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Public purpose as an essential necessity of expropriation

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Abstract

The Constitution of the Republic of Poland guarantees its citizens that the state protects the property and the right of inheritance. At the same time, pursuant to art. 21 par. 2 of the Basic Law, expropriation is permissible only if it is made for public purposes and for just compensation. The protection of property is also provided for by the Polish law of international law. According to art. 1 of Protocol No. 1 of 20 March 1952 to the Convention of November 4, 1950 on the protection of human rights and fundamental freedoms, each natural and legal person has the right to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and under the conditions provided for by law and in accordance with the general principles of international law. The expropriation conditions in Poland were determined by the Act of 21 August 1997 on real estate management. Expropriation of immovable property consists in deprivation or limitation, by way of a decision, of ownership rights, perpetual usufruct right or other right in rem over real property. At the same time, expropriation is only possible in relation to real estate located in areas designated for local purposes for public purposes or for real estate for which a decision was made to determine the location of a public purpose investment.

Keywords: Public goal; Public restriction of property rights; Property rights; Administrative recognition; Public-law partnership

1. Introduction

One of the most important conditions for the admissibility of expropriation is the need to do it for the public purpose. Therefore, the provisions on expropriation apply to real estates located in areas designated for these purposes in local plans or for which a decision was made to determine the location of a public purpose. The legislator does not define a public purpose, nor does it define criteria or manner of recognition as a public goal, but introduces in art. 6 u.g.n. a closed catalog of investments, facilities and activities which it considers to be such a purpose, while referring to public purposes specified in other acts. The public goal must therefore be specified directly in the Act, and what has not been indicated in any Act - the public purpose is not. Constructing an interpretation of the concept of public purpose in u.g.n. it was aimed at avoiding a situation in which the widely understood state public interest was in conflict with the individual's interest.

The catalog of public goals is included in the Act on real estate management. These include: separation of land for public roads, waterways, railway lines or airports, construction

and maintenance of public facilities for supplying people with water, electricity, sewage disposal, care of monuments, as well as construction and maintenance premises for offices, courts and prosecutors' offices, schools, etc. Public purposes are also other public goals specified in separate regulations. Therefore, real estate located in areas designated for public purposes indicated in separate acts will also be expropriated, while these laws must expressly refer to a given goal as the public purpose.

The aforementioned directness in using the effects of expropriation must respect the principle of equality before the law. Expropriation can not, therefore, aim to satisfy the needs of a legally restricted group of people. Any person in advance who is individually designated, or strictly defined, should not be denied access to the benefits of expropriation. It would be difficult to assume that the creation of private infrastructural devices would justify interference with the property rights of an individual through expropriation. Therefore, in this situation the principle of proportionality is an instrument aimed at preventing the constitutional legislature from unduly limiting constitutional rights. The requirement to limit the right of ownership has its reference point in the form of a public goal which the legislator intends to implement by limiting this right.

2. Public restriction of property rights

The implementation of public goals may lead not only to expropriation, but also to restrictions on the right to use the right of ownership or limited rights in property. The legal basis for this type of activities is provided in art. 64 para. 3 of the Constitution of the Republic of Poland, which reads as follows: „Ownership may be limited only by way of a statute and only to the extent that it does not infringe the essence of the right of ownership". The constitutional right to use the right of ownership is vested in both the State Treasury and local self-government units. In the opinion of the Constitutional Tribunal, the provision of art. 64 para. 3 of the Constitution of the Republic of Poland has a dual role. First of all, it is a clear and explicit constitutional basis for introducing restrictions on the right to property. Secondly, the premises of admissibility of limitation of ownership contained in it may constitute a criterion for constitutional control of restrictions introduced by statutes (Wyrok TK z dnia 11 maja 1999 r., K. 13/98, OTKZU 1999 r., Nr 4, poz. 74; wyrok TK z dnia 28 października 2015 r., sygn. akt SK 9/14, lex nr 1821295).

Certain conditions for restricting the right to property referred to in art. 64 para. 3 of the Constitution of the Republic of Poland does not refer to specific values and goods whose protection supports the admissibility of the Treasury and local government units to interfere in the right to property. This provision is limited only to the indication of the formal premise and the delimitation of the maximum limit of interference by restricting the owner's use of the right of ownership (Wyrok TK z dnia 11 maja 1999 r., K. 13/98, OTKZU 1999 r., Nr 4, poz. 74; wyrok TK z dnia 28 października 2015 r., sygn. akt SK 9/14, lex nr 1821295). The question arises here: whether art. 64 para. 3 of the Constitution of the Republic of Poland constitutes a lex specialis against art. 31 para. 3 of the Constitution of the Republic of Poland, which concerns the possibility of restricting constitutional freedoms and rights? In the case-law of the Constitutional Tribunal (Wyrok TK z dnia 11 maja 1999 r., K. 13/98, OTKZU 1999 r., Nr 4, poz. 74; wyrok TK z dnia 28 października 2015 r., sygn. akt SK 9/14, lex nr 1821295), such a question was answered in the negative. It has been assumed that the constitutional pattern of control of public-law restrictions on the right to property in addition to art. 64 para. 3 of the Constitution of the Republic of Poland is also art. 31 para. 3 of the Constitution of the Republic

of Poland. In the opinion of M. Safjan, art. 64 para. 3 of the Constitution of the Republic of Poland determines the depth of interference in the sphere of property law, while art. 31 para. 3 of the Constitution of the Republic of Poland determines its legitimacy and purposefulness, requiring the inclusion of other constitutionally protected values, such as the rights and freedoms of others (Wyrok TK z dnia 11 maja 1999 r., sygn. akt K. 13/98, OTKZU 1999 r. Nr 4, poz. 74; wyrok TK z dnia 12 stycznia 1999 r., sygn. akt P. 2/98, OTKZU z 1999 r., Nr 1, poz. 2).

So what is the difference between property rights and property expropriation? The Constitutional Tribunal expressed its position according to which the basic criterion distinguishing between both institutions is the form of restricting the right of ownership and expropriation. In a judgment of May 28, 1999, the Constitutional Tribunal stated that in cases of limitations determining the content and scope of protection of property rights established on the basis of ordinary acts and in cases of expropriation, there are different legal situations. In the first case, it is a limitation that comes to fruition through a general normative act, coming from the representative body, established in the public interest. In the second of these cases, the aim is to deduct in whole for the public purposes the right of ownership of a specific property for a specific entity (the State Treasury or a specific commune) carried out by means of an individual act, namely by way of an administrative decision (M. Safjan 1999).

The concept of distinguishing expropriation from the public law restrictions of property rights presented by the Constitutional Tribunal has been verified along with the assumption that in the light of constitutional provisions there is no basis for assuming that expropriation can only be effected by means of an individual act. The admissibility of ex lege expropriation confirmed by the Constitutional Tribunal breaks the concept of distinguishing the expropriation from the public law restrictions on the right to property, using the legal form criterion. The compensation criterion is not useful for a definitive distinction between the two institutions. In this case, there is no obligation to determine damages. This does not mean, however, that the legislator is not deprived of the possibility of granting it (Wyrok TK z dnia 28 maja 1991 r., sygn. akt K. 1/91, OTKZU 1991 r., Nr 1, poz. 4).

