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INTRODUCTION TO SPANISH PATRIMONIAL LAW

Introduction to Spanish Patrimonial Law

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EDITORIAL COMARES

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SERGIO NASARRE-AZNAR

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SUMMARY: I. DEFINITION OF LIMITED REAL RIGHTS. II. CLASSIFICATION OF THE LIMITED REAL RIGHTS. III. ENJOYMENT REAL RIGHTS. 1. Usufruct *(usufructo)*. 2. Servitudes *(servidumbres)*. 3. Emphyteusis *(enfiteusis)*. IV. GUARANTEE REAL RIGHTS. 1. Pledge (prenda). 2. Hypothec *(hipoteca)*. V. ACQUISITION REAL RIGHTS.

I. DEFINITION OF LIMITED REAL RIGHTS

Limited real rights are limited charges (in contrast to the completeness of ownership) on immovables or movables owned by anyone else different from the holder of the real right.

Unlike common-law countries, where a horizontal division of the property (into legal and equitable) is possible, ownership may only be divided vertically in the Span-

ish civil law systems. Therefore, only the faculties that incorporate the title of ownership may be split up from this title and may be vested in another person thus creating these limited real rights.

Limited real rights differ from obligational rights in that the first ones charge directly to the property [1] and exist irrespective of who is the owner of the charged property [2]. As several real rights with the same or different juridical character are able to charge one property, the first in time prevails (*prior in tempore potior in iure*). However special rules are applied when real rights are registered, especially the rules related to the protection of registered titles (since its registration date) and the non-opposability of the non-registered titles to good faith third parties [3].

Limited real rights are normally vested in someone by the force of law, by will or by a contract between the owner of the property and the holder of the limited real right.

II. Classification of the limited real rights

Limited real rights may be sorted out in the following sections [4]:

a) Enjoyment real rights: rights that give to their holder a right of use, enjoyment or acquisition of the fruits and revenues produced by the charged property. These are, essentially, usufruct (*usufructo*), servitude (*servidumbre*) and ground rent (*censo*, art. 1604 CC). Some others are the right of use (*derecho de uso*, art. 524.1 CC), the right of habitation (*derecho de habitación*, art. 524.2 CC) and emphyteusis (*enfiteusis*).
b) Guarantee real rights: real rights used to secure obligations. These are the immovable hypothec (*hipoteca inmobiliaria*) [5] and the movable pledge (*prenda*). There also exist the movable hypothec (*hipoteca mobiliaria*), the non-shifting pledge (*prenda sin desplazamiento*), the antichresis (*anticresis*, art. 1881 CC) and the right of retention (*derecho de retención*, art. 1780 CC), this last one having a specific regulation in Catalan law (art. 3 to 11 Act 19/2002, 5 July, on real securities).
c) Acquisition real rights: the call option (*opción*), the right of pre-emption (*derecho de tanteo*) and the right of redemption (*derecho de retracto*).

[1] TS 21.11.1929 (*Colección Legislativa - Jurisprudencia Civil*, Vol. 191, num. 63).

[2] TS 30.12.1986 (*RAJ* 7835).

[3] See § 28 on the Land Register.

[4] Due to the space limits, here we will only study in depth the most relevant limited real rights, though there is a reference to most of them.

[5] The economic meaning of the Spanish "hipoteca" can be related to the English or American "mortgage", but their juridical structure differs radically. That is why we use the Latin term "hypothec" rather than the "mortgage" one.

III. Enjoyment real rights

1. Usufruct (*usufructo*)

Art. 467 CC defines usufruct as a right to enjoy an alien property with the obligation to preserve its form and substance, unless anything else is stated in the law or in the constitutive title of the real right.

A usufruct may be established *inter vivos* or *mortis causa* and may be vested in one or more persons once they are the beneficiary of the usufruct. This limited real right may charge corporeal movables (animals, a credit, etc.) and immovables (a house, a piece of land, any right over immovables, etc.), some incorporeal (intellectual property) and even rights (art. 469 CC).

