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## **The Distinct Ownership of Premises from the Napoleonic Code to the Present Time**

### **SUMMARY**

The author raises the issue of distinct ownership of premises in a historical perspective. The author starts his analyses of a specific kind of distinct ownership of premises on the grounds of the Napoleonic Code in relation to the floors of the building. Further analysis was applicable during the interwar period of the Polish state. The author analyses the legal act from 1934 on the ownership of dwellings.

In the following section there is description of the provisions contained in the Civil Code, taking into account amendments to the act. This allows one to compare the quality of legal acts from 1918 to 1989.

To show the fullness of this adjustment the last section shows current regulations contained in the Act on Ownership of Premises, which entered into force in 1995.

**Key words:** ownership of premises, Napoleon Code, private law.

### **I. Initial remarks**

The main division of things in property law is division into chattels and real estate. Among real estate we can distinguish land, buildings and premises<sup>1</sup>. Land means part of the surface of the Earth being a separate object of property<sup>2</sup>. Building property are buildings permanently fixed to the land, constituting a separate object of property of the ground<sup>3</sup>. As for the premises the general

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<sup>1</sup> H. Witczak, A. Kawałko, *Prawo rzeczowe*, Warszawa 2006, p. 5–6.

<sup>2</sup> W. J. Katner [in:] *System prawa prywatnego. Prawo cywilne – część ogólna*, t. I, ed. M. Safjan, Warszawa 2007, p. 1080.

<sup>3</sup> H. Witczak, A. Kawałko, *Prawo...*, p. 5; it is possible to, for example, create land and mortgage register for real building estate acquired under the rule of the Napoleonic Civil Code, see resolution of the Supreme Court of 29.12.1995, 3 CZP 181/95, OSNC 1996, No. 4, item 50.

principle is that they are part of the building, being a constituent part of the real property<sup>4</sup>. The legislator allows however for the possibility of separation of premises. Then they are real estate separate from the building in which they are found, as well as the ground where such a building is incorporated. The possibility of regulation of separate property of premises has a rich tradition in Polish law<sup>5</sup>. It was already approved on the basis of the regulation of 1934 on ownership of premises<sup>6</sup>, which was modeled and based on the Napoleonic regulations<sup>7</sup>. This regulation was binding until the Civil Code<sup>8</sup> came into force. Then Article 135 of the Civil Code created the possibility of establishing a separate ownership of residential premises until the moment of the loss of its power and validity by virtue of the Act of 28 July 1990 on the amendment to the Act – Civil Code<sup>9</sup>. Then the possibility of the existence of separate property of premises was based on Article 136 of the Civil Code. Eventually this provision also lost its effective force. It occurred along with establishment of a new Act on premises ownership<sup>10</sup>, which is in force until today. This act regulates the issue of separate property of premises in detail. It applies to both forms of its creation and the management of common real property, and finally it regulates the institution of a housing cooperative.

In my point of view the human right to housing is one of the most important social human rights and every form of execution of this right should be noticed. A distinct ownership of premises concerns the realization of housing needs. Furthermore, this is an exception to the general rules of property and rule *superficies solo cedit*. A distinct ownership of premises has a very rich history in Polish law and so a presentation on how it has changed, allow us to notice this regulations.

## II. Napoleonic Code

In the inter-war period the basic forms of satisfying housing needs were ownership and renting<sup>11</sup>. Only in the part of the Republic of Poland where the

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<sup>4</sup> J. Pisiuliński [in:] *System prawa prywatnego. Prawo rzeczowe*, t. IV, red. E. Gniewek, Warszawa 2007, s. 234.

<sup>5</sup> W. J. Katner [in:] *System...*, p. 1183–1184.

<sup>6</sup> Regulation of the President of the Republic of Poland, dated 24 October 1934 on ownership of premises, Journal of Laws 1934, No. 94, item 848 with amendments, further Regulation of 1934.

<sup>7</sup> W. J. Katner [in:] *System...*, p. 1183.