The element of construction of restrictions on the right of ownership, which will allow to distinguish the restriction from expropriation, is the criterion of the essence of the right of ownership. In art. 31 section 3 of the Constitution of the Republic of Poland and in art. 64 para. 3 of the Constitution of the Republic of Poland. The Polish constitutional legislator determines the possibility of restricting the right of ownership on the way of the act and only in the way in which it does not violate the essence of this right. In the judgment of March 14, 2000, the Constitutional Tribunal stated that the problem of constitutional evaluation of provisions introducing limitations to the right to property was to be distinguished from the situation in which, by deducting property, it interferes with the very essence of that right (Wyrok TK z dnia 14 marca 2000 r., sygn. akt P 5/99, OTK z 2000 r., Nr 2, poz. 60). So if art. 64 para. 3 of the Constitution of the Republic of Poland determines the limits of the admissibility of interference with the content of the right of ownership, hence it is not commensurate with the constitutional evaluation of the admissibility of the institution of expropriation in which the element of property rights violation falls. Taking into account the issue of expropriation in art. 21 par. 2 of the Constitution of the Republic of Poland, it can be concluded that there is no justification for such an interpretation of provisions forming the premises for an acceptable restriction of the right of ownership, the purpose of which would be to extend their application (M. Zimermmann 1939).

A different view was presented by B. Banaszkiewicz who considered expropriation a certain type of restriction in the use of the right to property falling within the scope of the

regulation of art. 64 para. 3 of the Constitution of the Republic of Poland (B. Banaszkiewicz 2001). K. Ziemski stated that: „Assuming the rationality of the legislator, it should be stated that interference in the right of the owner further going, and thus affecting the essence of ownership, can take place only on the principles set out in art. 21 of the Constitution of the Republic of Poland" (K. M. Ziemiński 2000) defines expropriation as an interference of public authority in the broadly understood right to property, consisting in the violation of the essence of this law (M. Szewczyk 20003). Likewise, F. Zoll stated that expropriation is such an act of public authority that violates the essence of property rights. Other violations of property rights are not eligible as expropriation and are admissible if they are based on statute (F. Zoll 1998). In German law, in the 1950s, so-called the theory of diminishing the substance, which is an attempt at material and not a formal determination of expropriation, emphasizing the weight and intensity of interference. However, contrary to the old theory of "deserving of protection", which used the subjective criterion: whether the law deserves protection when balancing the general good and individual interest (W. Rüfner, W. Martens, P. Badura, H. Erichsen 1986), the theory of reducing the substance uses objective criteria: has the law been retained in its current function despite interference; whether it has been depleted in its substance (E. R. Huber 1954; E. von Hippel 1965).

The construction of the essence of law and freedom developed by the Constitutional Tribunal is based on the assumption that within a specific law and freedom one can distinguish certain basic elements, such as the core or nucleus, and some additional elements (envelope) that can be recognized and modified by the ordinary legislator in a different way without destroying the identity of a given right or freedom (Wyrok TK z dnia 12 stycznia 2000 r., sygn. akt P. 11/98, OTK 2000, Nr 1, poz. 3.) For the first time, this definition has been applied in Polish law in art. 31 para. 3 of the Constitution of the Republic of Poland. In this regard, in the judgment of January 12, 1999, the Constitutional Tribunal stated that the interpretation of the prohibition of violation of the essence of limited law should not be limited only to the negative level stressing the appropriate mitigation of the restrictions made. „One should also see in it a positive side connected with the striving to indicate a certain inviolable core of a given right or freedom, which should remain free from the interference of the legislator even in the situation when he acts to protect the values indicated in art. 31 para. 3 of the Constitution of the Republic of Poland" (Wyrok TK z dnia 12 stycznia 1999 r., sygn. akt P 2/98, OTKZU 1999, Nr 1, poz. 2).

Referring to property rights, including property rights, it should be recognized that an infringement of the essence of the law would occur as a result of introducing restrictions that concerned the basic rights that make up the content of a given right. It would be an exaggerated simplification to assume that the violation of the essence of property, resulting in the deprivation of someone of that right, fills the signs of expropriation as an interference with the essence of the right of ownership. The restriction, which in its intensity transcends the boundaries of the essence of property, may turn into expropriation. In the judgment of January 12, 2000, the Constitutional Tribunal stated that the assessment of any specific law interfering with the right to property must be made against all the existing limitations, because to determine whether the essence of the right of ownership has been preserved, it is necessary to analyze the sum of the the law of restrictions. In the aforementioned judgment of January 12, 1999, the Constitutional Tribunal directly points to the possibility of violating the essence of law by excessive accumulation of restrictions. The Constitutional Tribunal and the doctrine expresses this type of expropriation as factual expropriation (Wyrok TK z dnia 12 stycznia 2000 r., sygn. akt P11/98, OTKZU 2000 r., Nr 1, poz. 3).

In the opinion of M. Szewczyk, the concept of expropriation would contain manifestations of interference of public authorities, resulting in a violation of the essence of the right of ownership, which would not be accompanied by formal withdrawal of this right (M. Szewczyk 2003). In the judgment of 19 December 2002, the Constitutional Tribunal stated that „the mechanism for assessing the admissibility of certain restrictions relating to the right to property applies, in principle, also to other constitutionally protected property rights. Also, restrictions other than the right to property of constitutionally protected property rights must therefore meet the indicated conditions". The admissibility and limits of restrictions can not be considered in isolation from the essence (legal nature) of a particular institution. As indicated in the judgment of 29 June 2001, K. 23/00, „the limits of interference in constitutional rights and freedoms are determined by the principle of proportionality and the concept of the essence of individual rights and freedoms. The statement that restrictions can be established only when they are necessary in a democratic state requires consideration of: whether the regulation introduced is capable of achieving its intended effects; whether this regulation is necessary to protect the public interest with which it is connected; whether the effects of the introduced regulation remain in proportion to the burdens imposed on it by the citizen" (Wyrok TK z dnia 29 czerwca 2001 r., K. 23/00, sygn. akt OTK ZU nr 5/2001, poz. 124).

In this context, the position of the Constitutional Tribunal expressed in the judgment of 12 January 2000, P. 11/98, should be recalled, „according to which the scope of these restrictions can not invalidate the basic components of subjective right, causing it to „hollow" it from the actual content and leading to transformations into a semblance of law. In such a situation, there is a violation of the basic content - the essence of this law - that is unacceptable under the Constitution" (Wyrok TK z 12 stycznia 2000 r., P. 11/98, sygn. akt OTK ZU nr 1/2000, poz. 3.). The Constitutional Tribunal has assumed that in relation to cases in which interference in the legally protected sphere has taken the property interests of the entity takes place without formal deprivation of the entitled right title, and in fact by the actual actions of the public authority prevents the use or disposal of the law itself, we are dealing with expropriation de facto (Wyrok TK z dnia 19 grudnia 2002 r., sygn. akt. K 33/2002, sygn. akt OTKZU 2002 r., Nr 7a, poz. 97).

The view of M. Zimmermann, who claims that the difference between expropriation and restriction of property rights „is inherent in the fact that expropriation is intended to take away the individual right (by any norm) of an individual while maintaining all other, same rights - the reasons lie here, apart from the individual individual law itself, while in the case of statutory limitation of the right to property, a category of rights is abolished altogether, in all those who will find it. The abrogation is general and has the same effect on everyone („whoever"). The objective content of the law (powers) changes here" (M. Zimermmann 1939). Expropriation is treated as an interference with the property law, which breaks the principle of equality and requires a particular victim of law a special sacrifice for the benefit of the public. As emphasized by S. Czuba, it becomes inert whether ownership is taken away, transferred to another person, or only the owner is restricted in its performance (S. Czuba 1980). As M. Zimmermann rightly predicted: „the evolution of expropriation is not, however, an evolution of the law itself: it falls within certain limits and is utterly useless where the state does not want to take over a particular property, but where property wants to engage in regular public service. For this purpose, it is necessary to have general norms, ie „restrictions on the right to property", changes in the content itself, and the very nature of the law. Hence, the development of property rights must go above all towards its limitations. The main instrument of tomorrow's state will be partial socialization and restrictions on property rights. Expropriation will remain and must remain a separate institution, a „safety flap" for unforeseen accidents or special tasks" (M. Zimmermann 1939).

