

THE FUNDAMENTAL RIGHT TO PROPERTY IN POLISH LAW

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The definition of the property right (ownership) in Polish law can be found in Art. 140 of the Polish Civil Code. This provision indicates the area of ownership rights. According to this provision “Within the limits set by the law and the principles of community life, an owner may, to the exclusion of other persons, use a thing in accordance with the social and economic purpose of his right, and may, in particular, collect the profits and other revenues from the said thing. Within the same limits, he may dispose of the thing”². There are two basic ingredients of the property right i.e. the right to possess and the right to use.

The right to possess should be understood as the actual possession of a given thing. The right to use is the ability to derive benefits from things, including benefits (natural understood as e.g. fruit obtained from a tree) or income (i.e. legal benefits resulting from concluded contracts). It consists of the possibility of processing an item, connecting it with another, or destroying it. Disposing of an item is the possibility of transferring ownership to another person under a contract of sale, exchange, donation, another legal title, the right to renounce ownership, or transfer under any legal title. The right to dispose also means the right to transfer ownership or derive benefits from things, the right to encumber the property based on an obligation agreement or burden with a limited property right (pledge, mortgage, easement, etc.)³.

The next few provisions of the Polish Civil Code indicates some restrictions to the abovementioned area. But the most fundamental regulations about the property right in Poland are in the Constitution of the Republic of Poland of 1997.

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² The Civil Code, Art. 140. Ownership., Legalis, 06.02.2021.

³ M. Gruszczynski, Prawo własności w Kodeksie cywilnym, https://www.podatki.biz/artykuly/13_14697.htm, 30.01.2021,

Ownership, including ownership of real estate, as well as the right of inheritance, is in Poland constitutionally protected. However, the provisions of the Polish Constitution, which set the standard for the protection of property rights, are heterogeneous. This is due both to their location in the constitutional law and how they are formulated. Their catalog consists of both regulations in the form of system principles, provisions expressing subjective rights, and provisions constituting procedural guarantees for the implementation of the former. This creates certain interpretation difficulties, which have been resolved by the Polish Constitutional Tribunal many times⁴. Moreover, the Polish Supreme Court has also made numerous statements on the subject of property rights, in particular concerning the scope of this right in civil cases.

The group of systemic provisions includes Art. 20 and Art. 21 of the Polish Constitution located in Chapter I of the Basic Law (named THE REPUBLIC), which is a set of basic principles defining the nature of the Polish state as well as the values and priorities on which it is based. Article 20 makes private property one of the pillars of the social market economy (alongside freedom of economic activity, solidarity, and cooperation between social partners). In turn, Art. 21 formulates the principle of protection of property and the right of inheritance as one of the principles of the state system (paragraph 1) and allows for expropriation only for public purposes and for just compensation (paragraph 2). On the other hand, an explicit recognition of ownership as a public subjective right is included in Art. 64 of the Constitution, located in Chapter II (named THE FREEDOMS, RIGHTS AND OBLIGATIONS OF PERSONS AND CITIZENS). By this provision, the legislator grants everyone the right to property, other property rights and the right of inheritance. Further, this provision stipulates that these values (i.e. property, other property rights and the right of inheritance) are subject to equal legal protection for all, and ownership may be limited only by statute and only to the extent that it does not infringe the essence of the property right⁵. So due to the formulation of this provision we can see as well, how a big role is handed over to the judicial power, especially to the Polish Constitutional Tribunal and to the Polish Supreme Court.

Doubts may arise from the mutual relation of the provisions contained in Art. 21 and Art. 64 of the Constitution. It seems legitimate to assume that Art. 21 was formulated in terms of the duties and obligations of the state, while Art. 64 expresses specific subjective rights. The thesis about the purely objective approach to property is, however, contradicted by the position

⁴ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 8.

⁵ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 8.

in paragraph 2 Art. 21 regulations of the institution of expropriation, which cannot be separated from the sphere of subjective rights of an individual. This is convincing because this provision has no equivalent in the content of Art. 64 of the Constitution. It, therefore, means that paragraph 2 Art. 21 is a direct source of the right to fair compensation in the event of expropriation and in this respect is a more detailed provision as compared to Art. 64 of the Constitution. Regarding the relation of Art. 21 and Art. 64 of the Constitution, the Polish Constitutional Tribunal has expressed its opinion several times in its jurisprudence. In the judgment of 25 February 1999, the Constitutional Tribunal stated that the norm expressed in Art. 21 paragraph 1 “is one of the fundamental principles of the political system of the Republic of Poland, which results from the fact that this provision was included in Chapter I of the Constitution. [...] Systemic principles, such as those expressed in Art. 21 of the Polish Constitution, are of key importance in the search for a constitutional model with regard to the examination of the constitutionality of the challenged legal provisions, unless the Constitution of the Republic of Poland contains more detailed norms. With regard to the protection of property rights and limited property rights, such detailed norms are contained in Art. 64 of the constitution”. At the same time, the Constitutional Tribunal assumes that “the regulation of Art. 64 of the Constitution, it repeats in some directions, and in other - supplements the regulation provided for in Art. 21”. Due to this judgment, there is opinion in the literature that in the light of Art. 64 the establishment and protection of property rights is, therefore, the obligation of the legislator⁶. By myself, I agree with the opinion that “Although the obligation of legal ownership protection is vested mainly in the state authorities, other entities, including private ones, are also obliged to comply”⁷.

