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Between *Ius* and *Lex*: axiological and legal determinants of the problem of reprivatization in Poland in the light of transitional justice

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Abstract::

The article analyzes the axiological determinants of the problem of reprivatization in Poland in the light of the constitutional principle of protection of property rights and the requirements of the so-called transitional justice. The various principles that should be the foundation of the reprivatization process can be formulated in moral, as well as legal, economic or social aspects.

Keywords: right of property, reprivatization, transitional justice, legal theory

Rozróżnienie *Ius* a *Lex*: aksjologiczne i prawne uwarunkowania problemu reprivatyzacji w Polsce w świetle wymiaru sprawiedliwości okresu przejściowego

Streszczenie:

W artykule dokonano analizy uwarunkowań aksjologicznych problemu reprivatyzacji w Polsce w świetle konstytucyjnej zasady ochrony praw własności oraz wymogów tzw. wymiaru sprawiedliwości okresu przejściowego. Różne zasady, które powinny stanowić podstawę procesu reprivatyzacji, można sformułować zarówno w aspekcie moralnym, jak i prawnym, ekonomicznym czy społecznym.

Słowa kluczowe: prawo własności, reprivatyzacja, wymiar sprawiedliwości okresu przejściowego, teoria prawa

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Introduction

The problem of reprivatization is an issue around which heated disputes have been taking place in Poland since the political transformation of 1989 – not only from a political and legal point of view, but also from an axiological point of view, since the final legal decision on the adoption of certain solutions (models) of reprivatization each time requires a prior decision on the sphere of values constituting the basis for this decision.

At the same time, in the Polish literature on the subject, many different concepts have appeared – based, inter alia, on the categories of equity or justice – concerning the formulation of a certain hierarchy of values that would justify the decision on the possible return or lack thereof of property seized by the state as part of processes of nationalization to the former owners. There were also appeals to the human sense of injustice. Therefore, from the point of view of the objectives of this study, it is reasonable to present selected views on the axiological determinants of the problem of reprivatization.

These views have been repeatedly expressed in the literature over the past three decades. As Senate Speaker Alicja Grześkowiak noted in 1999 at the opening of a conference on reprivatization: “Since the Republic of Poland became a democratic state under the rule of law in 1989, it is the duty of the state to reverse, if possible, the illegality of that nationalization and to redress the wrongs caused by unlawful nationalization. In order to solve the problem of reprivatization, it is important to look at the nationalization carried out by the communist authorities from the point of view of its compliance with basic human rights, as well as the constitution in effect at the time.”²

This is due to the fact that – even in the reality set by the limits of legal positivism – the law in force in Poland (which can be described as just or equitable) is the law relating to the goals, principles and values of the Constitution of the Republic of Poland and to the obligations expressed in the international covenants on human rights ratified by Poland. Therefore, according to Speaker Grześkowiak, in order to carry out the reprivatization process “one needs not only the spirit of truth and respect for human rights, but also respect for the

² A. Grześkowiak, *Otwarcie konferencji*, [in:] *Reprywatyzacja w systemie prawa. Materiały z konferencji zorganizowanej przez Komisję Ustawodawczą Senatu we współpracy z Ministerstwem Skarbu Państwa*, ed. M. Lipińska, J. Pietrzak, Warszawa 1999, p. 12.

letter of these laws. So many people expect this. It expects a break with the totalitarian communist legacy and real respect for human rights.”³

Axiological determinants of the problem of reprivatization in the light of the constitutional principle of protection of property rights

Under the current Polish Constitution, the right to property is a constitutional principle belonging to fundamental human rights and freedoms (“Everyone has the right to property, other property rights and the right of inheritance” – Article 64(1) of the Polish Constitution). The right to property is therefore subject to special protection (“Property, other property rights and the right of inheritance shall be subject to equal protection under the law for all” – Article 64(2) of the Constitution of the Republic of Poland) and may be restricted only in special cases.