3. The essence of the right of ownership, as the premise limiting expropriation

The property in the civilian sense is subjective property law, the content of which is specified in art. 140 of the Act of 23 April 1964, the Civil Code (Dz. U. z 2016 r., poz. 1822 z późn. zm.). The fundamental feature of property law is its ruthless nature, which manifests itself in several aspects. First of all, the owner's rights correspond to the general obligation for all other entities to not exceed the owner's rights. Next, the content of ownership rights results not from the content of a specific legal relationship, but from a legal norm, and the implementation of these rights depends on the owner's will and fulfillment by other entities of the duty not to extend ownership of someone else's property. Therefore, it can be assumed after W. Rozwadowski that private property is a material and autonomous right of an individual to possess a material thing, unlimited in its content, as long as it does not violate the current legal order (W. Rozwadowski 1984). Ownership is the widest and most complete law. An expression of this is the possibility of bringing an action by the owner against anyone who unlawfully rules his thing, demanding the issue of the item (E. Skowrońska-Bocian 2011). Although ownership is the law that gives the holder the most complete power over the thing, it is not an absolute right (ius infinitum). Already in art. 140 k.c. the legislator introduced the possibility of limiting the ownership of, among others through the laws and socio-economic destiny of things. Thus, in its judgment of May 11, 1999, the Constitutional Tribunal stated that the protection of property rights is not absolute, since the very right to property can not be treated as a jus infinitum (Wyrok TK z dnia 11 maja 1999 r., sygn. akt K 13/98, OTK ZU z 1999 r., Nr 4, poz. 74). Treating ownership as an absolute right would inevitably lead to widespread infringement of the interests of other entities, including public interest (Wyrok TK z dnia 20 kwietnia 1993 r., sygn. akt. P6/92, OTK 1993, Nr 1, poz. 8.) According to T. Dybowski, "the relative fullness of ownership means that in the system of a given law, the content of ownership is the widest in comparison with the contents of other subjective rights, but not unlimited (T. Dybowski 1969). Similarly, the Supreme Court ruled on the right of ownership in the resolution of 16 July 1980, in which it stated that it provides the owner with „full rights in respect of things in the given circumstances" (Uchwała SN z dnia 16 lipca 1980 r., sygn. akt III CZP 45/80, OSNC 1981, Nr 2-3, poz. 25).

Property is a law whose object is things as material objects (Article 140 of the Civil Code). The content of this right authorizes the owner to use things with the exclusion of other people, in particular to collect benefits and other income from it. This provision allows the owner to exercise the rights set out therein, with the proviso that he will do so within the limits set by the statutes and the rules of social coexistence and, furthermore, in accordance with the socio-economic purpose of his right. In its judgment of January 12, 2000, the Constitutional Tribunal specified the scope of permissible statutory limitations of the right of ownership stating that „[...] these restrictions are admissible if they fulfill the requirements set out in Article. 31 para. 3 sentences 1 of the Constitution of the Republic of Poland. If, however, the scope of restrictions on the right of ownership becomes so large that it destroys the basic components of the right of ownership, distorts them from the actual content and transforms into the appearance of this right, the basic content („essence") of the property right will be violated, which is constitutionally unacceptable. The assessment of each specific law that intervenes in the right of ownership must be made against the background of all existing restrictions. In order to determine whether the „essence" of the right of ownership has been preserved, it is necessary to analyze the sum of the constraints established by law. In other words, constraints defining the content (boundaries) and scope of protection of the right of ownership do not deprive the owner of the option of regulation in his own right. Their meaning and purpose is to determine

only the content (borders) and scope of protection of property rights in the general interest, including in the interests of the owners themselves" (Wyrok TK z dnia 12 stycznia 2000 r., sygn. akt P11/98, OTK 2000/1/3.).

The above ruling of the Constitutional Tribunal refers to the judgment of 12 January 1999 that „the assessment of the constitutional admissibility of a statutory limitation of the right to property (and other property rights) must both take into account the requirements provided for in Article. 64 para. 3, and based on the confrontation of a given regulation with the premises contained in art. 31 para. 3 of the Constitution of the Republic of Poland" (Wyrok TK z dnia 12 stycznia 1999 r., sygn. P 2/98, OTK 1999/1/2).

Statutory restrictions determining the content and scope of protection of property rights mean that this right can not be considered as imposing any restrictions, absolute law. These rules can be considered as interpretative rules when interpreting art. 140 k.c. On this matter, the Constitutional Tribunal stated in a judgment of May 28, 1991 that „statutory restrictions on the right to property can not be statistically recognized, as they change with the scope of protection of property as changes in the course of social relations development"(Wyrok z dnia 28 maja 1991 r., sygn. akt K1/91, poz. 4). The above-mentioned provision is in fine that the owner of the items may dispose of them within the same boundaries. Disposal of an item means transfer of ownership, disposal, encumbrance, putting into possession by means of appropriate legal actions, as well as performing factual activities, e.g. destruction or abandonment of things (B. Rudzicki 2001).

The Civil Code defined the content of the property right by indicating the boundaries within which the owner of the item can exercise his rights towards it. Article 140 of the Czech Republic determines the positive as well as the negative side of ownership. On the one hand, this provision grants the owner the right to use and dispose of the thing (positive side), and on the other hand, it excludes other persons (the negative side) from it. Art. 140 Civil Code. imposes on all entities that are not the owners of a given property the obligation to passively respect the property rights of its owner. It is based on the refraining of these entities from all actions violating this non-facere law. The above passive obligation does not, however, have the character of the debtor's benefit to the creditor, because the person charged with it does not give up any entitlements they are entitled to, but only refrains from entering the sphere of the owner's rights (R. Strzelczyk 2011).

According to art. 140 k.c. the limits of property rights are determined by three determinants, namely: laws, principles of social coexistence and socio-economic purpose of the law. The term act also includes lower-ranking legal acts, with the proviso that they are enforceable to statutes and do not exceed the limits of authorizations contained in these laws. This interpretation is imposed by art. 64 para. 3 of the Constitution of the Republic of Poland, which allows limitation of ownership only by means of statutes and only to the extent that it does not violate its essence. The restriction of ownership through a lower-ranking legal act issued on the basis of an act within the limits of the delegation it contains does not violate the constitutional protection of property guaranteed in art. 21 par. 1, art. 31 para. 3 and art. 64 para. 3 of the Constitution of the Republic of Poland. This restriction can not violate the essence of the right of ownership (E. Skowrońska-Bocian 2011).

Civil law does not question the validity of restricting the right to property. This necessity is a natural consequence of the development of civilization (R. Strzelczyk 2011). Most restrictions are of public and legal nature and result from the provisions of administrative law, eg the Act of 21 May 1999 on weapons and ammunition (T. j. Dz. U. z 2015 r., poz. 1505 z późn. zm.). There are also no restrictions of a civil law nature, e.g. art. 144 k.c., which concerns immission (neighbor's law). Hence in art. 144 k.c. the legislator orders the owner to refrain from

actions that would disrupt the use of neighboring properties beyond the average measure resulting from the socio-economic destination of real estate and local relations (R. Strzelczyk 2011). In this regard, the Supreme Administrative Court expressed its opinion on December 1, 1995, which stated that while interpreting the provisions limiting the right to property, it should be remembered that they are exceptional and are not subject to a broad interpretation (Wyrok NSA w Warszawie z dnia 1 grudnia 1995 r., sygn. akt. II SA 1400/94, Wok. 1996, Nr 3, s. 32).