The sources of any conventional usufruct's regulation are, in the first place, the agreements between the parties: the owner of the property and the usufructuary. When nothing has been stipulated by the parties the law determines the legal regime of the usufruct.

Whereas the obligations of the usufructuary —who is entitled to enjoy and to use the charged property since the constitution of the usufruct— are to make an inventory of the charged property and to give a personal guarantee (art. 491 CC), his/her rights are to take possession of the charged property and to receive its revenues (art. 471 CC). The usufructuary is also entitled to assign his/her right (the usufruct) to a third party and to make improvements on the property under certain conditions (art. 487 CC). The usufructuary may also sell the usufruct (art. 480 CC) or charge it with a hypothec (art. 107.1 LH).

There are six possible situations which will extinghish usufruct.

a) Death of the usufructuary.
b) The pre-established duration coming to an end.
c) When ownership of the charged property and the usufruct are vested in the same person.
d) The rennounce of the usufructuary.
e) Loss of the charged property.
f) Prescription (unprotecting the right against any attack by third parties) (art. 513 CC). When the usufruct is extinguished, possession of the property returns to its owner (art. 522 CC).

There are special regulations for usufruct on impairable property, on perishable property, mines, woods, vineyards, stockfarming and rights (real rights, credits, securities, etc.) (art. 476, 483, 485, 486, 499 CC).

Besides this general regulation of usufruct for all of Spain, Catalonia has its own complete regulation since 2000 (Act 13/2000, 20 November, *de regulació dels drets d'usdefruit, d'ús i d'habitació*), dealing not only with the right of usufruct but also with the right of use and the right of habitation. Catalonia's regulations also foresee the "widow's usufruct": in case

of there being no will and the widower/widow not being the heir, he/she will be usufructuary of the whole estate (art. 331 CS). A similar institution exists in Aragon (art. 39.3 LS Aragon). Another type of usufruct in Catalonia is the one established by a pact between husband and wife (art. 24 to 30 CF). A similar institution to this last one is the usufruct regulated in Álava (*Fuero de Ayala*), which is called "*usufructo poderoso*"; it is created *mortis causa* and normally between husband and wife (art. 140 to 145 LDCF). In Navarre, usufruct, the right of use and the right of habitation are regulated in *leyes* 408 to 426 Comp.Nav.

2. Servitudes (*servidumbres*)

Art. 530 CC defines the servitude as a charge over a piece of land (servient land) for the benefit of another piece of land (dominant land) owned by another person, who is different from the owner of the dominant land.

Although any type of servitude may be freely established by agreement between the owners of each piece of land, the Civil Code establishes a specific regulation for most types of servitudes (art. 530 to 604 CC). It is impossible to create servitudes over one's own land.

Servitudes may be classified as voluntary or legal (depending on which has been their origin: either the agreement of the parts or the law itself[6]), positive or negative (depending on whether the servient land's owner needs to do anything), continuous or discontinuous and apparent or not apparent (depending on whether the servitude might be physically recognized or not).

Any servitude may be created by the owner of a piece of land, which is the object of this limited real right. Servitude owners have the *actio confesoria* to protect them against anybody who tries to perturb their right over the charged land. An undue servitude may be challenged by the owner of the undue charged land by the *actio negatoria*. Any modification of the servitude's conditions might be done not only by the agreement of the parties, but also unilaterally by the servient land's owner (*ius variandi*) where the servitude is too burdensome and an easier alternative is proposed (art. 545 CC).

Consolidation (the dominant land and the servient land are joined under the ownership of the same person), lack of use of the servitude, destruction of the land (building, house, etc.), renunciation and extinctive contracts (art. 546 CC) all extinguish servitudes.

Specific regulations are laid down for some types of servitudes. These are the water rights (Royal Legislative Decree 1/2001, of 20 July, *por el que se aprueba el texto refundido de la Ley de aguas*), the servitude of drainage, right of way (when a piece of land is located between two and has no exit to a public path, art. 564 CC) and the servitude of light and view (art. 580 to 584 CC).

[6] Legal servitudes are those which are created automatically by force of law (art. 552 CC) or those which are automatically attributed by law to one person when certain circumstances take place.