<sup>8</sup> Act of 23 April 1964 – Civil Code, Journal of Laws 1964, No. 16, item 93 with amendments, hereinafter referred to as the Civil Code.

<sup>9</sup> Journal of Laws 1990, No. 55, item 321.

<sup>10</sup> Act of 24 June 1994 on ownership of premises, Journal of Laws 1994, No. 85, item 388 with amendments, hereinafter referred to as Act of 1994 or WILU.

<sup>11</sup> M. Bednarek, *Prawo do mieszkania w konstytucji i ustawodawstwie*, Warszawa 2007, s. 83.

Napoleonic Code was binding<sup>12</sup>, existed the institution of separate property of premises, which was related to the separate property of floors in the building<sup>13</sup>.

A separate ownership of floors was stipulated in Article 664 of the Napoleonic Code. This provision was included in Title 4 concerning servitude<sup>14</sup> section 2 regulating servitude established by the law<sup>15</sup>, in part 1 concerning middle wall<sup>16</sup>, that is a wall separating buildings and the courtyard from gardens<sup>17</sup>.

The provision of Article 664 of the Napoleonic Code regulated the manner of bearing charges connected with maintenance of a middle wall, namely repairs of this wall and possible setting it up again. It did not concern thus directly the possibility to establish a separate ownership of floors in a building, however, because it regulated the method of settlements of the owners of particular floors, it indicated that such a separate ownership concerning floors of the building could be established.

With regard to mutual settlements this provision indicated that costs related to maintenance and construction of the roof and the main walls shall be borne by all owners of floors in relation to their value. Maintenance costs of floors were borne by each owner separately. Each of them was obliged to maintain the floor on their own storey. This provision also regulated the method of settlements concerning stairs. And so the owner of the first floor bore the costs connected with maintenance of stairs running from the ground floor to the first floor, the owner of the second floor of stairs from the first floor to the second, and each next owner of stairs leading from the lower floor of which he/she was the owner. Hence, the provision did not indicate directly whether it was possible to establish a property on the ground floor. On the one hand, it should be regarded impossible, taking into account that the ground floor could be used by each owner of upper floors, and after all they were not obliged to bear costs of floor maintenance on the ground floor. However, it seems that it would be necessary to assume that it was acceptable to establish a sepa-

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<sup>12</sup> Further KN.

<sup>13</sup> Article 518 of KN constituted that grounds, and buildings are real estate naturally; see: H. Witczak, A. Kawalko, *Prawo...*, p. 5; see also sentence of the Supreme Court of 20.1.1970, 3 CRN 476/69, OSNC 1970, No. 9, item 169 in which Supreme Court indicates that under the government of the Napoleonic Code the owner of building could be other person than the owner of the ground when the building constituted a separate property, and therefore, "as long as on the plot there stands a residential building constituting a separate property to which plaintiffs (owners of the ground P.S.) do not have the title, their debt collection claim cannot be effective". It seems that Supreme Court improperly indicated that this results not only from Article 518 of KN, but also from Article 533 of KN, this provision applies to interpretation of the word: equipment.

<sup>14</sup> "O Służebnościach albo służbach gruntowych".

<sup>15</sup> "O Służebnościach prawem ustanowionych".

<sup>16</sup> "O Srzodkowym murze i rowie".

<sup>17</sup> Article 649 of KN.

rate property on the ground floor since this provision did not exclude such possibility. The ground floor in many cases should be treated as a separate floor, taking into account that it could be very similar, also in respect of the possibility to satisfy residential needs, to other floors in a building.

### III. Regulation of 1934

The regulation of 1934 accepted separate premises, floors or parts of floors as separate property<sup>18</sup>. Of course premises or floors could constitute a separate ownership when they were located in one building. In addition, this pertained only to those acknowledged by appropriate authority as independent rooms. In the case of separation of separate property of premises, floors or their parts all the remaining parts constituted the common property of all owners of particular premises<sup>19</sup>.