In this connection, it can be said that respect for property rights means the possibility of unrestrained use of things. State authorities can not arbitrarily interfere in order to deprive or limit property. Restriction in the use of the constitutional and statutory right to property may, therefore, consist in deprivation of the right to property, if the circumstances specified in art. 31 para. 3 of the Constitution of the Republic of Poland. The right to property, as a constitutionally determined and at the same time protected value, must, therefore, yield to such values as were defined in art. 31 para. 3 of the Constitution of the Republic of Poland, while maintaining the principle of proportionality expressed in the constitutional wording: „restrictions [...] can be established [...] only when they are necessary in a democratic state ..." (M. Czech 2015).

4. The importance of a public purpose for the construction of expropriation

The main premise of expropriation and restriction of the right of ownership is the need to achieve a public goal. The public goal is a general clause, which until today has been concretised and systematized in the form of a uniform definition (M. Szalewska 2005). The Polish legislator has established a formal definition of a public purpose by creating in art. 6 u.g.n. the list of activities falling under its scope. This catalogue, however, may be changed by establishing new or adjusting existing public goals, forming them in a way that corresponds to the interpretation of constitutional concepts and principles resulting from them (T. Woś 1990). It can therefore be assumed that the concept of a public goal is dynamic and may change depending on the economic needs of the state and society (M. Wolanin 2009). M. Wolanin, recognizes all this for public purposes, achieving what the individual goals indicated in art. 6 u.g.n. (M. Zimmermann 1939). M. Zimmermann argued that the implementation of the public purpose, and the related obligation of just compensation, are in fact legitimate postulates for state power. The authorities are obliged to carry out public goals, however, taking into account the obligation of just compensation for expropriation or limitation of the right to property. A contrario, there can be no expropriation without a clearly defined public purpose (M. Zimmermann 1939). A different view is represented by T. Woś, who stated that „the most important element of the legal construction of expropriation is the determination of material legal conditions for the admissibility of expropriation, ie the purposes for which this form of state interference in the sphere of individual rights is permissible" (T. Woś 1998). In the opinion of M. Zdyba, the existence of the possibility of expropriation for public purposes specified in the Act is, in addition to the removal or limitation of the right of ownership and the form of an administrative decision, an important determinant of the institution of expropriation (M. Zdyb 1997). A similar view is presented by G. Bieniek, who stated that the characteristic feature of expropriation is „that it can only occur for reasons specified in art. 6 u.g.n. for public purposes" (Z. Marmaj 1998). On this issue, in the judgment of March 16, 2005, the Supreme Court stated that it was determined in art. 6 u.g.n. the catalog of public goals is closed in the sense that it is listed in its point 10 other goals are only goals set in other acts, as public (Wyrok SN z dnia 16

marca 2005 r., sygn. akt II CK 522/04, lex nr 2339801). The Supreme Administrative Court in its judgment of 15 May 2008 stated that art. 6 u.g.n. contains a list of public goals that can not be extended by way of interpretation. There are some interpretive gates in this catalog, but they must be translated in a restrictive way, based on the provisions of other laws, in accordance with the ratio legis art. 6 u.g.n., which is the creation of a clearly marked number of cases of using the term public purpose (Wyrok NSA w Warszawie z dnia 19 czerwca 2013 r., sygn. akt II OSK 3101/12, lex nr 1559695). The literal wording of art. 21 par. 2 of the Constitution of the Republic of Poland clearly indicates that the public purpose is a criterion for the admissibility of expropriation, which gives the legislator a tool for creating limits of imperious state interference in the sphere of the right of ownership of an individual. The legislator should be guided by the principle of proportionality, from which it follows that „adoption of a given regulation is possible only if it is necessary to protect the public interest with which it is associated, the shaping of a given regulation should take place in a manner ensuring the achievement of the intended effects. is obliged to maintain the proportion between the effects of the regulation introduced and the burdens or inconveniences resulting from it for citizens. This principle requires choosing among the most effective measures, and at the same time least burdensome for entities to whom they are to be applied, or painful to a degree not greater than necessary to achieve the assumed goal" (M. Szalewska 2005).

Thus, the most important element of the legal construction of expropriation is the determination of the substantive legal conditions for the admissibility of expropriation, ie the purposes for which this form of state interference in the sphere of individual property is permissible. Undoubtedly, it is true that the evolution of the institution of expropriation takes place mainly through changes in the definition and understanding of the purposes for which property expropriation is allowed (T. Woś 2011).

4.1 The concept of public purpose in the light of the case law of the European Court of Human Rights and the EU Court of Justice

Pursuant to the provisions of art. 1 of Protocol No. 1 of the European Convention on Human Rights, the condition of the existence of a public purpose is fulfilled when the deprivation of property will result from the implementation by the state of a specific policy, for example social or economic, even if the entire property will not benefit directly from it The determinant of the limits of public authorities' interference in the right of ownership is the broadly understood public goal to which examples the European Court of Human Rights includes, among others: spatial planning, environmental protection, regulation of economic activity, or restrictions on trade with foreign countries (Wyrok ETPCz z dnia z 18 lutego 1991 r. w sprawie Fiedin przeciwko Szwecji, skarga nr 12033/86, series A 192; decyzja ETPCz z dnia 15 maja 1996 r., w sprawie Kaira przeciwko Finlandii, skarga nr 27109/95; wyrok ETPCz z dnia 24 października 1986 r. w sprawie AGOSI przeciwko Wielkiej Brytanii, skarga nr 9118/80, series A 108).

Given the "public purpose" case law of the European Court of Human Rights, the concept of "public good" can be derived, which determines the use of a public goal by public authorities. The state may use the broadly understood public good, but under certain conditions, among which it is possible to distinguish:

1) the inability of a member country to invoke the protection of an important general interest if European regulations are in force in a given area;

2) inability to invoke public interest in the case of instruments motivated by economic goals, eg protection of a specific industry sector, since ensuring the integrity of the economic system is the responsibility of the community;

3) the principle of mutual recognition of national provisions with a comparable protection system, the host country can not justify the desirability of regulation with a public good, which has equivalent protection in the country of origin;

4) the principle that in the absence of European regulation a member state may apply its own law protecting some "public good" (M. Sthal 2007).

The influence of the jurisprudence of the EU Court of Justice on the notion of public good in the Member States and the prohibition of public-law interference in the values protected in the First Protocol to the Convention means in fact the so-called Europeanization of administrative law. This concept should be understood as seeking a certain universal system of values, characteristic of European cultures. Europeanisation accepted in this way is a time-stretched process that takes place in various areas of law and in various forms. It includes: the reception of the law; the impact of international organizations and their acts that are relevant to national legal orders (eg participation in the Council of Europe); the impact of Community or EU law (M. Jaśkowska 1998).

From art. 17 sec. 1 zd. 2 KPP, it is clear that the restriction or deduction of ownership by expropriation is allowed only due to the public purpose and just compensation. „Expropriation carried out without a specific public purpose and without compensation will be affected by a disadvantage resulting in non-compliance of the expropriation with EU law" (Wyrok TSUE z dnia 9 września 2008 r., sprawa Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) i Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon& Figli SpA i Fedon America, Inc. Przeciwko Radzie Unii Europejskiej i Komisja Wspólnot Europejskich, skarga C-120/06, C-121/06; wyrok TSUE z dnia 15 kwietnia 1997 r. w sprawie The Irish Farmers Association i inni przeciwko Minister for Agriculture, Food and Forestry, Ireland i Attorney General, skarga C-22/94; Wyrok TSUE z dnia 16 listopada 2011 r. sprawa P, Bank Melli Iran przeciwko Rada Unii Europejskiej, skarga C-548/09). In connection with this, the EU Tribunal, deciding on specific cases, assesses whether the means intended to achieve a public goal in expropriation proceedings do not constitute unauthorized interference with the property right or lead to the violation of its essence (Wyrok TSUE z dnia 10 lipca 2003 r. sprawa Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers, skarga C-20/00, C-64/00).

