

# POLISH ADMINISTRATIVE LAW

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## EXPROPRIATION OF REAL ESTATE IN THE CONSTITUTION OF THE REPUBLIC OF POLAND AND IN THE DECISIONS OF THE CONSTITUTIONAL TRIBUNAL

### 1. The Essence of Expropriation of Real Estate in the Constitution of the Republic of Poland

The notion of expropriation has caused a lot of doubts ever since this term was first used in Art. 7 of the Constitution of 1952 (in the version formed by the amendment of December 1989<sup>1</sup>). Even though the Constitution of 1952 was abolished when the “Small Constitution” of 1992 became effective<sup>2</sup>, Art. 7 maintained its binding force until the Constitution of the Republic of Poland of 2 April 1997 came into force<sup>3</sup>. Article 21 of the current Constitution says: “1. The Republic of Poland shall protect ownership and the right of succession. 2.2. Expropriation may be allowed solely for public purposes and for just compensation.”

Problems with the definition of expropriation are caused, most of all, by the fact that the Constitution does not precisely define this institution. Expropriation is regarded as a pre-existing term and, to define it, one must refer to views of the

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1 Statute of 29 December 1989 on amending the Constitution of the Polish People's Republic (Journal of Laws no. 75, item 444). As a result of the revision of the Constitution, such laws were changed as those on the social and economic system. The changes included an introduction of the principle of freedom of economic activity and protection of property.

2 Constitutional law of 17 October 1992 on Mutual Relations between the Legislative and the Executive Powers in the Republic of Poland, and on Territorial Self-government (Journal of laws no. 84, item 426, with subsequent changes).

3 Journal of Laws no. 78, item 483, with subsequent changes.

doctrine and to judicial decisions. Notably, as a statutory institution, expropriation has been and still is understood as deprivation of property on the basis of an individual administrative decision<sup>4</sup>.

Since the early 1990s, the constitutional term of expropriation has been generally understood in a broader sense than the statutory one. On the basis of Art. 7 of the Constitution of 1952, in its decision of 8 May 1990, the Constitutional Tribunal stated that “expropriation, in the understanding of Art. 7, means all deprivation of property [...] regardless of its form”<sup>5</sup>. The position of the Tribunal was completely different in its decision of 28 May 1991. The position of the Tribunal was completely different in its verdict of 28 May 1991<sup>6</sup>, when the Tribunal decided that the term “expropriation” has a fixed meaning in the doctrine and the law, and stands for depriving of property conducted on the basis of an individual administrative decision. However, in its later decisions, the Constitutional Tribunal returned to the broader definition of expropriation presented in the verdict of 8 May 1990. This understanding of the institution of expropriation became dominant in the 1990s. Because the provision on expropriation was transferred into the Constitution of 1997 almost without any changes, the decisions of the Constitutional Tribunal of the early 1990s remain valid to this day.

The fact that expropriation is treated as a pre-existing term does not mean that it should be interpreted the way it is defined in the act on real estate administration. According to general principles of interpretation of legal acts, as well as to decisions of the Constitutional Tribunal, provisions of the Constitution must not be interpreted on the basis of statutory provisions<sup>7</sup>. Therefore, the interpretation of the institution of expropriation in the Constitution of the Republic of Poland must be autonomous<sup>8</sup>. The statutory provisions may only play an ancillary role in the process of interpretation. This was the argument used by the Constitutional Tribunal in its verdict of 7 February 2001<sup>9</sup>. In another verdict, that of 12 April 2000<sup>10</sup>, the Tribunal stated that it is the Constitution that must set the direction for interpretation of statutory provisions, not the other way around.

The broad definition of expropriation that results from the Constitutional Tribunal verdicts means that expropriation comprises not only deprivation of property under an administrative decision but also any other deprivation of property

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4 See Art. 112 of the statute of 21 August 1997 on Administration of Real Estate (Journal of Laws 2004, no. 261, item 2603, with subsequent changes) and art. 46-48 of the previous statute of 29 April 1985 on Administration of Real Estate and Expropriation of Real Estate (Journal of Laws 1991, No. 30, item 127).