To establish a separate ownership of the premises a necessary form was a notarial deed<sup>20</sup>. This form was reserved under pain of invalidity. The deed should have included the most important information regarding the type and size of particular premises, specification of proportional share of owners of particular premises in co-ownership of real property from which isolation of these premises was made and apart from this, the method of administration of common real property and the scope of the share in incurring the burden related to maintenance and management of the common real property.

To create a separate property of the premises, apart from a notarial deed, it was also necessary to disclose this in the land and mortgage register, in which the information of the share in common real property was also placed.

The regulation of 1934 also specified the manner of administration of common real estate created as a result of separation of premises. And so to manage this real estate one- or several-people should be appointed to management. Members of the management board could be not only the owners of particular premises, but also other persons. The management board was entitled to manage the common real estate in the broadest possible extent, in particular they could undertake urgent repairs and works, divide costs among particular co-owners and pursue claims from them, as well as to insure the whole building, including all particular premises. The Board was also granted the

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<sup>18</sup> Article 1 of regulation of 1934.

<sup>19</sup> This applied to grounds, backyards, gardens, foundations, external and construction walls, walls separating particular separate premises, roofs, chimneys and other common devices and rooms, such as attics, basements, staircases, corridors, gates, common bathrooms, laundries, drying rooms lifts, drain, water supply, central heating or lighting devices.

<sup>20</sup> This form could be replaced even by court ruling, see ruling of the Supreme Court of 5.1.1962, 3 CR 920/61, OSNC 1963, No. 3, item 62.

judicial ability to represent, in court and outside-court cases, all co-owners. In the case of at least a two-person management board, a declaration of will on behalf thereof could be submitted by at least two members, and this provision had a dispositive character, which means that the contract establishing a separate ownership of premises could establish a different way of representation<sup>21</sup>. The board was established for a three-year-long term of office during a meeting of owners, and in the case of failure to appoint the board by the meeting, through a municipal court. The management board could be dismissed before the end of the term during a meeting, however, the condition precedent was the appointment of a new board.

In the act establishing a separate ownership of premises it was possible to establish an audit committee. In the case of committee appointment, it should consist of at least three co-owners, and the committee should be appointed for a period of at least one year. The audit committee had an obligatory character in the case when the number of co-owners exceed 10. Regardless of the committee each co-owner had the right to control.

Apart from the right to appoint members of the board and audit committee, the duties of the owners of the premises included matters related to maintenance and use of the common real estate. The meeting was also undertaking resolutions concerning the validation of accounting reports granting the vote of approval for the board (granting the board for performance of its obligations), and adoption of annual estimates of income and expenses. The Act distinguished ordinary and extraordinary meetings of owners. The former should be appointed within two months after one calendar year and their tasks included adopting resolutions concerning financial reports, estimates and the vote of approval. Extraordinary meetings could be summoned upon the request of the owners of premises representing at least 1/10 part of the shares in the common real estate or an audit committee submitted to the board. Such a meeting was summoned also in situations as provided in the act establishing a separate ownership of premises.

Meetings were summoned by management, while in the case of failure to summon them, the county court could authorize other persons, appointing, at the same time, the chairman of such a meeting. With regard to meeting the act did not condition the ability to make resolutions by the meeting by collecting a quorum, conditioning such capacity on the quantity of shares represented during the meeting, but it could however introduce an act establishing a separate ownership. Resolutions were undertaken with an absolute majority of

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<sup>21</sup> However, if declarations of will were submitted to all co-owners, it was sufficient to submit it with respect to one member of the board, which resulted in legal effect towards all co-owners. Analogical situation existed in the case of notices.

represented shares<sup>22</sup>, except for resolutions concerning proportional burden of weights of common real property maintenance where uniformity was necessary.