4.2 The concept of public purpose in the light of the provisions of the Constitution of the Republic of Poland

In art. 21 par. 2 of the Constitution of the Republic of Poland, the legislator stated that the public purpose is a criterion of the admissibility of expropriation, not being an element of the construction of the very concept of expropriation. According to this provision, expropriation is permissible only if it is made for public purposes and for just compensation. The public goal, along with just compensation, sets the limits of admissibility and, at the same time, the lawfulness of expropriation. The admissibility of expropriation exclusively for public purposes in the light of the above provision constitutes a constitutional principle. The Constitution of the Republic of Poland does not define the concept of a public goal. „One could say that the content of this concept was left to the ordinary legislator, which he did and could do in the future"(M. Szewczyk 2003).

Currently present on the basis of art. 6 u.g.n. the term public purpose is a formal definition, the practical meaning of which is limited to the enumerative indication of cases in which the activities of the state fall under its scope. The legislator therefore gave up the creation of a legal definition of public purpose and did not leave the public administration body the freedom to decide when the state's activity is compatible with the public goal and when not. The main reason for this situation is the fear of any interpretation of this concept in a situation where the state is hindered by the entity and its interests, mainly property interests, in achieving its goals. Whether an investment will pursue public goals can not be decided in isolation from the circumstances of a given case (Wyrok NSA w Warszawie z dnia 28 listopada 2007 r., sygn. akt II OSK 1583/06, lex nr 416607). The subject criterion determines the public character of a given objective, which only matters if the legislator stipulated that certain public goals can only be implemented by all or strictly defined public entities. In other words - where the possibility of privatization has entered the implementation of public administration tasks, public goals can be implemented by private entities (M. Szewczyk 2004).

On the basis of u.g.n. the value of the concept of a public purpose depends on a teleological interpretation in the context of a given investment, and not on the abstract meaning of this concept. In an individualized, and not abstract, assessment of the public purpose should be made, as in u.g.n. the definition of a public purpose serves specific public interests, which means that the public purpose should be defined in the context of a given case. The essence of the public goal is closely related to the current needs of society, which is conditioned by economic and social considerations, results from the level of development of a given society, and at the same time its economic possibilities. It is also noted that as the civilization develops, the individual, in order to meet his growing needs, is increasingly forced to use the help of society, as well as the freedom of the individual to be depleted for the benefit of the community. The notions of public interest can not be equated with the interest of the state or the interest of the commune, understood as a separate entity. Trends to identify the public interest with the interest of the state usually accompany autocratic governments (E. Modliński 1932).

The above criteria defining the notion of a public goal are characterized by variability over time, which results in the inability to define them unequivocally and permanently. This diminishes the possibility of permanent and permanent determination of public goals, for which the feature of variability and permanent indeterminacy is the essence, demonstrating the constant development of society and its needs. The constitution-maker, using art. 21 par. 2 of the Constitution of the Republic of Poland with the notion of a public goal, has not created a state of total discretion and discretion in prescribing specific actions or intentions of public purpose features. A constitutional permit of expropriation may be made if public purposes can not be implemented in any other way than by depriving or limiting the right to property. According to art. 21 par. 2 of the Constitution of the Republic of Poland, acting in the public interest should be guided by the principle of proportionality. It follows from this principle that the adoption of a given regulation is possible only when it is necessary to protect the public interest with which it is associated. The shaping of a given regulation should take place in a way that ensures achievement of the intended effects. The legislator is obliged to maintain the proportion between the effects of the regulation introduced and the burdens or inconveniences resulting from it for citizens. This principle requires choosing among the most effective measures, and at the same time the least onerous for the entities to whom they are to be applied, or painful to a degree not greater than necessary to achieve the assumed objective (T. Woś 2011). A similar regulation was included in art. 11 (4) Charter of fundamental rights and freedoms as part of the constitutional order of the Czech Republic: „Expropriation or involuntary restriction of property rights is allowed only in the public interest under the Act and

against compensation" (Tekst uchwały i Tekst Karty został ogłoszony w "Sbírka Zákonů České Republiky" 1993 nr 1 z 28 XII Prezydium Czeskiej Rady Narodowej z dnia 16 grudnia 1992). „Then in art. 14 par. 3 of the German Constitution, which stipulates that expropriation is permissible only for the general good and may only take place by statute or pursuant to the Act" (S. Bożyk 1993). Przepis ten określa dwie formy wywłaszczenia: „wywłaszczenie ustawowe (Legislativenteignung) i „wywłaszczenie administracyjne" (Administrativenteignung). W pierwszym przypadku wywłaszczenie następuję w drodze ustawy (durch Gesetz), w drugim w formie aktu administracyjnego (auf Grund eine Gesetzes) (O. Kimmnich 1992).

4.3 The concept of public purpose in the light of doctrinal views

The question of mutual relationship between public purpose and expropriation in the learning of civil and administrative law raises a number of doubts. On the one hand, views were presented about the redundancy of the public purpose element for the definition of expropriation, as a legal concept, and on the other hand, about the necessity of its occurrence for the essence of expropriation. The first view is represented by M. Zimmermann, stating that „the concept of public utility purposes is perceived so broadly that it sometimes loses all meaning at all and simply means the existence of any motives for the legislator at all"(M. Zimmermann 1939). The next thesis is that the legislator omits the requirement of public utility in the construction of expropriation. The author stated that the concept of public utility purposes is irrelevant for establishing the absolute concept of expropriation as a legal institution, but it is important to establish this concept as a relative, i.e. for a given legislation (M. Zimmermann 1939). The scope of the expropriation may be made dependent on the need for a public purpose, but then the requirement of a public purpose (M. Zimmermann 1939), public good is presented as a condition. „The power can only expropriate when it determines that the condition actually occurs" (M. Zimmermann 1939). And although the author in his views speaks for the superfluity of the notion of a public purpose purpose for the essence of the construction of expropriation, it nevertheless underlines that this element is important for positive legislation, e.g. when it occurs in the constitution, it is a constraint on the legislator. These goals are a guarantee of basic civil rights and expressis verbis were included in the Constitution of the Republic of Poland for a reason. The necessity of statutory regulation of public goals does not mean that one should stop searching for the essence of general expropriation, abstracting from positive legal regulations.

A different view from the presented one is presented by representatives of the so-called classic theory of expropriation. This view, as an element of public utility of the expropriated law, is considered to be a key element in the construction of expropriation as a requirement for expropriation to be necessary for the realization of specific public goals (T. Woś 2011). In T. Woś view, the most important element of the legal construction of expropriation is the determination of material legal conditions for the admissibility of expropriation, ie the purposes for which this form of state interference in the sphere of individual rights is permissible (T. Woś 2011). In the opinion of M. Zdyba, the use of expropriation solely for the purposes specified in the Act is, in addition to the subtraction or limitation of the right of ownership and the form of an administrative decision, the basic determinant of the institution of expropriation (M. Zdyb 1987). Z. Truszkiewicz indicates that it is possible to speak about expropriation when it occurs due to reasons and circumstances described in art. 46 ust. 2 u.g.g.w.n (Z. Truszkiewicz E. Drozd 1994). A similar opinion was expressed by G. Bieniek, claiming that in relation to the regulations included in the Act on Real Estate Management, the characteristic feature of

expropriation is that it can only occur for reasons specified in art. 6 u.g.n., precisely because of public goals (G. Bieniek, Z. Marmaj, E. Mzyk, R. Żróbek 1998).

