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# Constitutional nature and content of the right to restitution of an expropriated property

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## Abstract

The Act of 4 April 2019 on amending the Act on Real Property Management added a provision temporarily limiting the possibility of demanding restitution of the expropriated property. On the basis of the new provision, the right of the previous owner or its legal successors to reconstitute the expropriated property has ceased to be of perpetual nature. This right may not be exercised, as it previously was the case, at any time, as it expires 20 years from the date on which the decision to expropriate became final. This solution should be assessed negatively, as it deepens the non-constitutional nature of the statutory mechanism of restitution of expropriated real property, which makes the demand for restitution dependent on whether the public objective has been assumed (i.e. started to be implemented). If this is the case, then, in the light of the Real Property Management Act of 1997, the restitution of real property can never be claimed, and therefore even if such an objective in the future ceases to be implemented (e.g. as a result of the end of the operation of the real property as part of a public investment). However, in the light of the constitutional arrangements relating to the guarantee of ownership, the right to restitution of the expropriated property should always be vested in the expropriated owner or his/her legal successors whenever the public objective justifying the expropriation has not arisen as well as when it ceased to be implemented. In any event, the condition for claiming restitution shall be a claim made by the person concerned and a return of an appropriate, indexed sum paid as compensation for expropriation. The constitutional principle of the protection of individual status of property of the owner results in the "conditionality" of the transfer of ownership by way of expropriation to the State or another entity. Any existence and implementation of an appropriate objective justifying the expropriation for a public purpose, grants of the ownership and its permanence on the part of these entities. As a consequence, also the possible expiry date of the claim for the restitution of the property, expropriated after the expiry of the public purpose, should run from the time of such expiry and not from the moment when the decision about expropriation became final.

**Keywords:** expropriation, restitution of expropriated property, constitutional protection of property rights, property right

## 1. Introduction

Pursuant to the Act of 4 April 2019 on the amendment of the real property management act<sup>2</sup> as part of the amendments to the provisions on the expropriation of property in Article 136 of the Act of 21 August 1997 on real property

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<sup>2</sup> Journal of Laws of 2020, item 65, as amended.

management<sup>3</sup>, a new paragraph 7 was added, introducing a temporary limitation on the admissibility of the demand for restitution of the expropriated real property (or its part or a share in this real property or a part of it).

Pursuant to the new provision, the right to restate an expropriated property, as provided for in Article 137 paragraph 3 of the Act, ceased to be of perpetual nature. The statutory right (claim) of the existing owner or its legal successors for the restitution of the real property, which has been expropriated, may not be exercised at any time, and therefore without a time limit, in the light of the regulations introduced by the Act of 2019, this right expires after 20 years from the date on which the decision on expropriation became final. The right to restitution shall expire when the entitled entity has not submitted an application for restitution to the competent authority during the abovementioned period of time. In accordance with paragraph 3 of Article 136 (as last amended in 2019), the previous owner or his/her successors may, as a rule, demand the restitution of the expropriated property or a share in the real property or a part of the expropriated property or a share in that part if, pursuant to Article 137, the property or a part of it has become redundant for the purpose specified in the expropriation decision. This regulation is intended to ensure the stabilisation of the legal status of the real property, making it impossible to further trade it in the event of inability to define clear time limits for the exercise of the right of restitution. In particular, it meets the demands of local self-government units.

## **2. Right to demand restitution and redundancy of the expropriated property**

The right to demand restitution of the expropriated property and the related obligation are recognised as civil law institutions<sup>4</sup>, however the constitutional source of the obligation of restitution leads to the conclusion that the statutory mechanism does not have to lie only within the framework of civil law regulations. It should be borne in mind that, by nature, the right to demand restitution of the expropriated property is a result of the principle of constitutional protection of property rights, as referred to in the further part of these deliberations. The Constitution does not prejudge the mechanisms and statutory bodies which are intended to make it possible to achieve its safeguards in this respect.

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<sup>3</sup> Journal of Laws of 2019, item 801 (hereinafter: "Real Property Management Act").

<sup>4</sup> See e.g.: T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, Warsaw 2010, p. 312 and cited literature; Ł. Węgrzynowski, *Cywilnoprawne skutki naruszenia art. 136 ustawy o gospodarce nieruchomościami*, "Monitor Prawniczy" 2012, no. 9, p. 457.