5 K 1/90, OTK 1990, item 2.

6 K 1/91, OTK 1991, item 4.

7 See L. Morawski, *Zasady wykładni prawa*, Toruń 2006, p. 113.

8 B. Banaszkiwicz, *Konstytucyjne prawo do własności* in: M. Wyrzykowski (ed.) *Konstytucyjne podstawy systemu prawa*, Warsaw 2001, p. 47.

9 K 27/00, OTK 2001, no. 2, item 29.

10 K 8/98, OTK 2000, no. 3, item 87.

for public purposes. The form of the deprivation of property is irrelevant<sup>11</sup>. To support this position of the Tribunal, one can quote the fact that Art. 21, item 2 of the Constitution does not stipulate the allowed form of expropriation<sup>12</sup>. Another provision of the Constitution (Art. 31 passage 2) states only that expropriation can be effected solely on the basis of a statute.

The position of the Constitutional Tribunal was modified in the aforementioned verdict of 12 April 2000 and in the verdict of 14 March 2000<sup>13</sup>. The Tribunal made the reservation that the broad understanding of expropriation may not give the legislator the discretion to deprive citizens of property. Article 21 passage 2 may not be a model of control for depriving communes of elements of their property. What is applicable in such cases is the provisions of Art. 165 and 167 of the Constitution.

The verdict of the Constitutional Tribunal of 19 December 2002<sup>14</sup> on the property of Poles who have left their property in the territories to the east of the Bug River when they were re-settled to Poland in its new borders after World War II shows that Art. 21 passage 2 may refer to the so-called factual expropriation in the understanding of the decisions of the European Court of Human Rights<sup>15</sup>. On the other hand, in the aforementioned verdict of 14 March 2000, the Constitutional Tribunal found expropriation *ex lege*, conducted by means of a statute, which is a general and abstract act, as being in conformance with the constitution<sup>16</sup>.

The Constitutional Tribunal's verdict of 21 June 2000 was a turning point in the constitutional understanding of expropriation<sup>17</sup>. The Tribunal returned to the narrow definition of expropriation that was presented in the K1/91 case. The Tribunal referred to expropriation as a pre-existing institution and highlighted the importance of the administrative act of expropriation. It also stated that adapting the broad definition of expropriation makes the difference between expropriation and nationalization, and between expropriation and limitation of proprietary rights, very blurry. This standing was accepted by a part of the doctrine<sup>18</sup>.

11 Verdict of the Constitutional Tribunal of 8 May 1990, K1/90.

12 See M. Szewczyk, *Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawa* in: J. Filipek (ed.), *Jednostka w demokratycznym państwie prawa*, Bielsko Biala 2003, p. 654, 660-661.

13 P 5/99, OTK 2000, no. 2, item 60.

14 K 33/2002, OTK-A 2003, no. 7, item 97.

15 The existence of factual expropriation was permitted by the European Court of Human Rights, in its verdict in the *Sporrong and Lönnroth against Sweden* case (1982). See C. Mik, *Prawo własności w Europejskiej Konwencji Praw Człowieka*, "Państwo i Prawo" 1993, No. 5, p. 30.

16 See L. Garlicki, "Artykuł 21" in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, v. 3, Warsaw: 2003, note no. 16, and the critical remarks of T. Woś to such definition of expropriation: T. Woś, *Wywłaszczenie i zwrot nieruchomości*, Warsaw 2007, p.35-36.