However, this is not impossible, for the restriction of property rights already existed in Roman law. According to the wording of Article 21(1) of the Polish Constitution, on the one hand, “the Republic protects property and the right of inheritance”, and on the other hand, Article 21(2) of the Polish Constitution stipulates that deprivation of property without the consent of the owner requires appropriate compensation. It should be added here that the concept of expropriation, which appears in the text of the provision in question, is not defined, but only linked to the requirements of public purpose and adequate compensation. However, the concept of “expropriation” was defined by the Constitutional Court, stating that in light of Article 21(2) of the Constitution, “expropriation” is “any deprivation of property regardless of the form”⁴.

At the same time, however, it should be noted that during the period of revolutionary changes of a systemic nature, and the processes of nationalization carried out by the communist authorities in Poland in 1944-1962 should be considered as such, the right to property is often restricted in a grossly disproportionate manner as a result of legal acts or arbitrary actions of the authorities interfering in the sphere of individual property. An example of restriction may be – as noted Ryszard Pessel – the decree of September 6, 1944 on the implementation of land reform, where, contrary to the principle of property protection, no

³ Ibidem.

⁴ Judgment of the Constitutional Court of March 14, 2000 ref. P. 5/99, OTK 2000, no. 2, item 60.

compensation was provided for⁵. After the political transformation in 1989, this decree became the subject of many disputes regarding its actual nature in the constitutional sphere. However, in its order of November 28, 2001, the Court did not assess the compatibility of Article 2(1)(e) of the Land Reform Decree with Article 99 of the March Constitution⁶.

The nationalization processes carried out in Poland by the communist authorities permanently changed the ownership structure. This is because, as R. Pessel rightly emphasizes, the nationalization acts, as a public legal event, caused permanent effects in terms of changing the nature of property⁷. The Constitutional Court also made a similar statement, stating in the justification for its resolution of June 18, 1996, that “the concept of taking over for the benefit of the State Treasury hides various legal events, but all examples contain one common element, the forcible subtraction of the right of ownership, even when it was formally carried out on the basis of civil law, such as the execution of a claim for transfer of ownership”⁸.

Therefore, it is reasonable from the point of view of this study to discuss the consequences of nationalizing acts from a constitutional perspective, especially in terms of property protection. This is because the principle of protection of property rights expressed in Article 99 of the March Constitution – which specifies the possibility of state interference in the abolition or restriction of property – was subsequently transferred to the April Constitution, as well as to the 1997 Constitution. Therefore, comments on Article 99 of the March Constitution should also be referred to the April Constitution. This is because although Article 81 abrogated the March Constitution as a constitutional act, at the same time it upheld the twelve articles constituting it, including Article 99 establishing the protection of property.

At the same time, the determination of the content of the right to property in the 1952 Constitution of the Polish People’s Republic is also an important point of reference in this case, since the communist authorities carried out a number of nationalizing acts during the period of that Constitution. However, on the other hand, it should also be noted that the Constitution of the Polish

⁵ R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych*, Warszawa 2003, p. 78.

⁶ Provision of the Constitutional Court of November 28, 2001 ref. SK. 5/01, OTK 2001, no. 8, item 266.

⁷ R. Pessel, *op. cit.*

⁸ Resolution of the Constitutional Court of June 18, 1996 ref. W. 19/95, OTK 1996, no. 3, item 25.

People's Republic was enacted only in 1952, and therefore did not so much enable some of the nationalization processes as legitimize their effect in the form of state seizure of property. First of all, the Constitution of the Polish People's Republic adopted the model of nationwide property that was present in the USSR, based on the principle of unity of nationwide property, providing in Article 8 that "nationwide property shall vest indivisibly in the state".

In addition, the text of the Constitution of the Polish People's Republic stated that property had a diverse nature, and thus the scope of protection and the number of guarantees enjoyed by different types of property were also distinct. The least of these was enjoyed by so-called personal property, which was considered to be those goods that are used for consumption. Thus, the manner of property protection contained in Article 99 of the March Constitution differed from the model of socialist property protection adopted in the 1952 Constitution. An example confirming this statement is the fundamentally different definition of the state's goals, as limiting, suppressing and eradicating social classes living off the exploitation of workers and peasants. However, the state system until July 22, 1952, did not provide for such tasks, maintaining the standard of property protection from the March Constitution. The determination of the unconstitutionality of nationalization acts can be made on the basis of Article 99 of the March Constitution, which was then in effect, and not the provisions of the 1952 Constitution, which, after all, sanctioned the illegality of the seizure of private property.