The Constitution does not define or refer directly to the obligation to reconstitute the expropriated property and does not indicate the circumstances in which the obligation is kept up to date. For the first time, the redundancy and the order to reconstitute a real property was constituted by Article 34(1) of the Act of 12 March 1958 determining the rules and procedure for the expropriation of real property<sup>5</sup>. However, the term “redundancy” was neither defined in this provision nor in the subsequent one providing for reconstitution Article 69(1) of the Land Management and Real Property Expropriation Act of 29 April 1985<sup>6</sup>. On the other hand, the current act on real property management defines a narrow margin of “redundancy” of real property for the purpose of expropriation. Pursuant to paragraph 1 of Article 137 of the Real Property Management Act, the property is deemed to be redundant for the purpose specified in the decision on expropriation, if 1) despite the lapse of seven years from the date on which the decision on expropriation became final, no works related to this purpose have been commenced, or 2) despite the lapse of 10 years from the date on which the decision on expropriation became final, this purpose has not been met. As can be seen from the case-law of the Constitutional Tribunal<sup>7</sup>, “(...) as long as the expropriated items (rights) are not subject to compulsory collection for a public purpose justifying their expropriation, the purpose of the sole expropriation has not been achieved.” Such a situation cannot be “constitutionally legitimised”, as the purpose justifying interference in a private property should be realistic and not only formal.

On the basis of the Act of 1997, the judgement of the Constitutional Tribunal of 13 December 2012 was crucial for the assessment of the scope of the obligation to reconstitute an expropriated property.<sup>8</sup> In that judgement, the Tribunal stated that Article 137(1) of the Real Property Management Act in the wording in force at that time, to the extent that it does not consider a property as redundant, in relation to which, within the time limits specified

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<sup>5</sup> Journal of Laws No. 17, item 70, as amended. Pursuant to Article 34(1) of that Act, real properties have been reconstituted to the expropriated, former owner if the competent administrative authority has determined that “the property has not been used and is redundant for the purposes for which the expropriation has been declared”.

<sup>6</sup> Journal of Laws No. 22, item 99; pursuant to Article 69(1) of the Act, in the wording defined by the Act of 29 September 1990 on the amendment of the Land Management and Real Property Expropriation Act (Journal of Laws No. 79, item 464, as amended), “expropriated property or part thereof shall be reconstituted to the previous owner or his/her legal successor if it has become redundant for the purpose specified in the decision on the expropriation”.

<sup>7</sup> Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11, OTK ZU No. 11/A/2012, item 135.

<sup>8</sup> Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11.

in this provision, the purpose specified in the decision to expropriate was met, and then the property was earmarked for another purpose, is not incompatible with Article 21(2) of the Constitution. The above resolution was connected with the assumption that Article 21(2) of the basic act may not constitute a model of constitutional control in the absence of statutory rules for restitution of expropriated properties which have been properly transferred to the public purpose specified in the decision to expropriate and within the time limits specified in Article 137(1) of the Real Property Management Act. The justification of the judgement was that the Constitution of the Republic of Poland does not refer to "a separate standard imposing on the legislator a general obligation to reconstitute each expropriated property which is no longer used for any other purpose than the purpose indicated in the decision on the expropriation". This decision opened the way for the assumption of the correctness of the solution adopted in Article 137 of the Real Property Management Act.

In the light of the case-law of the Constitutional Tribunal and in view of the uniform position of administrative courts, it is assumed that if the purpose of expropriation has been properly achieved and, therefore, it has been undertaken to be implemented, then there is no possibility to demand the restitution of a real property pursuant to Article 137(1) of the Real Property Management Act. As a consequence, the current owner or his/her legal successor shall not be entitled to demand restitution, even if at any later time the purpose of the expropriation has ceased. As recognised by the Constitutional Tribunal in the judgement of 2012, "Article 21(2) of the Constitution refers to the assessment of the constitutional correctness of substantive grounds and regulations of expropriation – since the initiation of an expropriation procedure until the moment of obtaining the tent of last resort by the expropriation decision and its execution. (...) As a consequence, Article 21(2) of the Constitution does not give rise to a constitutional right to reconstitute the real property which has been expropriated in the course of a procedure satisfying the constitutional standard of expropriation. Since Article 21(2) of the Constitution has not been violated, there are no grounds for imposing an obligation to reconstitute." Also on the ground of ordinary legislation, both previous and current one, administrative courts refuse to grant to former owners or their legal successors a claim for the restitution of real property after cessation of implementation of the purpose of expropriation.