However, one must be aware that the above-presented views result to a large extent from different research and axiological assumptions of individual authors. These views can be aggregated into two groups. The first one is the views of the authors for whom the definition of a public purpose is important and departure from the rigid statutory catalog of these goals. Public authorities should be free to set public goals. In these views, the dominance of the public interest over the private one can be seen. The second group consists of views according to which there should exist a strict catalog of public goals, without the possibility of expanding it through interpretation. In this case, the private interest and protection is more important than the public interest.

5. Statutory authorization as a prerequisite for expropriation

From the previous analysis regarding the understanding of the concept of a public goal, another research problem appears, namely the issue of the legal basis for expropriation. The essence of expropriation, as well as the premises of its admissibility, i.e. public purpose and just compensation, can only be determined by law. M. Wolanin said that „the constitutional consent of expropriation only for the public purpose results in the possibility and at the same time the necessity to define public goals in a precise manner, only in statutes" (J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin 2009). The exclusivity of the act, in regulating the limits of the admissibility of expropriation, is indicated in art. 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which „no one may be deprived of his property, except in the public interest and under the conditions provided for by law under general principles of international law". For example, the James and Others v. The United Kingdom ruling (Wyrok ETPCz z dnia 21 February 1986 r. w sprawie Jamesa and Others v. the United Kingdom, series A no. 98, p. 32, § 46) at which the European Court of Human Rights granted Member States the freedom to define the limits of the concept of public purpose and to subtract property rights on its basis, as long as it does not contradict the values set out in art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Wyrok ETPCz z dnia 28 września 1995 r. w sprawie Scyllo v. Italy, skarga nr 19133/91).

Adoption of the thesis about the possibility of concretising a public purpose only by means of an act indicates the form of this concretisation, but it does not specify its content. When speaking about filling in the content of the notion of a public goal by the legislator, it should be indicated according to which criteria or principles this fulfillment should take place. Does the legislator enjoy total freedom? The first criterion will be the linguistic interpretation of the concept of a public purpose. According to it, the only public purpose that will be recognized is what serves the general public and is widely available, it is a good of the whole, ie the whole society or the regional socjety (T. Dybowski 1996). The second criterion defining the limits of statutory specification of the public purpose for the purpose of expropriation will be the principle of proportionality resulting from art. 2 of the Constitution of the Republic of Poland. In this matter, the Constitutional Tribunal indicated that „interference of the legislator must not contradict the axiological assumptions underlying the constitutional provisions and principles. It is permissible if it corresponds to the principle of proportionality, which presupposes the adequacy of the measure and purpose" (Wyrok TK z dnia 12 kwietnia 2000 r.,

sygn. akt K8/98, OTK 2000 r., Nr 3, poz. 87), in other words, a balance between the violation of individual rights and the actual need of a public interest (I. Lach 1998).

It follows from the principle of proportionality that the adoption of a given regulation is possible only when it is necessary to protect the public interest with which it is associated. The shaping of a given regulation should take place in a manner ensuring the achievement of the intended effects, and the legislator is also obliged to maintain the proportion between the effects of the regulation introduced and the burdens or inconveniences resulting from it for citizens. This rule requires choosing among the most effective means, and at the same time the least onerous for entities to whom they are to be applied or painful to a degree not greater than necessary to achieve the assumed objective (Wyrok TK z dnia 26 kwietnia 1995 r., sygn. akt K 11/94, OTKZU 1995 r., cz. I, poz. 12.) In turn, in the judgment of 17 October 1995, the Constitutional Tribunal stated that this principle implies that "adoption of a given regulation is possible only when it is necessary to protect the public interest with which it is linked, the shaping of a given regulation should take place. in a way that ensures the achievement of the intended effects, and moreover, the legislator is obliged to maintain the proportion between the effects of the regulation introduced and the burdens or inconveniences resulting from it for citizens. This principle requires choosing among the most effective measures, and at the same time the least onerous for entities to whom they are to be applied, or painful to a degree not greater than necessary to achieve the assumed goal (Wyrok TK z dnia 17 października 1995 r., sygn. akt. K10/95, OTKZU 1995 r., Nr 2, poz. 10).

The principle of proportionality is not unlimited. According to A. Walaszeka-Pyzioł: „the principle of proportionality is an instrument aimed at preventing an excessive restriction of constitutional subjective rights by an ordinary legislator. The requirement to limit a given law has its reference point in the form of a „public goal" which the legislator intends to implement by limiting this right. Even a very far-reaching limitation of the law can be reconciled with the principle of proportionality if it is a useful and necessary measure to achieve a specific, sufficiently important public purpose. Thus, the principle of proportionality, as such, does not constitute a barrier against the violation of the „essential content" or „nucleus" of subjective law"(A. Walszak-Pyzioł 1995).

6. Determination of the public purpose with the use of administrative discretion

The literature and jurisprudence assumes that the public purpose, as a not defined concept, can not constitute a prerequisite for the application of administrative recognition. The authorization is considered to be disputable if the legal provision uses defective (undefined) phrases in the description of the facts justifying the functioning of the authority (M. Wierzbowski, A. Wiktorowska 2006). Referring to the above issue in the judgment of November 16, 1999, the Supreme Administrative Court stated that „unlike other types of decision-making gaps, recognition is a possibility to choose legal consequences. In order to issue a correct decision in the situation of administrative recognition, the administrative body is obliged to examine the facts in detail and record the results of the audit in the case files. Obligations of the administrative body in the scope of evidence proceedings are even greater than in the case of statutory embarrassment, because in search of a material criterion for issuing a decision should most broadly examine the facts, in a dimension going beyond the circumstances typical in situations of binding, bearing in mind the special role in the discretionary decision, its compliance with the social interest and the legitimate interest of the

citizen of art. 7 k.p.a." (Wyrok NSA w Warszawie z dnia 16 listopada 1999 r., sygn. akt III SA 7900/98, lex nr 47243).

In the opinion of M. Jaśkowska, who belongs to the representatives of the opposition's position, one can not combine recognition with the existence of vague notions in the standard, because then we have to deal with different stages that take place in the process of applying the law. According to the author, the fact of using phrases that are not clearly defined does not testify to the existence of authorization to recognize. You can meet with the interpretation of the term under-defined (determining the content, for example, public order), and then with the assessment of the facts and with checking whether the given state of affairs corresponds to the adopted content of the concepts. If such compliance exists, there may be a requirement for specific behavior, i.e. no recognition (M. Mincer 2010).

M. Mincer is a representative of the narrow recognition approach, covering only a certain form of discretionary power in the field of the application of law (M. Mincer 2010). This author is based on the so-called the decision-making model of the application of law, built by J. Wróblewski (J. Wróblewski 1972), reflecting the problems before the body when adapting the legal norm to a specific case. According to the author, four stages can be distinguished in the process of applying the law, in which the body applying the law determines the meaning of particular terms appearing in the legal text:

1) the stage of free evaluation of evidence;

2) recognition of the fact as proven "under" applicable law;

3) binding determination of the legal consequences of a fact recognized as proven based on the applicable law. These consequences may consist in a predetermined legal effect (lack of recognition), or it may be necessary for the authority to choose the legal effect provided for in this standard (i.e. recognition);

4) the subsumption of a fact recognized as proven by applicable law (M. Mincer 2010).

According to M. Mincer, administrative recognition occurs when the legal norm does not determine these consequences in an unambiguous manner, but when it clearly leaves the choice to the administrative authority. Recognition concerns the future and its subject is not to determine the legal meaning or to assess the facts, but to determine the legal effect (M. Mincer 2010).