Regardless of the indicated interpretation difficulties, it is clear that the Constitution makes the protection of property rights and the right of inheritance one of the basic principles of the system. By guaranteeing the right of ownership, the basic law allows for expropriation (i.e. deprivation of property) only for public purposes (as specified in Art. 6 of the Real Estate Management Act) and for just compensation, which means not only the equivalent of the item but also additional costs related to the search for and purchase a replacement property. Expropriation of real estate may take place only for the benefit of the State Treasury or local

⁶ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 8.

⁷ J. Szponar-Seroka, Zasada ochrony własności w Konstytucji Rzeczypospolitej Polskiej, *Przegląd Prawa Konstytucyjnego*, Nr 4 (38)/2017, p. 68.

government units, except for private entities⁸. So we can see that the institution of expropriation was created by the Polish legislator in the manner of avoiding the harm of the essence of the property right and has its legitimization in the public interest (so the interest of the society as the whole).

It is also worth paying attention to the provision of Art. 31 paragraph 3 of the Constitution, according to which: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights"⁹. Both Art. 31 paragraph 3 and Art. 64 paragraph 3 of the Constitution set out the principles and conditions for permissible interference in the sphere of property rights, namely: the requirement of a statutory basis for such interference (a formal premise resulting from Articles 31 (3) and 64 (3)), prohibition of infringing the essence of the right to property, delineating the maximum limit of (Art. 31 (3) and 64 (3)) and material premises, i.e. certain values, the protection of which may justify interference with the sphere of property rights (Art. 31 (3)). Moreover, in each case of statutory limitations of the ownership right, it should be examined whether they do not violate the principle of proportionality, i.e. whether they are appropriate from the point of view of the intended purpose (the principle of adequacy), whether they are necessary (the principle of necessity) and whether they are selected in such a way as to be the least burdensome and bearable (the principle of proportionality *sensu stricto*). The prohibition of violating the essence of the law was repeated twice in the text of the constitution, i.e. in Art. 31 paragraph 3 and separately from the ownership right in Art. 64 paragraph 3, which is interpreted as emphasizing the special rank of property among all property rights¹⁰. The Polish legislator took advantage of the possibility of the statutory limitation of property rights, which is allowed by the provisions of the Constitution. I will mention examples of such restrictions at the end of this article.

In the judgment of December 1, 1999 the Constitutional Tribunal stated that "the violation of the essence of the right to property would occur if the introduced limitations concerned the fundamental rights that make up the content of a given right and would prevent

⁸ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p.8-9.

⁹ THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2nd APRIL, 1997, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, 07.02.2020.

¹⁰ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 9.

that right from fulfilling the function that in the legal order based on the assumptions indicated in Art. 20 of the Constitution". Thus, according to the Constitutional Tribunal, we are dealing with a violation of the essence of the right to property when "legal regulations, although they do not abolish the property right itself, in practice make it impossible to use it and perform its function". The constitutional guarantee of ownership also results in positive obligations of the state, such as the creation of precise legal and institutional rules for the functioning of property relations by shaping the basic legal institutions that specify the content of the property right and defining its boundaries, and on the procedural level the establishment of procedures and legal measures ensuring the protection of property and other property rights¹¹.

The Basic Law, which has been in force in Poland since 1997, does not mention the types or forms of ownership, adopting a concept that covers all forms. It expresses the contemporary understanding of property, which is not only an economic category but also a constitutional principle, a legal institution, and an element of human rights regulation. Property is not an absolute value according to our Constitution. Its limitation or even expropriation is permissible, and the admissibility of such a restriction is made dependent on the statutory regulation by the Polish Constitution. This allows for the restriction of ownership in a specific case by the parliament as a representative of the sovereign in a manner meeting social expectations and in a procedure subject to certain requirements as to its compliance with the Constitution. It seems that such a solution creates a sufficient protection of property, including in particular property ownership, on condition, however, of a properly functioning Constitutional Tribunal and respect for its independence by the parliament¹² and other state authorities.

It should be added that even though in the Polish Constitution there is currently no types or forms of ownership, but on the lower level in the statutes (acts) there some restrictions such as in the Immovable Properties Acquisition By Foreigners Act (with some exceptions for foreigners who are citizens of states being parties to the Agreement on the European Economic Area or of the Swiss Confederation), in the Act on Shaping of the Agricultural System (restrictions on trading in agricultural real estate) or in the Real Estate Management Act.

It should be noted that the Polish Constitution includes Art. 91 paragraph 2, which states that "An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such

¹¹ R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 9.

¹² R. Doganowski, Konstytucyjne gwarancje ochrony własności nieruchomości, http://profesjonalista.net/v2/wordpress/wp-content/uploads/2017/01/Gazeta_nr_4.pdf, 30.01.2021, p. 10.

statutes”¹³ and paragraph 3, called the European clause, which states that “If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws”¹⁴. They are also the basis for the implementation of potential restrictions on property rights, which will be introduced based on international agreements binding for Poland (prior consent expressed for the ratification of such an agreement in the form of an act/statue), including the European Union law, but they do not have priority before the Polish Constitution.

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¹³ THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2nd APRIL, 1997,
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¹⁴ THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2nd APRIL, 1997,
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