As a result, undertaking and thus implementing the primary purpose indicated in the decision to expropriate closes in a way the possibility of demanding

restitution at all, even if the property subsequently became redundant (in the case-law of the Constitutional Tribunal, it is referred to as “abandoned”, e.g. as a result of liquidation of a mine, a public road, etc.). It is considered that this claim is not due in the above circumstances, irrespective of whether the property was transferred for the implementation of another purpose, whether or not another, future purpose would be a public or of another kind. In such a case, in particular, the possibility of demanding restitution of the expropriated property is not justified by e.g. liquidation of the infrastructure used to fulfil the public purpose set by the content of the decision on expropriation<sup>9</sup>, or the making available at a later stage of the real property to private entities<sup>10</sup>.

As confirmed by the regulation in the Real Property Management Act, the restitution as an obligation relating to the expropriated property shall therefore be a term limited to a situation in which the public purpose has never been fulfilled (the property being the object of ownership within the constitutional meaning has not been used for a specific, individualised public purpose).

The above view, however well established in the case-law and the doctrine, raises significant doubts and constitutional reservations due to the lack of a pre-established restriction of the right to demand restitution in the light of constitutional norms, but above all due to the nature and institutional protection of property within the meaning of the Constitution and a strictly related expropriation mechanism referred to in Article 21(2) of the Constitution of the Republic of Poland.

### **3. Constitutional mechanism of expropriation**

#### **3.1. General framework for the protection of property freedom**

The assessment and possible framework for the admissibility of temporary limitation of the demand for restitution of the expropriated property (under Article 21 of the Constitution of the Republic of Poland also more broadly - the protected property) require a reminder of the basic constitutional rules concerning the purpose and legal structure of expropriation as part of a comprehensive constitutional protection of property.

The constitutional guarantee of the protection of property of private entities covers three aspects which coexist and complement the provisions of Article 21 and Article 64 of the Constitution of the Republic of Poland.

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<sup>9</sup> See, for example, judgement of the Voivodship Administrative Court in Białystok of 2 March 2004, file no. SA/Bk 1444/03, Lex no. 17369.

<sup>10</sup> See, for example, judgement of the Voivodship Administrative Court in Lublin of 3 March 2009, file ref. II SA/Lu 771/08, Lex No 543781.

Firstly, the basic act established the protection of individual property rights (guarantee of existence, Article 21(1), in German: *Bestandsgarantie*). It consists in ensuring that the person entitled to use his/her property is assigned to it and is able to use the property he/she holds. Therefore, it protects from interference in property rights which, in the light of legislation and under the legal title provided for therein, the entity has acquired and may exercise in accordance with the normative content of these rights.

Secondly, the guarantees of protection of ownership need to ensure whose property right has been removed or limited for the benefit of the general public and, therefore, expropriated, of the relevant equivalent (guarantee of value, Article 21(2), in German: *Wertgarantie*)<sup>11</sup>. It is in a way to consolidate the guarantee of existence concerning the individual property status when interference in the sphere of property rights is necessary due to the primacy of public interest.

Thirdly, the Constitution of the Republic of Poland sets standards in the scope of shaping the statutory framework of the system of ownership relations and the assignment of property (guarantee of legal institution, Article 64, in German: *Institutsgarantie*)<sup>12</sup>. In this aspect, the legal act imposes on the legislator mainly adequate obligations regarding the statutory materialisation of protection, and therefore the creation of a normative system enabling the acquisition, use and marketing of properties<sup>13</sup>. This means that the Constitution imposes on the legislator the obligation to create a legal framework concerning a broadly-understood economic freedom of private entities.

