glosa do uchwały Sądu Najwyższego z dnia 17 stycznia 2003 r., III CZP 79/02*, „Rejent" 2003, No. 3, p. 130–139, M. Balwicka-Szczyrba, *Glosa do uchwały Sądu Najwyższego z dnia 7 października 2008 r., III CZP 89/08*, „Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2010, No. 2, p. 111–117, M. Godlewski, *Zasiedzenie służebności przesyłu*, „Monitor Prawniczy" 2010, No. 7, p. 387–394.

[25] Also as in the ruling of 10 May 2005 of the Constitutional Tribunal, case No. SK 46/03, OTK ZU No. 5/A/2005, item 55.

The practice of civilian courts regarding the submission of questions of law without the courts making their own previous findings about the subject matter of the question, if any, must also be viewed critically. Courts have an optional instrument in the form of a settlement based on their own interpretation of both national regulations, including the Constitution, and of convention regulations.

The enquiring court could also make the independent evaluation of the conformity of *accessio possessionis* of the transmission easement and real easement from before 3 August 2008 with the provision of Article 1 of Protocol No. 1 to the European Convention on Human Rights. Significant guidelines settling that matter are included in the judgement of 2006 of the European Court of Human Rights in re. Hutten-Czapska v. Poland[26]. It should be noted that the acquisitive prescription of the real easement, including the transmission and combined easement, consisting of, within *accessio possessionis*, the real easement with the content corresponding to the transmission easement and the transmission easement, encumbers the owner of the encumbered property. In turn, infrastructural enterprises, the beneficiaries of the acquisition of the gratuitous easement, provide services contributing to the performance of the duty of the state as laid down in the provision of Article 76 of the Constitution. That provision stipulates that "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices". The scope of such protection shall be specified by statute. In relation to the objection concerning the breach of the ownership right by the Polish state through the use of the historic institution of the special lease rental procedure, the above-mentioned judgement of the European Court of Human Rights referred to the "fair balance" rule stemming from Article 1 of Protocol No. 1 to the European Convention on Human Rights[27].

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[26] The judgement of 19 June 2006 of the European Court of Human Rights, case No. 350014/97, in re. Hutten-Czapska v. Poland, Lex no. 182154.

[27] The earlier judgements pronounced by the Tribunal considered the limitation of ownership in relation to the existence of the public interest to be fully reasonable; the judgement of 28 September 1995 of the European Court of

The Tribunal held that the excessive burdening of one social group with the costs of housing market transformation is unacceptable, irrespective of how important the interest of another social group or the society in its entirety is, and such burden is a breach of Article 1 of Protocol No. 1. It will be reasonable to state that the above-mentioned provision expresses an order *implicite* addressed to the court each time to make an assessment of whether the person concerned had to suffer unproportional or excessive burdens[28]. The judgement in re. Hutten-Czapska and the subsequent judgements pronounced by the European Court of Human Rights in 2010 in re. Tarnawczyk v. Poland[29]and in 2011 in re. Potemska and Potemski v. Poland[30] set out the interpretation direction for the provision of Article 1 of Protocol No. 1 to the extent of the part which refers to the duties of the state with regard to the protection of the ownership right. It is the "fair balance" rule on the one hand and the so-called positive duty on the other. The latter construction formulated in the

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Human Rights, series A No. 315-B in re. Spadea and Scalabrino v. Italy and the judgement of 19 December 1989 of the European Court of Human Rights, case No. 10522/83 in re. Mellacher et al. v. Austria.

[28] P. Lewandowski *Zasada „sprawiedliwej równowagi" (fair balance)*, „Gdańskie Studia Prawnicze. Przegląd orzecznictwa" 2010, No. 1, p. 188.