On the basis of Article 99 of the March Constitution, the validity of which after World War II was determined by a decree of the PKWN, deprivation of property rights could only be carried out with compensation. This meant, therefore, that post-war nationalization acts had to be, first, laws, and second, provide for compensation to owners. Failing to meet both of these conditions, they were unconstitutional in the legal sense. Therefore, the search for legal justification for compensating the effects of nationalization acts issued in 1944-1962 in Article 99 of the Constitution is – as R. Pessel notes – closely related to the discussion of legal continuity between the Second and Third Republics"⁹.

At the same time, R. Pessel refers to the views of legal doctrine according to which the nationalization acts of 1944-1962 constituted neither expropriation nor socialization in terms of the March Constitution; Article 99 of that Constitu-

⁹ R. Pessel, *op. cit.*, p. 80.

tion corresponds to today's Article 21 of the 1997 Constitution¹⁰. This view seems to take into account the fact that Article 99 of the March Constitution can be considered a standard of property protection not dissimilar to that in the current Constitution (Articles 21, 64). However, according to some authors – including S. Jarosz – Article 99 of the March Constitution was not in force after World War II due to the new political conditions, since the PKWN Decree assumed the validity of only the basic assumptions of the March Constitution. However, a different view on this issue is presented by the majority of Polish doctrine. However, it is worth quoting individual considerations on this subject by selected authors.

Thus, according to Sylwia Jarosz, on the basis of Article 99 of the March Constitution, possible state interference in the sphere of property can be defined as follows:

- expropriation for reasons of higher utility (paragraph 1 sentence 1 of Article 99 of the March Constitution);
- a catalog of property that can be taken by the state into ownership for reasons of public benefit (paragraph 1, sentence 2 of Article 99 of the March Constitution);
- the determination by statute of the state's right to compulsorily purchase land and regulate the circulation of land (paragraph 2, second sentence of Article 99 of the March Constitution)¹¹.

Moreover, according to S. Jarosz, Article 99, paragraph 1, sentence 1 of the March Constitution defines expropriation in classical terms, while in the case of the content of Article 99, paragraph 1, sentence 2, we should speak of socialization¹². At the same time, even according to the typology of Andrzej Gwiżdż – made in 1956, and thus theoretically taking into account the communist way of thinking about the right to property – Article 99 of the March Constitution defined six separate legal norms, which concerned:

- recognition of the right to property as the basis of the social system and legal order;
- vouching for the protection of property by the state;
- determination of the possibility of abolishing or limiting the right to property;

¹⁰ *Ibidem*, p. 82.

¹¹ S. Jarosz, *Zagadnienia konstytucyjnych podstaw reprivatyzacji*, PiP, 1999, b. 7. p. 49.

¹² *Ibidem*, p. 51.

- defining by law the catalog and scope of property that could be owned by the state;
- determination by law of the restrictions in the sphere of free use of property;
- specifying by law the restrictions on the circulation of land through compulsory purchase¹³.

In addition, as early as 1956, A. Gwiżdż considered it inaccurate to justify the thesis that Article 99 allows the socialization of property (means of production) by means of their socialization. It is nowadays recognized that in democratic legal states, the restriction of property rights is possible only in cases specified by law and only for public purposes and with adequate compensation. With this in mind, it should therefore be concluded that the content of Article 99 of the March Constitution was part of such a standard of property protection.

All the more so, therefore, the nationalization acts issued by the communist authorities in post-war People's Poland were incompatible with this standard. Thus, sticking rigidly to the letter of the law, it would have to be considered that unlawful interference with the property rights of the owners should be remedied by granting them the previously seized property in kind or paying appropriate compensation.