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<sup>11</sup> A triad of the ownership guarantee is presented in detail in: K. Zaradkiewicz, *Instytucjonalizacja wolności majątkowej. Koncepcja prawa podstawowego własności i jej urzeczywistnienie w prawie prywatnym*, Warsaw 2013, *passim*.

<sup>12</sup> *Ibidem*, p. 529.

<sup>13</sup> Such a view is also recorded in the case-law of the Constitutional Tribunal; as it was e.g. reminded in the judgement of 3 April 2008, file no. K 6/05, OTK ZU No. 3/A/2008, item 41, "the order to protect properties and other property rights which are established in Article 21(1) and Article 64(1) of the Constitution, specify obligations for the ordinary legislator: a positive obligation to enact provisions and procedures granting legal protection of property rights and a negative obligation to refrain from regulations that would deprive or restrict the legal protection. In addition, the protection provided to property rights shall be realistic. The reference point (criterion of verification of this feature) must be the effectiveness of the performance of a specific subjective right in a specific system environment in which it functions" (see also judgements of the Constitutional Tribunal referred to therein of: 13 April 1999, file ref. no. K. 36/98, OTK ZU No. 1/1999, item 40; 12 January 1999, file no. P. 2/98, OTK ZU No. 1/1999, item 2; 25 February 1999, file no. K. 23/98, OTK ZU No. 2/1999, item 25, as well as 12 January 2000, file no. P. 11/98, OTK ZU No. 1/2000, item 3 and 19 December 2002, file no. K 33/02, OTK ZU No. 7/A/2002, item 97).

### 3.2. Expropriation

In the Constitution of the Republic of Poland, the admissibility of expropriation is directly stated by Article 21(2). This provision allows for expropriation only for public purposes and for legitimate compensation. Without going into a detailed analysis of the content of the basic act as part of the specific subject matter of this article, it is sufficient to support the statement that, as already mentioned, it does not prejudge *expressis verbis* whether the elimination of the purpose of expropriation determines the further status of the expropriated property, in particular it updates the obligation to restitute to its previous owner (expropriated) or its legal successors. This provision in any case does not explicitly specify the generality of the restitution order. There is therefore no constitutional standard indicating clearly the obligation to restitute, whether or not the purpose of expropriation has been achieved.

However, the absence of such obligation expressed *expressis verbis* in the Constitution of the Republic of Poland does not imply the appropriateness of the view that, as regards the introduction or the scope of such an obligation, the legislator disposed of a broad regulatory freedom. On the contrary, while from the point of view of general principles of civil law, a transfer (disposition) of property rights is usually aimed at the adoption of a final nature, from a constitutional point of view it treats an expropriated property as temporarily located in the public domain, in a conditional way, i.e. for the duration and the possibility of achieving a specific public purpose, which justified the appropriation of this property in an expropriation mode. This means that the change of an owner, regardless of the legal basis for the transfer of ownership, should be treated as a transitional stage, depending on the materialisation and possibly the duration of the purpose justifying the expropriation.

This conclusion is based on the assumption that expropriation is a means of interference in the sphere of private property, which is independent of the will of the authorised entity and as a proprietary instrument should only be used to the extent necessary for the achievement of the constitutional purpose of expropriation referred to in Article 21(2) of the Constitution of the Republic of Poland. In this sense, the expropriation being a lawful interference in the sphere of property freedom is a unique solution.

First of all, this means that the removal or limitation of ownership within the constitutional meaning of an expropriation nature should be carried out only if the State is not able to carry out a specific public purpose otherwise, in particular by acquiring such a (similar) property on general market terms. The exercise

of the power of interference provided for in Article 21(2) of the Constitution of the Republic of Poland is admissible only if the expropriation instrument becomes necessary to achieve the public purpose, and therefore it is necessary to use a specific (and not, for example, qualitatively identical) property for that purpose<sup>14</sup>. Since the expropriation is a solution for the determination of interest of the individual property, “scarifying” an individual right in favour of the community (this is particularly highlighted in the special sacrifice theory, in German: *Sonderopferstheorie*)<sup>15</sup>, reaching for an instrument in the form of expropriation should only be carried out in cases of real necessity and the provisions on deduction or reduction of ownership should be subject to restrictive interpretation. As the Constitutional Tribunal rightly points out: “the sacrifice made by the expropriator is justified and constitutionally excused by the fact that it is necessary and vital for the achievement of a specific public purpose”<sup>16</sup>.