17 P 25/02, OTK-A 2005, no. 6, item 65.

18 T. Woś, *ibid.*, 33-35.

## 2. The Object of Expropriation

According to a systemic interpretation, expropriation (Art. 21 passage 2 of the Constitution) applies to property stipulated in Art. 21 passage 1 of the Constitution. Due to the variety of terms used by the Constitution, it is difficult to determine the meaning of the term “property” in the understanding of Art. 21. Without a deep analysis of this issue<sup>19</sup>, it is reasonable to support the view that the meaning of property should be broad, due to the guarantee role of the Constitution. Property, in the understanding of Art. 21, means various proprietary rights. Contrary to the provisions of relevant statutes, the Constitution does not specifically state that expropriation refers to real estate. Consequently, as a part of the doctrine claims, the object of expropriation may be not only real estate but also movable goods and intangible goods<sup>20</sup>. An additional argument supporting such a position is the broad definition of property in Art. 1 of the Protocol no. 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms<sup>21</sup>. The supporters of the narrow definition of expropriation, on the other hand, claim that only real estate may be the object of expropriation<sup>22</sup>.

## 3. Prerequisites for Expropriation

The material prerequisite for expropriation is a public purpose. The Constitution does not define this term and leaves it to statutory provisions to define it<sup>23</sup>. The legislator purposefully used an imprecise definition in order to allow the statute to cover complex circumstances of social life<sup>24</sup>. The prerequisites are evaluated not only by the agency effecting expropriation but also by the court that decides on the legality (conformance with the constitution) of the deed<sup>25</sup>. The linguistic interpretation leads to the conclusion that a public purpose has to serve the whole society or a regional society<sup>26</sup>. The limit of so-defined public purpose is the principle of proportionality<sup>27</sup>.

A public purpose of a compensation means that expropriation cannot be effected to the benefit of a public entity (e.g. to enfranchise members of housing

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19 See M. Szalewska, *Wywłaszczenie nieruchomości*, Toruń 2005, 121-124; S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*, Kraków 2003, p. 32-43; T. Woś, *ibid.*, 28-30.

20 M. Szalewska, *ibid.*, 125; otherwise T. Woś, *ibid.*, 30.

21 See F. Zoll, *Prawo własności w Europejskiej Konwencji Praw Człowieka*, “Przegląd Sądowy” 1998, No. 5, p. 28.

22 T. Woś, *ibid.*, 40.

23 M. Szewczyk, *ibid.*, 655. The public purpose is defined by Art. 6 of the statute on administration of real estate.

24 L. Garlicki, *ibid.*, note 18.

25 *Ibid.*

26 T. Dybowski, *Własność w przepisach konstytucyjnych wedle stanu obowiązywania w 1996* in: J. Trzcinski, A. Jankiewicz (eds), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, Warsaw 1996, p. 326.

27 See M. Szalewska, *ibid.*, 98. Compare B. Banaszkiwicz, *ibid.*, 48; L. Garlicki, *ibid.*, note 18.

cooperatives)<sup>28</sup>. It is prohibited to use real estate that has been expropriated for a purpose other than a public one<sup>29</sup>.

The literature on this subject does not contain any important disagreements on defining public purpose as a prerequisite for expropriation being constitutional and not as a part of the definition of expropriation<sup>30</sup>. Similarly, in its verdict of 12 April 2000, the Constitutional Tribunal stated that “a public purpose is the condition for admissibility of expropriation and not its constitutive characteristic.”

The formal prerequisite of expropriation is its statutory grounds. The possibility to effect expropriation solely on the basis of a statute is stipulated in Art. 31 passage 3 of the Constitution. This provision allows for limiting the rights and freedoms of an individual solely by means of a statute. This is particularly important because expropriation, which breaches the essence of proprietary rights, can be effected only on the basis of a statute<sup>31</sup>. Moreover, it should be highlighted that authorization to effect expropriation must be expressly stated in a statute and cannot be implied<sup>32</sup>.

#### 4. Just Compensation

As early as the aforementioned verdicts of 1990, the Constitutional Tribunal decided that just compensation is compensation that does not harm the individual and, thus, one which is fair and equivalent<sup>33</sup>. Such compensation should make up for the value of the expropriated real estate and allow the owner to reconstruct it<sup>34</sup>. Moreover, it should determine an adequate, given the circumstances, method to evaluate and pay the compensation<sup>35</sup>. Such compensation does not always have to be a full compensation. The very fact of the compensation not being full does not have to be deemed unconstitutional<sup>36</sup>. Nevertheless, decisions of the Constitutional Tribunal have tended to require a compensation of the full value of the expropriated good<sup>37</sup>.