Axiological determinants of the problem of reprivatization in the light of transitional justice

From the point of view of the axiological determinants of the problem of reprivatization, it is also worth considering the issue in the context of transitional justice and its various models, which are associated with the description of the fundamental political transformations and methods of settling the past¹⁴. As Michal Krotoszyński notes, accounting for the past is a multifaceted phenomenon, which can be analyzed on at least three levels (or: at least in three aspects)¹⁵. Firstly, at the level of mechanisms – in particular: legal mechanisms – by means of which societies settle the undemocratic past. Secondly, at the axiological level, encompassing formulas of justice related to the settlement of

¹³ A. Gwiżdż, *Burżuazyjno-obszarnicza Konstytucja z 1921 r. w praktyce*, Warszawa 1956, p. 81.

¹⁴ See A. Czarnota, *On the Beauty of Confusion or Transitional Justice and Rule of Law*, [in:] *Wielowymiarowość prawa*, ed. J. Czapska, M. Dudek, M. Stępień, Toruń 2014.

¹⁵ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 11.

the past, as well as the values pertaining to this settlement and to the construction of a democratic system. And last but not least, at the level of decisions on the application of mechanisms of settling the past, made taking into account the values nourished by the subject and the formulas of justice accepted by him, as well as factors of non-ethical nature.

The very concept of transitional justice is linked to actions taken by a modern state or society to confront its history, including those acts of the former political regime that violated human rights. At the same time, the state interference with an individual's right to property and the transition of this right from the private to the public domain as a result of acts of nationalization issued by the communist authorities in Poland in 1944-1962 should be considered an action that violated human rights.

The problem of the reprivatization of property in Poland from the perspective of the constitutional protection of property rights should therefore be considered in the context of the wording of Article 99 of the March Constitution or of Articles 21 and 64 of the 1997 Constitution of the Republic of Poland. Contemporary to this is the question of the relationship between the constitutional principle of the rule of law and the individual's right to compensation from the State Treasury for unlawful acts of public authorities, as expressed in Article 77(1) of the Constitution. In particular, the discussion concerned the question of the possibility of direct application of this article, i.e. resolving whether the provision expressed in Article 77(1) has the character of a mere programmatic provision, or whether it constitutes an independent legal norm that is a source of rights and obligations or a constitutional benchmark of the state's liability for the unlawful actions of its various bodies¹⁶.

The Constitutional Court also commented on this problem in its judgment of April 12, 2001, stating that the prerequisites for the liability of public authorities are the occurrence of damage within the meaning of Article 361 of the Civil Code, the active act or omission of a public authority (legislative, executive and judicial) and the unlawfulness of that act or omission¹⁷. Thus, The basis for the liability of the State Treasury under Article 77(1) of the Constitution is – as

¹⁶ See M. Safjan, *Odpowiedzialność państwa na podstawie art. 77 Konstytucji RP*, „Państwo i Prawo” 1999, b. 4, p. 3 and the following; A. Szpunar, *O odpowiedzialności odszkodowawczej państwa*, „Państwo i Prawo” 1999, z. 6, s. 86. and n.; E. Łętowska, *W kwestii zmian kodeksu cywilnego o odpowiedzialności za szkody wyrządzone działaniem władzy publicznej*, „Państwo i Prawo” 1999, b. 7, p. 75 and the following.

¹⁷ Judgment of the Constitutional Court of April 12, 2001, ref. SK. 18/00, OTK 2001, no. 9, item 256.

R. Pessel notes – exclusively the unlawful action of the public authority, so it is irrelevant whether this action was subjectively culpable¹⁸. The exception to this general civil liability is justified by the special servant role of public authorities, which are supposed to ensure the protection of freedoms and human and civil rights. The grounds for such protection, set forth in Article 77 (1) of the Constitution, apply to situations of unlawful deprivation of property on the basis of nationalization acts.

According to Krzysztof Łaszkievicz, the recognition of obvious lawlessness as a legal state simply because there never existed and there is currently no procedure for challenging certain normative acts issued in the Polish People's Republic, which clearly violated the legal order, and which are still in force, is contrary to the essence of the rule of law¹⁹. There is – as K. Łaszkievicz notes – a clear inconsistency in that, on the one hand, there is a declared intention to move away from the legacy of the Polish People's Republic, to create democratic principles, while on the other hand, old regulations that clearly served to perpetuate the totalitarian regime and harmed the freedom and property of citizens are respected²⁰.