Special regulation for servitudes already exists in Catalonia (art. 6 to 18 Act 22/2001, of 31 December, *de regulació dels drets de superfície, de servitud i d'adquisició voluntària o preferent*), in the Basque Country (art. 128 to 130 LDCF), in Navarre (*leyes* 365, 393 to 407 Comp.Nav.), in Aragon (art. 145 to 148 Comp.Arag.) and in Galicia (art. 26 to 28 LDCG) where a similar institution called "serventía" is also regulated (art. 30 and 31). Neither the Basque, the Galician nor the Aragon regulation are complete: only certain specialities (the right of way in the Basque Country) or specific types (the right of way in Galicia) compared with the general regulation in Spain are regulated. Instead, Catalonia and Navarra do have a complete regulation of the servitude.

3. Emphyteusis (*enfiteusis*)

Emphyteusis, a kind of ground rent created by contract on public document (art. 1628 CC), is the right whereby the owner of a land (formal owner) cedes the beneficial/useful ownership of it to another person (material or emphyteutic owner), though the former retains the right to receive from the latter a yearly rent[7] (art. 1605 CC).

The material owner has the right to acquire the fruits of the land (art. 1632 CC) and may sell or charge the land itself or dispose it by will (art. 1633 and 1634 CC). The formal owner has the right to receive the yearly rent and the laudemium, which is a percentage on the price that is paid if the material owner sells the land (art. 1644 CC).

The formal owner may redeem the emphyteusis (art. 1648 CC). Where the material owner does not pay the rent for a period of three years, (art. 1649 CC) defaults in accomplishing any stipulation or allows the land deteriorated by his/her fault

It should be added that Catalonia has its own regulation of emphyteusis (art. 13 to 27 LC Cat), without division of ownership (*cens* is a limited real right). Majorca also has some kind of specific regulation (art. 63 Comp.Bal.).

IV. Guarantee real rights

These types of limited real rights aim at assuring performance of an obligation (either a debt or any other sort of obligation). Like any other right, they allow their holder (who is generally the same as the creditor in the secured obligation) to enforce directly that the charged property is to be repaid. This preference (to other creditors)

[7] The legal character of this right is unclear, but it seems that it splits up ownership into two property rights which are held by the formal and by the material owner. This situation is particular to Spanish law.

to directly become satisfied and the fact that real rights continue on existing irrespective of who is the owner of the charged property are their main advantages.

The common features of Spanish guaranteed real rights (especifically of hypothec and pledge) are:

a) They are granted to assure a specific obligation. They are firmly attached to this obligation by their constitution until their extinction (art. 1857.1 CC). They are completely ancillary and undivisible (art. 1860 CC).
b) Property on which the hypothec or the pledge have been established must be owned by the person who creates those rights (the grantor) (art. 1857.2 CC), who should also have the free disposition of his/her assets and enough capacity to dispose of the charged property (art. 1857.3 CC).

In case that the secured obligation becomes due and payable, the owner of the hypothec or the pledge may promote the value of the charged property (judicially or by other ways). The creditor cannot acquire ownership of the charged property (prohibition of lex comissoria, art. 1859 CC).

1. Pledge (*prenda*)

Pledge is a real security over movables (art. 1864 CC). It requires the transfer of the possession of the charged property to the creditor or to a third party (art. 1863 and 1869 CC). However, a non-shifting pledge is possible if the pledge is granted and over specific kinds of property (art. 52 to 54 Act of 16 December 1954). There are three categories of non-shifting pledges: the agricultural non-shifting pledge, the non-shifting pledge over machines, goods and raw materials and the non-shifting pledge over property of historical and artistic value.

Focusing now on the shifting pledge, the Civil Code allows the charge of a property to guarantee different creditors, though only one party may take possession of it. No specific form is needed for its constitution unless it is intended to bind third parties, in which case a notarial act is required (art. 1865 CC).