Imposing deductions other than those related to the pre-existing encumbrances of the real estate breaches the constitutional principle of just compensation<sup>38</sup>.

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28 L. Garlicki, *ibid.*, note 15. See verdict of the Constitutional Tribunal of 29 May 2001.

29 T. Dybowski, *ibid.*, 326.

30 So says e.g. B. Banaszkiwicz, *ibid.*, 47.

31 L. Garlicki, *ibid.*, note 18.

32 See the decision of the Supreme Administrative Court of 15 February 2000, SA/Bk 901/99, OSP 2001, v. 4, item 61 with a gloss of M. Wolanin.

33 Verdict of the Constitutional Tribunal of 8 May 1990, OTK 1990, item 2.

34 Verdict of the Constitutional Tribunal of 19 June 1990, K 2/90, OTK 1990, item 3.

35 M. Szalewska, *ibid.*, 257.

36 Verdict of the Constitutional Tribunal of 23 September 2003, K 20/02, OTK-A 2003, no. 7, item 76.

37 See L. Garlicki, *ibid.*, note 20.

38 Verdict of the Constitutional Tribunal of 8 May 1990.

Compensation must be paid instantly<sup>39</sup>. The Constitutional Tribunal also decided that it was not allowed to pay compensation in installments in such a way that the actual value of the compensation becomes lower as a result of inflation<sup>40</sup>.

## 5. Conclusion

It is quite difficult to define the essence of expropriation in the Constitution of the Republic of Poland. There is a broad agreement on the fact that the institution of expropriation is autonomous to statutory provisions. On the other hand, the lack of a legal definition of expropriation in the Constitution results in it being regarded as a pre-existing institution. The doctrine does not unanimously declare whether expropriation stipulated in Art. 21 passage 2 of the Constitution should be treated in a broad way, regardless of its form, or whether it should be treated traditionally, as the deprivation of ownership of real estate on the basis of an administrative decision. The lack of unanimity in the doctrine affects the decisions of the Constitutional Tribunal. Just a few years ago, one could say that, despite some hesitation, the Tribunal adopted the broad concept of expropriation. However, in its decision of 21 June 2005, the Tribunal returned to the traditional definition of expropriation.

It appears that the rights of an individual should be the focal point of discussions about the constitutional concept of expropriation. Therefore, one should strive to define the circumstances in which the constitutional proprietary right will be protected in the most effective manner. Nevertheless, it appears that a broad definition of expropriation is a more effective method and, as T. Woś proves in his work, an expropriation effected on the basis of an individual administrative decision, subject to the monitoring of an administrative court, can assure an effective protection of proprietary rights. Allowing *ex lege* expropriation results in a constitutional becoming the only measure of defense available to an individual<sup>41</sup>. It is apparent that discussion on the constitutional nature of expropriation is far from reaching its conclusion.

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39 P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Warsaw 2000, p. 35.

40 Verdict of 19 June 1990, K 2/90 (OTK 1990, no. 1, item 3). Similarly in verdict of 14 March 2000, P 5/99.

41 T. Woś, *ibid.*, 35–36

## **Streszczenie**

Problematyka wywłaszczenia nieruchomości została uregulowana w art. 21 ust. 2 Konstytucji RP z 1997 r. W świetle tego przepisu wywłaszczenie może być dokonane tylko na cele publiczne i za słusznym odszkodowaniem. Ustrojodawca nie konkretyzuje, że chodzi o wywłaszczenie nieruchomości (jak to jest tradycyjnie rozumiane). W związku z tym w doktrynie i orzecznictwie Trybunału Konstytucyjnego pojawiają się, wciąż nierozstrzygnięte, kontrowersje co do faktycznego przedmiotu wywłaszczenia, o którym mowa w konstytucji. Sprawę dodatkowo komplikują spory co do konstytucyjnego rozumienia prawa własności (art. 21 ust. 1).