Article 21(2) of the Constitution of the Republic of Poland is not a norm subject to direct application referred to in Article 8(2) thereof. This is mainly due to the lack of constitutional regulation of the procedure and legal instruments (type of settlement, authority entitled to issue them, etc.). The expropriation is one of these constitutional arrangements, which require the introduction of appropriate statutory regulations (specification) to be applied in legal transactions<sup>17</sup>. Although the assessment of expropriation as a legal entity in the light of the constitutional norms is irrelevant, with which normative (statutory) instruments it is implemented, these standards should, however, materialise the values and constitutional purposes and be interpreted in accordance with these values. Similarly to other institutions and constitutional concepts, expropriation and ownership have an autonomous content and nature<sup>18</sup>. This means in particular that “the constitutional concept of expropriation extends beyond the concept of expropriation contained in the Real Property Management Act”<sup>19</sup>.

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<sup>14</sup> K. Zaradkiewicz, *op. cit.*, p. 448.

<sup>15</sup> *Ibidem*, p. 448 and 458–459; see also, for example, the following: G. Anschütz, *Die Verfassung des Deutschen Reichs. Ein Kommentar für Wissenschaft und Praxis*, Berlin – Zürich 1933, p. 712; on this subject in Polish literature: J. Parchomiuk, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej*, Warsaw 2007, p. 13–14.

<sup>16</sup> Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11.

<sup>17</sup> See e.g.: L. Garlicki [in:] *idem* (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom III. Uwagi do art. 21, s. 15*; in German literature, e.g. H.-J. Papier [in:] Th. Maunz i G. Dürrig (ed.), *Grundgesetz. Kommentar, Band II, kommentar do art. 14 GG*, München 2010, p. 279; K. Zaradkiewicz, *op. cit.*, p. 470.

<sup>18</sup> Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11; J. Parchomiuk, *op. cit.*, p. 148; K. Zaradkiewicz, *op. cit.*, p. 473.

<sup>19</sup> Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11.



The provisions of the basic act may not be interpreted in accordance with the definitions or referring to the institutions and mechanisms provided for in the Act. As rightly pointed out in the case-law of the Constitutional Tribunal, “in order to determine the scope of Article 21(2) of the Constitution, these are the constitutional provisions that should be applied, and not the regulations contained in the ordinary law”.<sup>20</sup>

The above assumptions also lead to the conclusion that the expropriation mechanism within the framework of the general protection of the constitutional guarantee of private ownership (Article 21(1) of the Constitution of the Republic of Poland) requires complete materialisation in the legislation in accordance with the principles and assumptions resulting from the constitutional guarantees of property protection.

#### 4. Expropriation and guarantee of existence of ownership

Expropriation is not the only constitutionally permissible instrument of interference in the sphere of private property, regardless of the will of the authorised. However, the nature of expropriation in comparison with similar institutions, including the constitutional competence of the legislator to shape the framework and the content of statutory institutions of property rights (derivatives of property in constitutional meaning), entails, in particular, that, in the first instance, in the case of authoritative action of the State, the authorised is not able to prevent the loss or limitation of its property rights.

From the point of view of the guarantee mechanism provided for in Article 21(2) of the Constitution, the way of redressing a damage occurred as a result of executing an authoritative interference by the State is to be in the first instance the obligation of compensation. This obligation should not, however, be seen as a means of petrification of the status of seizing the property by means of expropriation, first of all because the compensation for expropriation is not a way of redressing damage in the sense the civil law traditionally attributes to the institution of indemnity. Undoubtedly, expropriation weakens the guarantee of existence of ownership by replacing it with the so-called guarantee of value. Both guarantees are complementary, but the first one invariably, in view of the exceptional nature of expropriation, preserves the primacy of materialisation in the light of constitutional requirements. This, in consequence, directly affects the assessment of the scope and effects of expropriation. From this perspective, the

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<sup>20</sup> Judgement of the Constitutional Tribunal of 14 March 2000, file no. P 5/99; see also judgement of the Constitutional Tribunal of 13 December 2012, file ref. P 12/11: “constitutional concept of expropriation extends beyond the concept of expropriation contained in the Real Property Management Act”.

guarantee of value (compensation) should be treated as a necessary solution, but at the same time temporary and ancillary. The constitutional guarantee of existence forces the priority to maintain an individual legal status (of the property right to the extent that it has been legally standardised and acquired)<sup>21</sup> and, in the case of elimination of the motive to materialise the guarantee of value, it should be regarded as ordering the restitution to the state of belonging of the property to the private property (*restitutio*). The guarantee of value cannot serve to replace or eliminate the guarantee of existence<sup>22</sup>.