Resolutions of meetings were enforceable. This applied to resolutions that were not conforming to the law or acts establishing a separate ownership, as well as harming the interests of particular owners or aiming at doing harm to any of them. Resolution should have been challenged within 6 weeks from the date the plaintiffs became aware about it, but no later than within 3 months from its adoption. In order to challenge such a resolution it was necessary to bring an action against all the owners of the premises. Permission to place such a lawsuit was granted to the owner of the premises, who during the meeting voted against the resolution and after its adoption filed an objection to the protocol, as well as to the absent owner provided that prevention of his or her access to this meeting was unlawful, there was a faulty summoning of the meeting or undertaking the resolution concerning an issue not included in the agenda. Such permission was granted additionally to the board and an audit committee but then all co-owners would be represented by a trustee appointed by the court, and not the board.

With regard to respective share in the common real property it was inherent in ownership of the premises, it could not be separately sold and this co-ownership could not be abolished as long as there was a separate ownership. The Buyer of the premises entered into rights and obligations of the seller. Enforcement from separate property was conducted on the basis of provisions concerning enforcement from real property.

Article 18 of the regulation of 1934 regulated the problem of compensation in the case of damaging the building. And so, in the case of destruction of the building, the sum from compensation was transferred to the board who used it to restore the building to its due condition. If the compensation turned out too low, deficiency was to be covered by the owners of the premises in relation to the amount of their shares in the common real estate. However, if the whole building was destroyed, and the owners did not agree on its reconstruction, then a separate ownership of premises expired by law, and the sum of compensation was shared between co-owners.

The Act was revoked by Article 5 item 1 of the Act of 23 April 1964 – Regulations introducing Civil Code<sup>23</sup>.

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<sup>22</sup> This provision had also the dispositive character.

<sup>23</sup> Journal of Laws 1964, No. 16, item 94, further PWKC.

## IV. Civil Code

After the Civil Code came into force, the issue of separate property of the premises was regulated in general regulations of Title of the 2<sup>nd</sup> Book of the Civil Code – Property. The Constitution of the People’s Republic of Poland (PRL)<sup>24</sup> and, in turn, the Civil Code differentiated many types of property<sup>25</sup>. And so there were distinguished social ownership (state ownership, also called national and collective), individual ownership (capitalist and small production) and personal ownership of citizens<sup>26</sup>. Article 132 of the Civil Code – first<sup>27</sup> defined personal ownership. Personal property was ownership of things intended for satisfying the personal material and cultural needs of the owner and his relatives and ownership of minor means of production used for manufacturing objects intended for satisfying the personal needs of the owner and his relatives. On the other hand, article 133 of the Civil Code – first, indicated the object of personal property. It included an open catalogue. The object of such property could be, in particular, a detached house or housing premises constituting a separate property along with outbuildings necessary to use it. The Civil Code also defined the notion of a detached house (article 134 of the Civil Code – first) and housing premises (article 135 of the Civil Code – first). And so a detached house was a residential house, as well as an independent part of a semi-detached house or a terraced house, provided that its intended use is satisfying residential needs of the owner and his or her relatives. Such a house also could not exceed a specified dimension<sup>28</sup>. Housing premises could constitute a separate ownership, and also it had to be intended for the purpose of satisfying the housing needs of the owner and his relatives and it could not exceed a given size<sup>29</sup> and there had to be a possibility of its separation in a given residential house on the basis of separate regulations. If, in a residential house in which there were separated living quarters, there were utility premises required to perform the profession of the owner of the

<sup>24</sup> Act of 22 July 1952, Journal of Laws 1952, No. 33, item 232 with amendments.

<sup>25</sup> M. Bednarek, *Prawo...*, p. 88.

<sup>26</sup> *Ibidem*.

<sup>27</sup> Act of 23 April 1964 – Civil Code, Journal of Laws 1964, No. 16, item 93 in the primary version, further the Civil Code –.

<sup>28</sup> Surface 110 m<sup>2</sup> originally and then 220 m<sup>2</sup>, see: M Bednarek, *Prawo...*, p. 90.