By sharing the above the view should be taken of the view of A. Wróbel, according to which the interpretation of indefinite concepts should take place in the process of applying procedural law by public administration bodies. In relation to the public interest concept similar to the public purpose, the author stated that „one can not rely on an abstract social interest in making negative decisions to the party without proof and comprehensive justification, on what this interest in a specific case it consists and why it speaks against dealing with a procedural matter in accordance with the party's request" (A. Wróbel 2000).

The above views allow to conclude that the possibility for administrative authorities to apply administrative recognition in the event of a public purpose would require the legislator to introduce Article 6 u.g.n. phrases such as may, requires consent, with consent and what is not in the content of this article (M. Mincer 2010). M. Mincer notes that there is a group of terms that have traditionally been considered empowering to recognize, and which by themselves do not mean anything yet. Refers to permits and permits. The author claims that even in every case of using such terms, one should find the answer to the question whether in certain conditions the authority is required to issue a permit or whether it can, but does not have to do so? (M. Mincer 2010). The basis for recognition is a specific legal norm that „must designate the addressee and circumstances in which the proceedings are to be implemented and contain a specification of the designated procedure" (M. Mincer 2010). A norm built for the needs of

recognition must therefore consist of two elements: a hypothesis concerning the determination of the actual state in relation to which there may be a free assessment of evidence and legal succession in the form of an alternative, which can not be determined when analyzing art. 6 u.g.n. The volatility of public goals creates an acceptable situation of increasing or reducing the use of expropriation as a form of imperious interference in the rights of the individual, without affecting the very essence of expropriation as a legal concept. Entering the public purpose in the construction of the concept of expropriation would entail the changeability of the concept, reflecting the variability of the concept of a public purpose (M. Jaśkowska 2015).

7. Implementation of the public goal in connection with public-law partnership

A separate possibility of privatization due to the implementation of a public goal may take place in connection with the implementation of investments under public-private partnership. This institution has its source in the Anglo-Saxon law system. Public-private partnership allows for sharing risk and costs of implementing a specific investment project between public authorities and non-public entities. The premise of the public purpose is treated in the American doctrine as a blank wording (empty question) (M. Jaśkowska 2015). In the American doctrine, the phrase "for public use" used in the fifth amendment does not mean that expropriation must be done solely for this purpose. The Constitution has left the authorities a wide field to interpret what is within the limits of public use (R. A. Epstein 1985).

The current approach to the basic condition of public-law interference in the right to property suggests that in the US Constitution the possibility of expropriation occurs only „for public use" (W. B. Stoebuck 1972). As a result of the judicial practice of the Federal Supreme Court and lower courts, the phrase public use contained in the V Amendment was defined as containing every public purpose, which led to the legalization of many private expropriations as consistent with the V Amendment (P. J. Kulick 2000).

One of the main reasons for such a broad interpretation of the US public purpose is that the owner of the property designated for the implementation of the project will seek to stop the sale, raising the price, significantly exceeding its value, or will wait for the increase in property prices in the area. The above operation in free market conditions makes it difficult, and even impossible, for the property to be acquired voluntarily by both the authorities and private entities that face the owner in the same position. Expropriation is considered the only tool that allows to circumvent this problem, because it does not give up the planned investment, transfer its location, or pay an excessively high price. An administrative body acting for private entities may simply expropriate the property by paying just compensation. The Supreme Court of New Jersey spoke on this matter, stating that the expropriation of real estate for highway construction is an absolutely necessary measure, because otherwise a single unit could block the investment by its action **(**D. B. Kelly 2006; wyrok SN Florydy z dnia 15 maja 1996 r. w sprawie Zamecnik v. Paul Beach Country, 768 So. 2d 1217 (Fla. Dist. Ct. App. 2000). The foundation of the current interpretation of the term public purpose in the legislation and judicial decisions in the United States is based on four precedent cases: „Berman v. Parker" (Sprawa Everest W. Cox Co. V. State Highway Comm'n, 133 A. 419, 513 (N. J. 1926): „the exercise of the power of eminent domain is absolutely necessary for building state highways because if this were not the law, then single individual could hold up a state project"); „Hawaii Housing Authority v. Midkiff"(sprawa Berman v. Parker, 348 U.S. 26 (1954): „It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its

authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way"), „Poletown Neighborhood Council v. City of Detroit" (Sprawa Hawaii Housing Authority v. Midkiff z dnia 30 maja 1984, 467 U.S. 229 (1984).), „Kelo v. City of New London" (Wyrok SN Stanu Michigan z dnia 13 marca 1981, 410 Mich. 616, 304 N.W.2d 455- The Supreme Court of Michigan faced the question of expropriation in the city of Detroit of the entire city, inhabited by 3,500 people, with 1,174 buildings (including 144 office buildings, 3 schools, 16 churches and a cemetery) to build the General Motors factory (the project has been worth over 200 million dollars) is an activity in line with the V Amendment. The expropriated residents argued that it was not, because the only beneficiary of such action is a private entity, aimed at achieving its own goals and profit. The court did not share such a position, stating that even if the private beneficiary is the direct beneficiary of the expropriation, the benefit for the local community, which is the elimination of unemployment and economic growth, makes the expropriation take place for public purposes.) Their significance is so significant that they appear in judicial decisions in all countries belonging to the common-law system and almost in every publication devoted to the privatization of public objectives. This institution is still a novelty in our legal system and is still undergoing slow development, as evidenced by the small number of investments carried out in this form.

The American public-private partnership model has had a profound impact on achieving public goals also in Western Europe, especially in the United Kingdom, where the provision of public services takes place mainly through the application of rules in the open market. This solution has transferred measurable benefits in terms of infrastructure development in this country (Wyrok SN z dnia 23 czerwca 2005 r., sprawa „Kelo v. City of New London".). Similarly, in Poland, the Act of May 2, 2015 on public-private partnership was introduced (A. Panasiuk 2010). However, the implementation of public tasks in public-private partnership is not very popular. Lower interest in the above institution in Poland is influenced by the law, in particular regarding the tax burden of the private sector involved in achieving public goals, as well as the obligation to comply with the Public Procurement Act when concluding subcontracts. Also important is poorly developed infrastructure, which does not provide an adequate basis for the implementation of public undertakings by private entities and poor knowledge of the methods of using this institution. An example of this is the rules on the financial discipline of local government units. Pursuant to § 3 point 2 of the Regulation of the Minister of Finance of December 28, 2011 on the detailed manner of classifying debt titles classified as public debt (Dz. U. z 2015 r., poz. 696 z późn. zm.), from 1 October 2012, local governments are obliged to include in the level of indebtedness, in addition to loans, loans of debt securities, also public-private partnership agreements, affecting the level of public debt. The funds transferred by local governments for infrastructure investments with the participation of private entities are included in the total indebtedness of these units, even if they are not due. Since the privatization of achieving public goals in not all areas brings the desired results. There are areas in which leaving free market mechanisms is unachievable because the market is unable to shape demand or prices in them. These areas include: public education, health care and areas in which municipal public utility companies operate, operating on the basis of monopoly, eg communal municipal waste market, in which local governments often privilege municipal companies. Introduced from 1 January 2012 an amendment to the act on maintaining cleanliness and order in municipalities (Dz. U. z 2011 r. Nr 298, poz. 1767 z późn. zm.), the refusal to consolidate this state of affairs, because the commune, as the organizer of the tender, as a result decides which enterprise will conduct such activity in its territory. It should also be emphasized

that the privatization of a public goal is not always possible. Art. 49 k.c. enables transmission easement for devices, some of which have not been indicated, directly as a public purpose within the meaning of art. 6 u.g.n. The existence of two legal regulations compliant with each other, permitting the implementation of transmission infrastructure, i.e. Art. 124 u.g.n. and art. 305^1 k.c. it does not have a positive impact on the development of public law cooperation in this area. In addition, fears related to the protection of constitutional rights of citizens are constrained.