## 5. Restitution mechanism in the light of Article 21(2) of the Polish Constitution

In the judgement of 24 October 2001, the Constitutional Tribunal stated explicitly that “After the entry into force of the Constitution of 1997, the principle of restitution should be treated as an obvious consequence of Article 21(2) of the Constitution, which, by allowing the expropriation for ‘only public purposes’, creates an inextricable relationship between the determination of those purposes in the decision to expropriate and the actual use of the expropriated item”<sup>23</sup>. This is the case, despite the fact that Article 21(2) of the Constitution does not provide for *expressis verbis* of the obligation of public authorities to reconstitute the property<sup>24</sup>. This view corresponds to the interdependence of two co-existing guarantees within the meaning of Article 21 of the Constitution of the Republic of Poland: existence, on the one hand, and value on the other hand.

The guarantee of value, the materialisation of which serves as a constitutional mechanism of expropriation, is an expression of the principle that the Constitution guarantees the preservation of the status of the entity’s assets<sup>25</sup>, is to serve as a “probability of restoring the property situation from before the expropriation”,<sup>26</sup> which<sup>27</sup> constitutes a change of “the form of the expropriated

<sup>21</sup> K. Zaradkiewicz, *op. cit.*, p. 522 and cit. in particular O. Depenheuer [in:] H. v. Mangoldt, F. Klein, Ch. Stark, *Kommentar zum Grundgesetz*, ed. 5, München 2005, p. 1363–1364, uses the term ‘Vorrang des Primärrechtsschutzes’.

<sup>22</sup> *Ibidem*, p. 523 and appointed there O. Depenheuer [in:] H. v. Mangoldt, F. Klein, Ch. Stark, *op. cit.*, p. 1364; see also the decision of the German Federal Constitutional Court (I Senate) of 15 July 1981, file no. 1 BvL 77/78, BVerfGE 58, 300 (330–331); BVerfGE 100, 226 (p. 243 and n.).

<sup>23</sup> Judgement of the Constitutional Tribunal of 24 October 2001, file no. SK 22/01

<sup>24</sup> See: Judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11.

<sup>25</sup> K. Zaradkiewicz, *op. cit.*, p. 517.

<sup>26</sup> See e.g.: judgement of the Constitutional Tribunal of 19 June 1990, file no. K 2/90, OTK in 1990, item 3; judgement of the Constitutional Tribunal of 14 March 2000, file no. P 5/99; see also: T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, rev. 5, p. 43; K. Zaradkiewicz, *op. cit.*, p. 518.

<sup>27</sup> K. Zaradkiewicz, *op. cit.*, p. 518 and cit. M. Zimmerman, *Polskie prawo wywłaszczeniowe*, Lwów 1939, p. 17.

property while retaining its value”, allows to “preserve the economic value of the expropriated property, in the framework of which interference occurs”<sup>28</sup> and, in this sense, this guarantee strengthens the constitutional protection of property.