At the same time, the functioning of a state with an effective public order, but against the principle of legality can, in the prospect of changing the political and legal arrangement, lead to the legalization of illegal states. The most desirable way of convalidation – as R. Pessel notes – is the acquiescence of the sovereign state and nation to legalize the established states of affairs, which occurred in Poland after 1989, and is evident from the rulings of the Constitutional Court²¹.

These considerations should therefore be understood in terms of transitional justice. In reflecting on the relationship between law and politics during the transition period, R.G. Teitel, pointing out the need for law to adapt to the circumstances of the changes taking place, places an exceptionally strong emphasis on the importance of the political context of specific transformations²².

¹⁸ R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych*, Warszawa 2003, p. 87.

¹⁹ K. Łaszkievicz, *Problemy związane z realizacją roszczeń z tytułu utraty własności*, [in:] *Reprywatyzacja w systemie prawa. Materiały z konferencji zorganizowanej przez Komisję Ustawodawczą Senatu we współpracy z Ministerstwem Skarbu Państwa*, Warszawa 1999, p.18.

²⁰ *Ibidem*, p.18,

²¹ R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych*, Warszawa 2003, p. 92.

²² Cf. Ruti G. Teitel, *Transitional Justice*, Oxford 2000, p. 109.

She proposes to reflect on law in the context of the nature of political transformation. For justice is, according to Teitel, then always related to political circumstances, has a contextualized and partial character, and the concept of what is just is conditioned by previous injustice. Undoubtedly, political circumstances often influence the shape of the law; the programmatic norms that best express them are also normally an important argument in the process of applying the law especially in difficult cases. During the period of transition, the law is unusually open to moments of this nature. According to M. Krotoszyński, transitional justice can be seen as a concept of justice relating to the moral dilemmas of the period of fundamental political change, whereby the implemented mechanisms of transitional justice are an expression of political decisions made earlier and the lack of will of those in power often derails the possibility of their implementation²³. According to Ruti G. Teitel, it constitutes a concept of justice associated with the moment of significant political change²⁴. According to Wojciech Sadurski, transitional justice should be defined as legal mechanisms that are adopted to settle accounts with the past²⁵. There are many forms of settlements with the past.

However, as M. Krotoszyński notes, with regard to the type of reaction to the historical legacy, that is the legacy of the previous regime, three models of forms of settling accounts with the past can be distinguished²⁶. Firstly, the retribution model, characterized by the application of sanctions against people whose ties to the previous regime are condemned in the new socio-political reality – and this sanction is different from the disclosure of information about the ties of these people to the past regime. Secondly, the model of historical clarification, characterized by the disclosure of information about the nature of the previous regime, with no sanction against those responsible for this nature other than the possible disclosure of information about their ties to the previous regime. Thirdly, the model of the thick line, characterized by the lack of application of the tools mentioned in retribution model or model of historical clarification.

Among the many visions of settling the past that operate within the broad current of transitional justice studies, it is worth considering the method of settling the past through the state's adoption of the rule of law during a period of

²³ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 59.

²⁴ R.G. Teitel, *Transitional Justice Genealogy*, „Harvard Human Rights Journal” 2003, no. 16, p. 69.

²⁵ W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht 2008, p. 223.

²⁶ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 76.

fundamental political change. This is because it carries enormous political and legal consequences.

In Poland, the principle of a democratic state of law realizing the principles of social justice – while referring to the tradition of *Rechtsstaat* rather than the idea of rule of law – was introduced by the Constitutional Act of December 29, 1989²⁷. This amendment changed the content of Article 1 of the Constitution of the Polish People's Republic in force at the time, which read: "The Polish People's Republic is a state of people's democracy. In the Polish People's Republic, power belongs to the working people of towns and villages"²⁸. Subsequently, the rule of law was incorporated into Article 2 of the current 1997 Constitution, the wording of which is as follows: "The Republic of Poland is a democratic state governed by the rule of law, realizing the principles of social justice"²⁹.