The above-mentioned remarks entitle you to draw two applications. First of all, the fact that assessing whether a given investment implements a public goal will require analysis as part of the regulations of the applicable legal system and applying to the provisions on municipal management, maintaining order and cleanliness in communes, and the act on waste. The above-mentioned provisions, cited, for example, with an indication of the matter they regulate, will allow to answer the question whether the public purpose is being pursued. Secondly, investments for public purposes do not necessarily require public entities to implement them. In a concrete case, therefore, the assessment will be made as to whether there is such an investment that can and should be considered a public purpose.

8. Necessity of expropriation for the public purpose

The necessity of realizing a public goal is another basic premise of expropriation. This claim is based on the provision of art. 112 para. 3 u.g.n. in which the legislator predicted that expropriation could take place only if:

1. public goals can not be implemented otherwise than by deprivation or restriction of rights to real estate;
2. these rights can not be acquired by way of a contract (G. Bieniek, S. Rudnicki 2004).

The first condition is predominant and must be met in every case. Both when the negotiations with the owner are carried out regarding the acquisition of rights by way of a contract, and when, in the event of ineffectiveness of negotiations, expropriation takes place by way of a decision. Specifying that public purposes can be implemented in a different way means that the State Treasury or a local government unit do not have real properties that allow achieving the public goal. On the other hand, the implementation of the goal is not possible by means of a milder form of interference with the owner's rights, e.g. by temporarily seizing the property.

The legislator defined the term of public purpose in art. 6 points 1 - 9b u.g.n. In the judgment of 9 November 2009, the Voivodship Administrative Court stated that when formulating the definition of a public goal, the legislator gave a relatively large freedom on the type of entity conducting the investment, the extent of its impact or the method of financing. However, the condition for recognizing a project as an investment of a public goal is to precisely define the purpose of the planned investment. The undertaking whose purpose is in the catalog of public goals specified in art. 6 points 1-9 of the Act on Real Estate Management or pursuant to art. 6 point 10 of this Act was specified in another act, it can be considered as an investment of a public purpose. It is also worth emphasizing that although the catalog is closed, other public goals may be indicated in separate acts (Wyrok WSA w Warszawie z dnia 9 listopada 2009 r., sygn. akt IV SA/Wa 1256/09, lex nr 589431).

Therefore, it should be considered whether the public goal, as a closed catalog of activities, has not been formulated too narrowly. The need to narrow the understanding of the public purpose is obvious, since it can lead to the deprivation of property rights. In the recent

past, the public goal was to implement co-operative housing, which is excluded in the current legal status. It is obvious that the definition of a public goal contained in art. 6 u.g.n. it will facilitate the interpretation of this concept in the course of expropriation proceedings, but it will not solve all the doubts that still arise (G. Bieniek, S. Kalus, Z. Marmaj, E. Mzyk 2011).

The concept of a public goal has been specified in the Act on Real Property Management in two ways:

a) in art. 6 points 10 u.g.n. calculated - as far as possible - goals recognized by the legislator as public goals within the meaning of the Real Estate Management Act;

b) in art. 6 points 10 u.g.n. it was indicated that they could be "other public goals specified in separate acts", e.g. art. 37 of the Act of 28 September 1991 on forests (T. j. Dz. U. z 2014 r., poz. 1153 z późn. zm.)

The formulation of a public purpose as a closed catalog is more justified than contained in the previous Act of 29 April 1985 on land management and expropriation of real estate, in which art. 46 ust. 2 point 5 contained the term other obvious public goals. This created a certain freedom in assessing whether a given goal was taken for granted as a public purpose. This freedom has been removed in the currently binding legislation on real estate management. The scope of discretion is defined by the legislator through the concept of a separate act, which goals should be considered public (G. Bieniek, S. Rudnicki 2004). The Act on Spatial Planning and Development of March 27, 2003 (hereinafter: u.p.z.p (Dz. U. z 2015 r., poz. 199 z późn. zm.), redefines the concept of public purpose investment and imposed on all municipalities that banned the construction of base stations the obligation to abolish this prohibition during the year. The admissibility of property expropriation for this purpose is still an open question. The issue raised is of great importance in practice. In art. 2 pts 5 p.p. defines the concept of public-purpose investments included in art. 6 u.g.n. The concept of public purpose will be assessed by various authorities.

According to art. 21 par. 2 of the Constitution of the Republic of Poland, expropriation is permissible only if it is made for public purposes and for just compensation. Use by the legislator in art. 21 par. 2 of the Constitution of the Republic of Poland, with the expression only then, indicates the exceptional and final nature of expropriation as an institution serving the implementation of public goals. Any expropriation must be justified by the need to achieve a public goal, but not every public purpose can be achieved through expropriation. Expropriation is a definitive and exceptional measure, applicable only when ownership relations obliterate the possibility of pursuing a public goal, beyond the condition of prudent and cautious settlement of the conflict of individual and public interest.

According to art. 112 para. 3 u.g.n. the admissibility of expropriation has been limited only to situations where public purposes can not be implemented otherwise than by deprivation or restriction of rights to real property. T. Woś stated that „it means inadmissibility of expropriation of real estate, if a specific purpose can be achieved without its use, if its achievement does not require the use of real estate in the whole range, or it is possible using less severe interference in the property right”(T. Woś 1998). According to Z. Truszkiewicz, „indispensability implies the optimization of solutions of a given undertaking due to a specific public purpose justifying expropriation, and secondly, the adequacy of the scope of expropriation to the realized public purpose by means of a specific undertaking”(E. Drozd; Z. Truszkiewicz 1994).

Underdecision of the concept of indispensability and a non-existent element of the assessment imposes on the legislator the obligation to create mechanisms limiting the arbitrator's and the pre-emptive authority's making decisions about the necessity of a given real estate for the public purpose. The restriction will be the requirement to use the property for

public purposes in the local spatial development plan or in the decision on determining the location of the public purpose investment. At the stage of spatial planning, a preliminary assessment of the necessity of a given property for public purposes is made.

9. Recapitulation

The notion of public purpose fulfills a special role, constituting the basic criterion for determining the limits of permissible State interference in the sphere of individual rights, that is in the sphere of individual interest. Despite the identification of the notion of public purpose and the notion of public interest, the latter is usually treated as the basic criterion determining the admissibility of legislative interference in the social and economic relations of an individual. Therefore, the expropriation of real estate can be made if public purposes can not be implemented otherwise than by deprivation or restriction of rights to real estate, and these rights can not be acquired by way of a civil contract.

For accepting such a function of the notion of a public purpose for the construction of expropriation also speaks of the lack of specificity and variability of the concept of a public purpose. Article 21 paragraph 2 of the Constitution of the Republic of Poland clearly indicates that the public purpose is a criterion of the admissibility of expropriation, not being an element of the construction of the very concept of expropriation. Assigning this category of the conceptual function of the requirement of admissibility of expropriation gives the legislator a tool for creating limits of imperious state interference in the sphere of the right of ownership of an individual.

Expropriation is a last resort, serving the state to achieve specific public goals, usually against the will of the individual. It is necessary at the outset to define these public goals and how to achieve them. Hence the necessity of expropriation consists in determining whether it is necessary to deprive the right of ownership, or whether it is enough to limit it. According to the so-called the theory of gradation of interference, imperative measures should be applied in order from the least onerous for individual rights and freedoms to the most severe ones. Therefore, a property should not be taken away if it is sufficient to limit it for the realization of a given public purpose, eg in the form of establishing an easement of a necessary road. The feature of necessity of expropriation for the purpose of public purpose also excludes the possibility of initiating expropriation proceedings when it is possible to implement the investment in a different way.

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