In the opinion of the Constitutional Tribunal, the principle of restitution stems from the fact that the legal regulations in force at the moment of restitution affect the specification of premises of admissibility of the expropriation itself. As pointed out by the Tribunal, the “Purpose of the provisions on the restitution of expropriated rights is to determine the scope of permissible interference in the ownership right, as well as the creation of the possibility of abolishing the effects of this exceptional interference if it turned out to be deprived of the required constitutional justification. The content of the authorisation of the State to perform an expropriation remains complementary to the property guarantees covered by Article 21(1) of the Constitution. This provision guarantees and secures the specific property of citizens”.<sup>29</sup> In this sense, as the Tribunal rightly points out, Article 21(2) of the Constitution sets out the guarantees of property protection resulting from Article 21(1) of the Constitution. As is further indicated in the case-law of the Tribunal, “If the public purpose, for which the real property is expropriated, is not carried out, or the real property is redundant for this public purpose, it is not only a constitutional legitimacy of interference into the private property which does not exist, but also a legal basis (reason) for the acquisition of ownership by a public entity. In this situation, the guarantees of property rights resulting from Article 21(1) of the Constitution recover their protective power. The legal position and the interest of the public entity achieved by such expropriation must take place before the constitutional protected legal position of the citizen”<sup>30</sup>. In formulating this general view, the Tribunal does not seem to leave any doubts as to the substance of the mechanism for the restitution of property. This also applies to the situation where the purpose was eliminated (expired, has been abolished).

Under Article 137(1) of the Real Property Management Act “achieving the purpose” of expropriation may mean any situation in which this purpose was (even for a short period of time) or still is carried out. It is assumed in the case-law that, as a rule, the real property should be regarded as redundant for the purpose of expropriation when this purpose has not been achieved at all or within the necessary time, when a different purpose than the one specified in

<sup>28</sup> See: M. Zimmermann, *op. cit.*, p. 9; K. Zaradkiewicz, *op. cit.*, p. 518.

<sup>29</sup> Justification of the judgement of the Constitutional Tribunal in the file no. P 12/11, see also the verdict cited therein of the Constitutional Tribunal of 3 April 2008, file no. K 6/05, OTK ZU No. 3/A/2008, item 41.

<sup>30</sup> Justification of the judgement of the Constitutional Tribunal in the case of file no. P 12/11.

the expropriation decision has been completed, or if there was no decision to establish the location of the investment or such a decision expired.

The above-mentioned assumptions resulting from the constitutional relationship of guarantee of existence and value result in the recognition that otherwise than it is adopted pursuant to the provisions of Articles 136 to 137 of the Real Property Management Act, entered into the construction of the title of the guarantee of ownership pursuant to Article 21 and Article 64 of the Constitution of the Republic of Poland, the mechanism for the restitution of property under the guarantee of value is recognised in the broad sense. In general, it can be concluded that the obligation to reconstitute the expropriated property in the light of the constitutional guarantees is updated whenever there is no public purpose (within the meaning of the Constitution) justifying the expropriation, regardless of whether it was established at all or no longer exists for any reason. In particular, it cannot be concluded that the justification for the duration of expropriation is the expectation in the future or even the emergence of any other public purpose, to which the previously expropriated property could serve, while remaining in the public domain. On the contrary, since a specific, elaborated public purpose is required each time, which allows for the mobilisation of the expropriation instrument, as a consequence, its lack updates an order to reconstitute to the previous owner, which was subject to the expropriation. On the ground of the Real Property Management Act, as a rule, it is unacceptable to change the manner of using the property by changing its public purpose<sup>31</sup>. Pursuant to Article 136(1) of the Real Property Management Act, the expropriated real property may not be used for a purpose other than the one specified in the decision on expropriation, taking into account Article 137 of the Real Property Management Act, unless the previous owner or his/her successors fail to submit a demand for the restitution of this property. Therefore, only the expiry of a claim for restitution due to a failure of its submission by an authorised entity allows the use the real property for another public purpose than originally intended to justify the removal or limitation of ownership or another property right. In the case-law of administrative courts, it is assumed that there can be no redundancy for the purpose of expropriation when the real property after the expropriation has been used in accordance with the purpose of expropriation, and only after the purpose has been changed<sup>32</sup>.

From this perspective it is possible to distinguish three basic situations

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<sup>31</sup> See: judgement of the Supreme Administrative Court of 14 January 2009, file no. I OSK 70/08

<sup>32</sup> See e.g.: judgement of the Supreme Administrative Court of 5 March 2015, file no. I OSK 1584/13, as well as of 21 March 2013, file no. I OSK 1722/12 and of 4 December 2014, file no. I OSK 1049/13.

where a constitutional order of restitution can materialise:

- 1) absence of a public purpose which would justify expropriation;
- 2) failure to implement the public purpose for which the property was expropriated;
- 3) broadly defined cessation (retention) of the previously implemented purpose, including:
  - a) change of circumstances causing the modification of the purpose (in consequence, the purpose originally planned is eliminated, but instead of it there is another specific public purpose to be carried out;
  - b) secondary importance of the property for the achievement of the original purpose;
  - c) permanent elimination of the purpose.