As M. Krotoszyński notes, the introduction of the principle of the rule of law into the legal systems of post-authoritarian states raises specific problems related to the attempt to grasp the meaning of this principle in a period of dramatic political changes³⁰. According to M. Krotoszyński, in mature democracies, this principle is a guarantor of stability, as it is associated with the principle of legalism, which means the obligation to comply with the law made with and the absence of arbitrariness and repetition of decisions of state bodies: "However, during the period of transition, should a formal understanding of it be adopted, conditioning the continuity of the legal system, or rather, due to the gross injustice of pre-transition legislation, should the rule of law refer to substantive premises, conditioning at least partial discontinuity of the legal system?"³¹.

The possible answer to the question posed in this way stems from society's attitude to past injustices. This means, according to R.G. Teitel, that the ideal of the rule of law is inapplicable if it is not adapted both to the specific political conditions of a given state and taken into account in the broader context of the changes taking place³². Indeed, the community can either lean towards the value of legal certainty, which is associated with the continuation of the legal system,

²⁷ Act of 29th of December 1989 amending the Constitution of the Polish People's Republic (Journal of Laws of 1989, No. 75, item 444).

²⁸ Constitution of the Polish People's Republic of 22nd of July 1952 (Journal of Laws of 1952, No. 33, item 232).

²⁹ Constitution of the Republic of Poland of 2nd of April 1997 (Journal of Laws of 1997, No. 78, item 483).

³⁰ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 223.

³¹ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 223.

³² R.G. Teitel, *Rządząca prawą okresu transformacji*, „Ius et Lex” 2003, no. 1, p. 56.

or point to moral and equitable considerations of law, expressing the need to redress past injustices.

The introduction of the principle of the rule of law into the legal system constitutes, according to Sławomira Wronkowska, a limitation on the lawmaker in terms of possible forms of settlement with the past: "If one takes the position (...) that in the event of a conflict between moral norms and the norms of positive law, primacy should be given absolutely to moral norms, one must consequently reject the concept of the rule of law at the time of making settlements with the past"³³. According to S. Wronkowska, this limitation is due to the fact that legal-natural concepts that could provide a more complete axiological basis for transitional justice are difficult to reconcile with the rule of law than positive law, which "is not a means of achieving all desirable social states"³⁴.

As M. Krotoszyński points out, "The Polish Constitutional Court after 1989 derived a number of other principles of law from the principle of a democratic state of law using inferential rules. From this principle, first of all, the principle of proportionality, the principle of the tri-partite government, the principle of *nullum crimen sine lege*, the principle of unity of the legal order, the principle of *pacta sunt servanda*, the principle of legal certainty – which includes the requirements of: openness, clarity and stability of the law – and the principle of protection of citizens' trust in the state and the law created by it were derived. From the latter principle, in turn, were deduced: the prohibition of retroactivity, the principle of preserving adequate *vacatio legis*, the principle of decent legislation and the principle of protection of justly acquired rights. The Court also deduced from the principle of the rule of law the rights and freedoms of the individual, such as human dignity, the right to life, the right to privacy, and the right to a court of law and two-instance proceedings"³⁵.

Against the backdrop of the above considerations, it is therefore justified to present the jurisprudence of the Constitutional Court, which formulated both assessments regarding the legality of individual communist authorities, as well as made evaluations – from the perspective of Article 2 (democratic legal state) and Article 64 (protection of property rights) of the Polish Constitution – of the

³³ S. Wronkowska, *Czy Rzeczpospolita Polska jest państwem prawnym?* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, red. S. Wronkowska, Warszawa 2006, p. 94.

³⁴ *Ibidem*, p. 95.