The creditor, whose right is guaranteed by a pledge (pledgee), has the following rights:

a) He/She (or a third party in his/her name) may retain possession of the property until he/she becomes fully repaid (art. 1866 CC). The pledgee must take care of the property with the usual standard of diligence *(diligencia de un buen padre de familia)* (art. 1867 CC), whereas the debtor must pay the expenses of its conservation. The creditor is neither allowed to use the pledged property nor to receive its fruits or revenues, which can be used only to compensate for the debt (art. 1868 CC).
b) The pledgee is also entitled to protect the pledged property as if he/she was its true owner (actio reivindicatoria, to call for the ownership of the property from a non-owner who has its undue possession, for example) (art. 1869 CC).

c) He/She may also enforce the property (by notarial auction, usually) in case the debtor defaults in paying the credit or fails to comply with the guaranteed obligation (art. 1872 CC and 681 LEC).
d) The pledgee has a preferential claim to be repaid with preference to any other creditors of the debtor over the amount obtained by the enforcement of the pledged property (art. 1922.2 CC).

The pledge being an ancillary right, it extinguishes at the same time as the guaranteed obligation. But if the charged property is destroyed and it was insured, the pledge will charge the amount due to be paid by the insurance company.

In Spanish law some other types of special pledges are also known, like the monetary pledge (a certain amount of money is pledged) or the plegde of rights (a movable right or a credit is pledged).

Catalonia completed a modern regulation of pledge in 1991 (currently in art. 12 to 20 LDRG), with some special considerations which contrast to the Spanish Civil Code. An example of this is the existence of an almost-not accesory pledge, that is to say, a pledge that might be used to secure present and future obligations taking precedence over an already existing basic obligation (art. 13.3 LDRG). Navarre has its own regulation of the pledge too (*leyes* 468-474 Comp.Nav.).

2. Hypothec (*hipoteca*)

Hypothec is a guaranteed real right over immovables or immovable rights (art. 106 LH). However, in Spanish law, the hypothec over special movable property (movable hypothec) which might not be properly pledged, like ships, airplanes, cars, machines, etc. (art. 12 Act of 16 December 1954) is also regulated.

The most important hypothec (which is the one useful to promote land credit) and the one we study here is the hypothec over immovables or the immovable hypothec, which is regulated in the *Ley Hipotecaria* 1946 (LH) and in art. 1874 to 1880 CC. In relation to pledge, hypothec has an important advantage: the creditor does not take possession of the charged property. The person who has granted the hypothec over his/her own piece of land or immovable right (for example, a usufruct on an immovable item) is freely entitled to sell it, because hypothec "follows property" and the charged property still guarantees performance of the secured obligation/credit.

The main principles which guide the hypothec are: publicity, speciality and accessority.

a) Publicity principle: no hypothec might exist without registration in the Land Registry (*Registro de la Propiedad*) (art. 104 LH). Since 1861, any hypothec requires to be registered in order to exist so as to avoid usury and ocult charges on land. Land credit requires the absolute dependence of the hypothec on the Land Registry: creation, life and extinction, not only in its active operations

(credits guaranteed by hypothec —*créditos hipotecarios*—) but also in its passive operations (hypothecs funded by mortgage bonds —*cédulas hipotecarias*— and mortgage-backed securities —*bonos de titulización hipotecaria*—). Any hypothec that is not registered does not exist. Once registered, hypothecs receive a rank, which determines their priority in respect of other charges on the land and with respect to third parties.

b) Speciality principle: as there is a complete registration of the hypothec in the Land Registry, all aspects of the charged land over which the hypothec is granted must be determined. Only the clearly specified immovable (art. 119 LH) can be charged by hypothec. It is not possible to create a hypothec or any other security on the debtor's whole patrimony.

c) Accessority principle: the creation of a hypothec is only possible in Spanish law if this is done in order to protect a credit/obligation. Thus, there is a narrow relationship between the guaranteed credit/obligation and the hypothecary credit. No hypothec is able to live without a credit/obligation; it subsists as long as the obligation/credit continues to exist. This is the reason why in Spanish law the term "hypothec" is also attached to the term "credit", that is to say, hypothecary credit (*crédito hipotecario*). This is particularly important and evident in case of assigment of credits that are secured by a hypothec: as it is stated in art. 149 LH, the assignment refers to hypothecary credit itself as a whole juridical reality, but not to the hypothec alone. Hypothecs alone cannot be charged: what is susceptible to charge is the hypothecary credit; this is a sub-hypothec (art. 107.4 LH), that is, a hypothec of a credit guaranteed by a hypothec.