## 6. Conclusions

The fact that expropriation “should be used only in necessary situations”<sup>33</sup> means that the framework for this need designate not only the original circumstances or the conditions for the admissibility of the expropriation, but also generally shape the expropriation mechanism and thus also refer to the guarantee of the consequent elimination of the primary purpose, and in consequence also include situations in which this purpose has ceased to be pursued. T. Woś is certainly right in stressing that the institution of the restitution, referred to in Article 136 et seq. of the Real Property Management Act, aims at “the restoration of the state of ownership of the expropriated property prior to the issuance of the expropriation decision by abolishing the effects it caused, due to the elimination of premises of its release (...)”.<sup>34</sup> This *actus contrarius* with respect to the expropriation is intended to level its effect, which justified, to the necessary extent, making the former owner a “special sacrifice” who, at the cost of his/her property, bears the consequences of its intended use for a specific, necessary public purpose. The elimination of the motif of a “special sacrifice” should result in the elimination of its effects in the legal sphere by exercising the right of restitution. The lack of a comprehensive realisation of this mechanism within the framework of the provisions on the restitution of the expropriated property and the narrowing of the concept of “redundancy” leads

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<sup>33</sup> Justification of the judgement of the Constitutional Tribunal of 13 December 2012, file no. P 12/11.

<sup>34</sup> T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, Warsaw 2001, p. 307.

to the conclusion on the non-constitutional nature of the mechanism of restitution of the expropriated property, which is standardised in Articles 136 to 137 of the Real Property Management Act.

Not only the narrow approach to the restitution mechanism of the real property provided for in the real property management act, but also the new solution to Article 136 section 7 of the Act of 4 April 2019 on the amendment of the real property management act, are contrary to Article 21(2) of the Constitution of the Republic of Poland. It should be stipulated that, as a rule, the right to demand the restitution of the expropriated property in the absence of a public purpose (including in the case of its subsequent elimination) is not excluded *a limine*, by introducing a statutory time-frame for its implementation. From a constitutional perspective, it does not matter whether such limitation will be introduced by the institution limiting period of claims of the former owner or its legal successors, or the expiry of this right. Any time restriction concerning the execution of a claim for restitution of the expropriated property should be assessed in the light of the principle of proportionality (Article 31(3) in conjunction with Article 21(2) of the Constitution of the Republic of Poland). However, the mechanism provided for in Article 136(7) of the Real Property Management Act, by entering into a narrow understanding of the concept of restitution, leads to the fixation of the state of non-constitutional nature, not so due to the adoption of a time limit, insofar as it is important to consolidate the non-constitutional content and to exclude the interpretation of the provisions on the restitution of a real property expropriated in accordance with the Constitution. In the case of a subsequent failure of a public purpose, which results in an update of the possibility of asserting a claim for restitution (its “demandability”), assuming a broader scope than the literal meaning defined in the Real Property Management Act, the scope of the term “restitution” could prove that due to the expiry of the deadline, the entitled person would not have the chance to exercise this right. This is due to the mechanism adopted in the Act on the calculation of the beginning of the period – in accordance with Article 136(7) of the Real Property Management Act, this entitlement expires if 20 years have lapsed from the date on which the decision on expropriation became final and, within that period, the entitled person did not submit a demand for restitution. The legislator assumed, in accordance with the generally accepted interpretation, that the restitution related to the property’s redundancy relates solely to the situations enumerated in Article 137(1) of the Real Property Management Act, which relates the redundancy with the expiry of a specific period, 7 or 10 years, during

which the decision on expropriation became final, and with non-performance of the public purpose, and not with its subsequent elimination, even though it was originally implemented. Consequently, the subsequent elimination of the public purpose (after the commencement of works related to its implementation or completion) after the expiry of the 20-year period, referred to in Article 136(7) of the Real Property Management Act, indicates that the right to restitution will never be able to be exercised.