<sup>29</sup> Act of 28 May 1957 on exclusion from public apartments management detached houses and apartments in residential cooperatives houses, i.e.: Journal of Laws 1962, no. 47, item 228 with amendments, and then Regulation of the Council of Ministers of 26 June 1974 on execution of some legal regulations (Journal of Laws No. 26, item 152, further LokRozp) specified this size as 110 m<sup>2</sup>; see sentence of the Supreme Court of 18.5.1983, 1 CR 108/83, LEX no. 8535; E. Bończak-Kucharczyk, Comments to the Act of 24 June 1994 ownership of premises (Journal of Laws 00.80.903), in: E. Bończak-Kucharczyk, *Własności lokali i wspólnota mieszkaniowa. Comments*, Oficyna 2010, LEX.

premises, they were a constituent part of the living quarters<sup>30</sup>.

In the event of separation of ownership of the premises in a residential building co-ownership of the owners of the premises was created on a land plot, on which a residential building was built, as well as any parts and devices of a house that were not intended for the exclusive use of owners of the particular premises, and the share was connected with a separate property of the premises, and the request of common real property division was impossible as long as a separate ownership of premises lasted (article 136 of the Civil Code – first). This co-ownership was of a compulsory character<sup>31</sup>.

With regard to the form required to establish a separate ownership of the premises it was necessary to have the form of a notarial deed (article 137 of the Civil Code – first). Such a contract should define in particular the type, location and size of particular premises, the size of shares to the owners of particular premises in a common real property, as well as to determine management of this common real property. It was also possible to establish a separate property of the premises in the proceedings on the elimination of co-ownership<sup>32</sup>.

Pursuant to Article 1 item 23 of the Act of 28 July 1990 on the change of the Act – Civil Code<sup>33</sup> article 126–135 of the Civil Code were repealed. On the other hand, articles 136 and 137 of the Civil Code were changed – amendment of 1990. After amendment it was article 136 of the Civil Code – amendment of 1990 that regulated the issue of separate property of the premises. According to it, a separate real estate could constitute living quarters, functional premises, as well as the garage being the constituent part of the building. This provision also provided co-ownership to the owners of premises on the plot of land where the building was erected, as well as on these parts of the building and devices that were not intended for exclusive use of particular owners of premises. This co-ownership could not be abolished as long as there was a separate ownership of premises. With regard to article 137 of the Civil Code – amendment of 1990, the change as a result of the amendment was limited only to crossing out the word “residential” what was caused by the fact that the possibility of separation of other premises than residential was approved. Before the amendment, it was only possible to separate premises if they were intended for satisfying housing needs, and the remaining premises could constitute only a constituent part of such premises and only so far as the owner of the residential place performed his or her occupation there. Af-

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<sup>30</sup> In such situation the area of such premises could be up to 140 m<sup>2</sup>, see § 1, passage 1 LokRozp.

<sup>31</sup> M. Bednarek, *Odrębna własność lokali – zagadnienia sporne*, “Studia Prawnicze” 1991, No. 1, p. 131.

<sup>32</sup> Decision of the Supreme Court dated 11.6.1982, 3 CRN 2/82, OSNC 1983, No. 1, item 16; Decision of the Supreme Court dated 5.11.1982, 3 CRN 285/82, LEX no. 8483.

<sup>33</sup> Journal of Laws 1990, No. 55, item 321, regulations after amendment defined as the Civil Code – amendment. 1990.



ter the amendment of 1990 it became possible to separate utility premises and garages.

Regulations of the Civil Code governing a separate ownership of premises were binding until the effective date of the Act, which, originally comprehensively settled the issue of separate property of premises<sup>34</sup>. Hence, the concept of a separate normative act regulating the essence of separate property of the premises returned. However, article 1, passage 2 WILU refers, in the scope not regulated by this Act, to the Civil Code. This act removed the regulations of article 136 and 137 of the Civil Code – amendment of 1990 and article 19 of PKWC (Regulations Introducing the Civil Code)<sup>35</sup> and independently settled issues concerning establishment of separate property of premises, the scope of co-ownership of common real property as well as the rights of owners of premises<sup>36</sup>.

## V. Act on ownership of premises

On 1 January 1995 an act on ownership of premises came into force, which specifies the way of establishing a separate property of independent housing premises and premises of different intended use, as well as rights and obligations of owners of these premises and management of the common real property.