³⁵ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 250.

fundamental effects of legal acts of a nationalizing nature, which were issued by these authorities in the years 1944-1962. Thus, the Constitutional Court, in its resolution of April 16, 1996, regarding the interpretation of the universally binding Article 2(1)(e) of the PKWN decree of September 6, 1944, on the carrying out of land reform (Journal of Laws of 1944, No. 4, item 17), stated that "the full assessment of the sovereignty and legality of the PKWN as the Polish legislator, belongs to the modern democratic legislator. Nevertheless, it must be stated that despite the extra-constitutional character of the PKWN – the decrees issued by it functioned in the Polish legal system with the same effects as statutes, and for this reason must be subject to the universally binding interpretation established by the Constitutional Court"³⁶.

In the justification for the decision of November 11, 2001, on the constitutional complaint for declaring the incompatibility of Article 2(1)(e) of the PKWN decree of September 6, 1944, with Articles 2, 21, 64 and 32 of the 1997 Constitution, in the part concerning the allegation of the lack of constitutional legitimacy of the PKWN to issue decrees with the force of law, the Constitutional Court stated, first, that the issue of the legality of the PKWN's action belongs to the sphere of historical and political assessments. These assessments cannot be transferred directly to the sphere of legal relations formed by the nationalization decrees. Secondly, the lack of legitimacy of the PKWN, KRN, Provisional Government cannot be the basis for ignoring the facts that they effectively exercised state power³⁷.

Thus, in conclusion, it should be stated that, on the one hand, the Court used the principle of legality, stating that the actions of the communist authorities were not grounded in the provisions of the Constitution in force at the time, while on the other hand, it used the principle of effectiveness in the context of the legal recognition of the communist authorities as actually exercising power. This actual failure of the Constitutional Court to resolve the question of the legality of the communist authorities of the Polish People's Republic should therefore be assessed unequivocally negatively, despite the fact that at the same time it must also be admitted that, being obliged to resolve this problem, the Court was placed between Scylla (property rights) and Charybdis (protection of acquired rights).

³⁶ Resolution of the Constitutional Court of April 16, 1996, ref. W. 15/96, OTK 1996, no. 2, item 13.

³⁷ Provision of the Constitutional Court of November 28, 2001, ref. SK. 5/01, OTK 2001, no. 8, item 266.

In the context of the axiological conditions of the problem of reprivatization, it is also worth referring to the concept of legal principles (which is part of the non-positivist theory of fundamental rights) by the German jurist – Robert Alexy³⁸. As M. Krotoszyński notes, fundamental to the theory of fundamental rights is the division of norms into rules and legal principles³⁹. Robert Alexy defines principles as optimization orders, that is, norms that oblige addressees to realize a certain state of affairs to the maximum extent possible, taking into account the legal and factual possibilities. A principle is a norm that orders the realization of a definite state of affairs, without providing for the relativization of the degree of this order from legal and factual circumstances. Therefore, a principle is always realized to a certain degree – a rule, on the other hand, can only be either realized or not. According to R. Alexy, conflicts between principles play out in the dimension of validity, while collisions between rules, since only valid rules can collide with each other, outside of it in the dimension of their importance⁴⁰.

This statement means that in the case of a collision between two principles, a comparison of their weight should be made taking into account the facts of the case together with the circumstances belonging to them. Thus, as M. Krotoszyński emphasizes, when the balancing of two principles is made, the generalized circumstances of the case constitute the scope of application of the rule prescribing the realization of the state of affairs envisaged by the principle to which, in these circumstances, greater weight is assigned⁴¹. The principle is therefore a general and abstract norm. On the other hand, the principle to which lesser weight is assigned in the given circumstances does not lose its validity and may prevail in the event of a collision of these principles in other circumstances.

According to Marzena Kordela, legal principles are legal norms that prescribe (prohibit) the realization of a certain value⁴². Thus, the weight of a given principle is derived from the weight of the values, the realization of which is ordered or prohibited by the principle. In summary, the model of choosing a form of settlement with the past based on the procedure of balancing principles captures the decision to choose or morally accept a type of transitional justice as

³⁸ See R. Alexy, *Teoria praw podstawowych*, Warszawa 2010.

³⁹ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 282.

⁴⁰ See R. Alexy, *Teoria praw podstawowych*, Warszawa 2010, p. 80.