[29] The judgement of 7/12/2010 of the European Court of Human Rights, case No. 27480/02, ECHR 2010. In re. Tarnawczyk v. Poland the applicant was uncertain about her ownership for a long period (the expropriation decision was not issued and the deadline for the issue of the decision was not stated), therefore it is reasonable to consider the uncertainty situation to be a breach of the right to the undisturbed possession of assets. The European Court of Human Rights also held that the proportions between the reasonable public interest and the right to respect for assets were disturbed to the prejudice of the applicant's rights and thus the breach of Article 1 of Protocol No. 1 of the European Convention for Human Rights. At the same time, the European Court of Human Rights held that the planned expropriation without a formal issue of the expropriation decision does not influence, in a limiting way, the disposal of the right and is not, in itself, a breach of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights. Thus the Tribunal maintained the attitude expresses in the previous judgement in re. Sporrong and Lannroth v. Sweden (case No. 7151/75 and 7152/75, LEX 80830).

[30] The judgement of 29 March 2011 of the European Court of Human Rights, case No. 33949/05, ECHR 2011.

judgement in re. Potemska and Potemski v. Poland is linked to the protection of the ownership right not only by the "non-breach" of that right, but also by the order for the authorities to perform the positive duty understood as actions protecting the ownership right[31]. Another conclusion following from the broader judicial decisions of the Tribunal is that in the relations between the state and the individual, the Tribunal prefers the *in dubio pro individuum* formula (when in doubt, for the individual's benefit) which may be a problem for the axiologically remote "mentality" of Polish administration bodies[32], but should not be a problem for Polish civilian courts.

What is a problem to the Poznań-Nowe Miasto and Wilda District Court is the strong connection with the syllogistic, more and more archaic adjudicating model characteristic of the derivation of legal implications only from legal norms in the subsumption process[33] with the clear domination of the language interpretation. In the judicial decisions concerning the existence of the so-called easement with the content corresponding to the transmission easement before 3/08/2009, the Supreme Court relied on the functional interpretation of, first of all, the provision of Article 145 of the Civil Code settling the necessary road easement. The Constitutional Tribunal evaluated the above critically and indicated in the statement of reasons to the judgement commented on that in the

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[31] Such an understanding of the duties of the state within the protection of the ownership right is also formulated in previous judgements of 2004 of the European Court of Human Rights in re. Oneryildiz v. Turkey (case No. 48939/ /99, ECHR 2004-XII), Broniowski v. Poland, 2004 (case No. 31443/96, ECHR 2004-V) and Plechanow v. Poland, 2009 (case No. 22279/04, ECHR 2009).

[32] P. Lewandowski, *Wykonywanie prawa własności w świetle standardów ETPCz*, „Gdańskie Studia Prawnicze. Przegląd orzecznictwa" 2011, No. 3, p. 184.

[33] It has already been noted in literature that rule-based decision making differs from the "traditional" non-hermeneutic settlement of disputes in that decisions are not taken on the basis of norms decoded from the regulations but are the result of the balancing of opposing rules, L. Rodak, P. Żak, *Sprawiedliwość jako reguła rozstrzygania kolizji zasad. Niesylogistyczny model stosowania prawa*, in: *Rozdroża sprawiedliwości we współczesnej myśli filozoficzno-prawnej*, ed. B. Wojciechowski and M.J. Goleckiego, Toruń 2008, p. 278, R. Dworkin, *Hard Cases*, „Harvard Law Review" 1975, Vol. 88, No. 6, R. Alexy, *Teoria praw podstawowych*, Warszawa 2010, p. 80–81.

judicial decisions of the Supreme Court there were no deliberations justifying a departure from the language interpretation. There were no criteria, either, which would indicate the extensive interpretation of Article 285 § 1 of the Civil Code, which was the consequence of the functional interpretation of the regulation.

Such an evaluation is unjustified. The extensive interpretation based on the functional rules[34] permits the limitation of the consequences of law inflation manifesting itself in uncontrolled or redundant "issue" of the regulations which does not "correspond" to the needs of transactions. Law inflation also follows the disregard of opportunities offered by higher level interpretations, namely the praxeological, teleological or derivative ones[35], and from considering each gap in law to be a structural gap.