Art. 137 LH states that hypothecs may be either voluntary or legal. Voluntary hypothecs are those that are agreed by the parties or by constituted unilateral disposition of the land owner[8] (art. 138 LH); after the agreement or the unilateral disposition, the hypothec does not exist until it is registered. Legal hypothecs are those created on the basis of a legal disposition in certain special cases, but this does not mean that they are created automatically by law: the law only gives a right to certain people to grant a mortgage on certain other's goods (art. 158 LH). Besides the types of legal hypothecs that are already regulated in the Ley Hipotecaria (art. 168 LH), only specific dispositions in future acts may create new legal hypothecs. Once legal hypothecs are registered, they produce the same effects as the voluntary ones.

Besides a"standard/normal" hypothec over a piece of land, art. 107 LH establishes other possible property which can be charged by a hypothec: usufructs, already existing hypothecary credits (sub-hypothec), superficies, administrative concessions, properties under redemption, etc. They have different specialities, the study of which goes beyond the scope of this work.

[8] In this last case a posterior acceptance of the creditor is needed the hypothec to be fully effective. If this acceptance of the charge does not take place, the hypothec must be cancelled in the Land Registry. No legal period of time for acceptance is laid down. The main advantage of this type of hypothec is that, once the acceptance takes place, the hypothec is treated as having existed since the unilateral declaration of the owner, with its corresponding advantages in the rank.

Special and more flexible hypothecs are those which guarantee future obligations (art. 142 to 143 LH), hypothecs that guarantee bank accounts (art. 153 LH) and hypothecs guaranteeing securities (art. 150, 154, 155 and 156 LH). Second and posterior hypothecs granted on the same property are also possible (art. 107.3 LH).

Any hypothec contains the following contents:

a) Right of the hypothecary creditor to prevent the depreciation of the charged land's value (*acción de devastación*, art. 117 LH).

b) Once the guaranteed obligation is enforeable and the debtor defaults in paying, the hypothecary creditor may require the sale of the charged land. Besides this real action (real because it is enforced directly to the charged land, art. 129 LH) a personal action also exists, which may be enforced against all the patrimony of the defaulted obligation's debtor (art. 1911 CC).

c) The procedure to foreclose a hypothec is regulated by art. 681 to 698 LEC. Usually, it is a judicial procedure, but the parties may agree to foreclose the hypothec by a notarial procedure in case the debtor defaults (art. 129 LH).

d) The consequences of foreclosure are the sale of the land (by a public auction) and the purge of any subsequent registered rights and charges over the foreclosed land (art. 134 LH). In the first place, the enforced credit must be fully satisfied with the amount that has been obtained. In the second place, all rights and charges over the land, which have been registered (in the Land Register) after the enforced obligation, must disappear. The creditors of these last credits will only be satisfied in the case that there is any surplus between the amount obtained by the land's sale and the amount of the enforced obligation (art. 692 LEC). Previous charges to the enforced one will be outstanding over the land, independently of who has acquired it at the auction.

V. ACQUISITION REAL RIGHTS

The holder of these types of rights has the right to obtain, from its owner's hands and with some kind of preference, ownership of the property charged with these rights.

The call option (*opción*) is the faculty that the owner of a property gives to another person to acquire it, paying the agreed price and accomplishing some other conditions. Only if this call option right is properly registered (in the Land Register) will it bind any third party who may acquire the property[9]. The agreement between the

[9] In order to study which are the relationships between the call option and the Land Register, see RDGRN 7.12.1978 (*RAJ* 4506) and RDGRN 28.9.1982 (*RAJ* 5369).

owner and the holder of the call option, the agreed price and the time that the holder of the call option has to enforce the right must also be registered.