⁴¹ M. Krotoszyński, *Modele sprawiedliwości tranzycyjnej*, Poznań 2017, p. 283.

⁴² M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2012, p. 102.

dependent on the preference of values nourished by a rational subject. And the legislator, against whom the attribute of rationality is used, should be considered such a subject.

In the case of the problem of reprivatization, it is necessary to try to find a compromise between the principle of *ex iniuria ius non oritur* (according to which acts of nationalization should not have legal consequences) and the principle of protection of justly acquired rights, which aims to protect the fundamental value of legal security, i.e. the certainty that subjective rights acquired by force of law and in accordance with the principle of justly remain intact.

At the same time, it should be stated that the protection of acquired rights, to which the jurisprudence of the Constitutional Court and judicial and administrative rulings after 1989 repeatedly refers, does not mean "that all rights acquired under the old regime can be protected by law, protection is deserved by rights acquired in accordance with the constitutional principle of equity and justice, which, however, hierarchically stands higher than the principle of protection of acquired rights in question". The content of both can be drawn from the principle of the rule of law expressed in Article 2 of the Constitution of the Republic of Poland.

At the same time, according to T. Zieliński, the concept of justly acquired rights cannot be understood in an absolute manner, because they can be limited or even abolished in the event of a fundamental change in the system of values in the political-legal structure, which means that they are unquestionable only in the case of axiological immutability of a given legal system⁴³. There is a difference between the rights acquired as a result of the nationalization carried out and those taken away by the state. It concerns the determination of which rights should be considered protected first from the point of view of the new assumptions of the axiological system to which the 1997 Constitution refers (the principle of protection of rightfully and justly acquired rights).

In Poland after 1989, the Constitutional Court resolved in its decision of November 28, 2001, the question of the order between the rights of former owners and the rights rightfully acquired in favor of new owners who took ownership of land as a result of its nationalization by the state during the land reform taking place in 1944. Thus, the Court assumed in its ruling that giving priority to

⁴³ T. Zieliński, *Ochrona praw nabytych – zasada państwa prawnego*, „Państwo i Prawo” 1992, b. 3, pp. 3-11.

the protection of the rights acquired by the new landowners requires the principle of legal security, for this will prevent the unpredictable legal, economic and social consequences of a ruling that the content of Article 2(2)(e) of the Decree of September 6, 1944 is inconsistent with the wording of Article 2 and Article 64 of the 1997 Constitution of the Republic of Poland.

In conclusion, it should be said that although Article 21(1) and Article 64 in the Constitution of the Republic of Poland are devoted to the protection of property rights, they do not directly address the issue of property that passed from the private to the public domain in 1944-1962, and can only form a certain axiological benchmark for future legislative solutions, if, of course, further legislative initiatives would appear. However, they seem necessary, for the duty to regulate the problem of reprivatization by law should be found in the constitutional principle of a democratic state of law and the principle of social justice, which are contained in Article 2 of the Constitution of the Republic of Poland, as well as in the contents of the preamble to the Constitution.

Conclusion

It should be noted that no attempt at a systemic solution to the problem of reprivatization will ever be satisfactory to all parties involved. This is because no proposal can take into account the entirety of the claims of former owners, and this is due both to the financial capabilities of the state, as well as the considerations of equity itself, which dictate that such variables as the time factor or the principles of protection of bona fide vested rights be taken into account. Thus, when looking for a possible solution to the problem of reprivatization, it is necessary to make a kind of weighing of the principles and values that would guide a given solution, while this solution will still have an arbitrary and political element. This is because it is impossible to carry a law through Parliament solely on the basis of considerations of equity and to the exclusion of positive law. At the same time, the actions taken by the legislator in the area of systemic solution to the problem of reprivatization should be accompanied by symbolic actions, showing the illegality of the nationalization carried out by the communist authorities of Polish People's Republic. For just as it should be considered impossible from the perspective of 2023 to rectify the negative consequences of nationalization acts in the property sphere in a just and equitable manner

for all, it should be considered necessary to rectify these consequences in the symbolic sphere, since from the current perspective this is not only easier, but also less costly.

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