The Supreme Court broadened the concept of necessary road by departing from the purely linguistic exegesis of the word "road" understood, for the purposes of establishing a necessary road easement, as a part of somebody else's real easement (the encumbered real property) enabling the connection of the dominant real property with a public road. A significant element in the Supreme Court's reasoning is the use of the previously formulated functional rule for the connection of the dominant real property with public infrastructure supplying an energy agent[36]. Without the connection effected with the use of the encumbered real property, the owner of the dominant property would be deprived not only of access to points connected by public roads, but also to the services or to running water as part of the consumer needs under protection formulated

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[34] M. Zieliński, *Wykładnia prawa Zasady reguły wskazówki*, Warszawa 2012, passim.

[35] Ibidem, passim.

[36] Such a result permits the formulation of the thesis about the lack of the statutory situation for the change of the Civil Code, such a change introducing the transmission easement as a new limited right in property, as in P. Lewandowski, *Służebność przesyłu w prawie polskim*, p. 7 and numerous judicial decisions of the Supreme Court cited there. The lack of the transmission easement and the existence of the right to use somebody else's real property as part of the necessary road easement would also remove the problem of accessio possesionis.

in the disposition of the norm of Article 76 of the Constitution. The Supreme Court pointed out, therefore, to that result of the interpretation, which also complies with the postulate following from the preference to the interpretation supporting the Constitution.

An additional argument in favour of the easement with the content corresponding to the transmission easement before 3/08/2009 is the phrase "to the specified extent", included in the provisions of Article 145 of the Civil Code and in Article 285 para 1 of the Civil Code. With regard to real easements, the legislator has allowed a degree of the freedom of agreements, within which the parties may shape the content of the legal relationship by means of act in law, thus creating various easements. When analysing real easements from the point of view of their content, it may be rightly stated that the content set out in the provision of Article 285 para. 1 of the Civil Code is the *essentialia negotii* of each agreement if the parties intent to establish a real easement. The entire remaining content is comprised by the *accidentalia negotii* or *naturalia negotii* of the act in law and permits each legal relationship to be individualised, the aim of such a relationship being the use of somebody else's land on the basis of the real property relationship[37]. Thus, before 3/08/2009, it was possible to create, under an agreement, a real easement with the content corresponding to the contemporary transmission easement on the basis of the provision of Article 145 of the Civil Code on the necessary road easement or under Article 285 para. 1 of the Civil Code on another real easement.

STRESZCZENIE

Glosa do postanowienia Trybunału Konstytucyjnego z 17.10.2018r., sygn. akt P 7/17, Orzecznictwo Trybunału Konstytucyjnego ZU A/2018, poz. 59

Powodem, dla którego Trybunał Konstytucyjny po raz kolejny wypowiedział się w sprawie zasiedzenia służebności przesyłu, było przedstawienie

[37] Ibidem, p. 29.

przez Sąd Rejonowy Poznań – Nowe Miasto i Wilda w Poznaniu trzech pytań prawnych dotyczących zasiedzenia służebności przesyłu. TK postanowił umorzyć postępowanie, odmawiając odpowiedzi na pytania sądu. Glosator w pełni podzielił zdanie zawarte w treści tenoru postanowienia. Stwierdził jednak, że glosowane postanowienie jest dotknięte nieważnością względną spowodowaną wadą personalną składu orzekającego, w którym znalazły się osoby niebędące sędziami TK.

Słowa kluczowe: zasiedzenie; *accessio possesionis*; służebność przesyłu

SUMMARY

A gloss to the judgement of 17/12/2018 of the Constitutional Tribunal, case No. P 7/17, Orzecznictwo Trybunału Konstytucyjnego ZU A/2018, item 59

The reason why the Constitutional Tribunal commented again on the acquisitive prescription of the transmission easement was that the Poznań-Nowe Miasto and Wilda District Court in Poznań submitted three questions of law. TK ruled that the proceedings be discount by refusing an answer to a question from the District Court. A glosator fully supported the conclusion in the tenor of the ruling of the TK. Nevertheless he expressed his view that the ruling commented on is vitiated by relative invalidity caused by the defect of the staff in the adjudicating panel, which included persons who were not the judges of the TK.

Keywords: *acquisitive prescription*; accessio possesionis; transmission easement

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