Pre-emption (*tanteo*) entitles its holder to acquire the charged property before any third party acquires it, paying the price that this third party would have paid (ex. art. 1656.6 CC). Whereas a pre-emption might be enforced before the alienation of the property, redemption (*retracto*) should be enforced only when the property has already been alienated (art. 1507 CC) [10]. In this case, the holder of the acquisition real right subrogates himself/herself to the position of the first buyer of the property, paying the same price that was paid for the thing by this buyer.

Besides these types of contractual acquisition of real rights, the Spanish civil laws in force establish some legal redemption rights, that is to say, redemption rights that exist by the force of law for the benefit of some specific persons who hold a special juridical position (art. 1521 CC). These people are: co-owners of a property for which a share in the property is held by each one (art. 1522 CC); owners of adjoining farmland to purchase farmland that is physically contiguous with their own (art. 1523 CC); all or some of the co-heirs to a share in joint estate sold by one or more of the fellow heirs (art. 1067 CC); formal and material owners of property in emphyteusis (legal right of pre-emption and redemption, art. 1636 CC); and lesees over the leased dwelling where the lessor wants to sell the dwelling to a third party (art. 25 LAU).

Catalonia has its own regulation on acquisition of real rights in Act 22/2001 (art. 19 to 35). Option, pre-emption and redemption may be shaped either as obligational or real rights (art. 20) and may charge movables, immovables and future property (art. 21). In Galicia, a special legal redemption right which is called "retracto de graciosa", and whose finality is the recovering of agricultural tools by the farm labourer in case that his/her patrimony (and also the tools) has been enforced by debts is regulated in art. 34 LDCG. In the Basque Country there exists the institution of the "saca foral", which is similar to the legal redemption of the Civil Code, but has significant differences: when the legal beneficiary of the right enforces it, the first sale becomes void and a new contract of sale must be carried out between him/her and the original owner, with a new set of conditions and a new price (with an objective determination of it). The "saca foral" may only be held by relatives of the direct line when the property is sold to a non-relative or to a distant relative third party (art. 112 to 127 LDCF). Navarre (*leyes* 445 to 462 Comp.Nav.) has a general regulation with special institutions like the "retracto gracioso" (in case of a patrimonial foreclosure) or the "retracto gentilicio" (a familiar right of redemption). Aragon, with the "derecho de abolorio o de la saca" (art. 149 to 152 Comp.Ar.) and the Balearic Island (a *mortis causa* right of redemption, art. 82 Comp.Bal.) have their —more or less complete— own regulation on acquisition of real rights.

[10] TS 21.4.1975 (*RAJ* 1820), 20.2.1978 (*RAJ* 586).

§ 28. LAND REGISTER

PEDRO DEL POZO CARRASCOSA

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SUMMARY: I. THE LAND REGISTER. II. APPLICABLE LAW. III. REGISTRABLE SITUATIONS. IV. THE OBJECT OF THE REGISTERED RIGHT: THE REGISTERED PROPERTY. V. ACCESS TO THE REGISTER. 1. Registrable titles. 2. Application entry. 3. The evaluation by the Registrar. 4. The mechanics of the Register. The real record. 4.1. The concept of real record. 4.2. Opening of the real record: *immatriculation*. 4.3. The operation of the real record. A) The principle of priority. B) The principle of continuity. 5. The entries in the Register. 5.1. Registration entry. 5.2. Advance registration. 5.3. Marginal notice. 5.4. Cancellation. VI. THE CONSEQUENCES OF PUBLICATION IN THE REGISTER. 1. The presumption of exactitude of the Register. 1.1. Possessory presumptions. 1.2. Void titles are not validated. 2. The effects of registration with regard to third parties. 2.1. Article 32 LH. 2.2. Article 34 LH: the principle of public authority of the Register.

I. THE LAND REGISTER

The aim of the Land Register is the registration of acts and contracts related to ownership and real property rights in land (art. 1 LH and 605 CC).

The legal background of any immovable property can be found in the books of Land Register, thus making it possible that third persons know the exact legal situation that might affect them. The Register is public, so that anybody with a legitimate