A separate ownership of premises can be established by way of a contract, unilateral activity of the owner and pursuant to court ruling abolishing co-ownership, while for it to arise, an entry to land and mortgage register is necessary.

With regard to the responsibilities of owners of premises, first of all, the owners shall bear expenses related to maintenance of the premises, is obliged to keep their premises in due condition, keep household order, use common real property in manner not limiting the use by other co-owners and cooperate with them to protect the common good. The owner of the premises is obliged to bear costs of management of common real property which include, first of all, expenses on current maintenance, utility fees in the part relating to the common real property as well as the fee for collective antenna and an elevator, insurance, public law levies, expenses related to order and cleanliness

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<sup>34</sup> Article 34 WILU.

<sup>35</sup> Article 19 of PWKC concerned the obligation of establishing the land and mortgage register for the separated premises. Such entry to the land and mortgage register was only declaratory, see: sentence of the Supreme Court of 13.5.2004, 5 CK 492/03, LEX no. 328063.

<sup>36</sup> E. Bończak-Kucharczyk, Comments to Article 1, Article 34, Article 35, Article 36, Article 37, Article 38, Article 39 of the Act of 24 June 1994 on ownership of premises (Journal of Laws 00.80.903), in: E. Bończak-Kucharczyk, *Własność...*, LEX.

maintenance and remuneration for members of the board or an administrator.

There is a possibility of the compulsory sale of separate premises, in the event when the owner is for long in arrears with the payment of due fees, or when he/she goes grossly or persistently against household order or by their inappropriate behaviour makes the use of other premises or real property common inconvenient. In such a case the residential community may request in the mode of a process the sale of the premises by means of auction on the basis of the Civil Code<sup>37</sup> concerning enforcement from real estate. Such an owner is not given alternative premises.

With regard to obligations concerning the common real estate, the residential community is liable for them without any limitations, while particular owners only with regard to the corresponding part of their share in common real estate.

With regard to management of the common real estate, the manner of performing this management may be determined in a contract establishing a separate ownership of premises or in a future contract concluded in the form of a notarial deed. Such a management may in this way be transferred to a natural or legal person. If the agreement does not specify the method of management of the real estate, then in the case when there are seven or less separated premises, general regulations on co-ownership should apply. However, if there are more than seven of such premises, there is an obligation to appoint a management board by way of a resolution of owners of the premises. Activities of ordinary management are made independently by management, while to perform activities exceeding the scope of ordinary management, the consent is required from owners of the premises made by way of a resolution.

## VI. Final remarks

A separate ownership of premises in the Polish legal system has a rich tradition. Certain regulations in this field were binding in the areas of today's Republic of Poland after the partition period, as well as during the 2<sup>nd</sup> Polish Republic. The first normative act regulating separate ownership of premises in an autonomous manner was the regulation of 1934. The Act enabled establishing a separate property of premises, specified mode of separation of premises and regulated mutual rights and responsibilities of particular owners. This regulation was, however, repealed by the Civil Code, which regulated the possibility of separating premises throughout the whole period of the People's Republic of Poland (PRL) to the amendment of the Civil Code of 1990,

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<sup>37</sup> Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws 1964, No. 43, item 296 with amendments, hereinafter referred to as KPC.

and then, to the effective date of a new Act on premises ownership. Regulations of the Civil Code to the amendment of 1990 were burdened with “the socialist” understanding of property, which distinguished national ownership from individual and personal property. Therefore, these regulations reduced the possibility of separating premises. In 1995 a separate act on ownership of premises came into force, which specifies the way of their being distinguished, as well as mutual rights and obligations of owners of particular premises and finally the issue of administration of common real estate. These provisions benefit from institutions developed in previous normative acts, in particular the regulation of 1934. It adjusts, however, the issue of separate property of the premises to contemporary needs and in a manner significantly more detailed regulates mutual rights and obligations of owners of particular premises, and, above all, specifies the way of management over common real estate.

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