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Małgorzata Pracka
Kazimierz Pulaski University of Technology and Humanities in Radom, Poland
ORCID: 0000-0003-3531-8433
m.pracka@uthrad.pl

Securing Owners' Rights in Expropriation Proceedings – Selected Aspects

Zabezpieczenie praw właścicieli w postępowaniu wywłaszczeniowym – wybrane aspekty

ABSTRACT

The institution of expropriation is an instrument for public authorities to actuate discharge of public tasks that are important for general needs of society. Substantive conditions of expropriation determine activities of public administrative authorities that reach for this instrument while specifying protection of ownership rights under the Polish legal system. In addition, they guarantee constitutional standards of expropriation that also include expropriation procedures regulated by statutes that protect owners' interests against excessive public legal interference with their rights. Securing rights of expropriated property owners is of paramount importance in the perspective of both standards of democratic rule of law and their compliance with axiology of the provisions of the Polish Constitution. The conclusions reached in this paper will help to assess how they fulfil the constitutional determinants of expropriation.

Keywords: expropriation; ownership rights; public administrative authorities; Polish legal system; expropriation procedures; property owners

CORRESPONDENCE ADDRESS: Małgorzata Pracka, PhD, Assistant Professor, Kazimierz Pulaski University of Technology and Humanities (Radom), Faculty of Law and Administration, Bolesława Chrobrego 31, 26-600 Radom, Poland.

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INTRODUCTION

Expropriation is a legal tool public authorities can use to rule in the domain of owner rights.[1] Article 21 (2) of the Polish Constitution[2] is the primary constitutional model of control over application of expropriation. In parallel, the principles of protection of acquired rights, citizens' trust in the state, proportionality, and reasonable legislation under Article 2, Article 31 (3), and Article 64 (2) and (3) of the fundamental law indicate normative limits of public legal interference with individual property rights.[3] These legal grounds express first of all protection of rights of the individual, who only in exceptional circumstances may be deprived of their property rights, subject however to the statutory nature of any restrictions imposed which are realised in the name of the common good and for the sake of public interest.[4] It should be emphasized that the concept of expropriation was used in the Polish Constitution in a material sense, and at the same time very broadly, leading to a violation of the essence of the law, which distinguishes the institution of expropriation referred to in Article 21 (2) of the Polish Constitution from the institution of restriction of the property right provided for in Article 64 (3) of the Polish Constitution.[5]

Executive interference with property rights by means of the public legal instrument of expropriation may only rule out protection of a property right for the purpose of realising a public purpose and subject to payment of fair compensation. The constitutional provisions fail to define prerequisites to expropriation accurately, yet this should be read as the legislator's premeditated action. Given the axiological assumptions of the Polish Constitution, these prerequisites are to be guidelines for the ordinary legislator, tasked with specification and expansion of constitutional provisions in their legislative activities.[6]

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[1] M. Szewczyk, *Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawa*, [in:] *Jednostka w demokratycznym państwie prawa*, ed. J. Filipek, Bielsko-Biała 2003, p. 660; M. Zdyb, *Wywłaszczenia. Komentarz. Orzecznictwo*, Lublin 1993, p. 7; K. Świderski, *Wywłaszczenie w świetle art. 21 ust. 2 Konstytucji RP*, "Casus" 2006, no. 4, p. 10.

[2] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.10.2021].

[3] P. Śmiałek, *Przesłanki wywłaszczenia w świetle norm konstytucyjnych*, "Przegląd Prawa Konstytucyjnego" 2018, no. 5, p. 261.

[4] More about the concept of expropriation, see I. Nakielska, *Prawo do własności w świetle Europejskiej Konwencji Praw Człowieka*, Gdańsk 2002, pp. 124–126. See also R. Michałowski, *Regulation of Protection of Agricultural Land and Limitation of Ownership Rights to Real Estate*, "Studia Iuridica Lublinensia" 2020, vol. 29(2), pp. 127–139; A. Gorgol, *Prawo ochrony środowiska jako ustawa daninowa*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2020, vol. 12(4), pp. 72–73.

[5] Z. Leoński, M. Szewczyk, M. Kruś, *Prawo zagospodarowania przestrzeni*, Warszawa 2012, p. 106.

[6] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004, p. 92.

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The constitutional concept of expropriation encompasses a variety cases of compulsory state intervention in rights of other entities to an object regardless of causes and legal form of a seizure.[7] According to the Polish Constitution, expropriation should be therefore understood as all and any cases of deprivations of the property right or its significant restriction violating the essence of the right, performed by public authority.[8] This is absolutely not equal to accepting the legislator's complete freedom at resorting to various forms of property deprivation even when the legal constitutional determinants of expropriation are preserved. The guarantee-providing nature of the basic law decides, however, the constitutional understanding of "expropriation" cannot be identified with its meaning for the purposes of the Real Property Administration Act,[9] for instance, which contains a legal definition of expropriation. The solutions it indicates can't provide grounds for interpretation of the constitutional provisions.[10] The constitutional approach is undoubtedly broader than its statutory equivalent,[11] which admits a range of special legal laws providing for expropriation by force of law as part of the legal order. This special procedure of expropriation has been envisaged, i.a, in the Road Act,[12] the Airport Act,[13] the Railroad Act,[14] the Flood Prevention Act,[15] the Terminal Act,[16] the Oil Act,[17] the

[7] G. Bieniek, Z. Marmaj, *Ustawa o gospodarce gruntami i wywłaszczaniu nieruchomości*, Warszawa–Zielona Góra 1995, p. 175; E. Drozd, Z. Truszkiewicz, *Gospodarka gruntami i wywłaszczanie nieruchomości. Komentarz*, Kraków 1995, pp. 204–205.

[8] Judgement of the Constitutional Tribunal of 16 October 2007, K 28/06, OTK-A 2007, no. 9, item 104.

[9] Act of 21 August 1997 on real property administration (consolidated text, Journal of Laws 2020, item 1990, as amended), hereinafter: RPA.

[10] Cf. judgement of the Constitutional Tribunal of 14 March 2000, P 5/99, OTK 2000, no. 2, item 60; judgement of the Constitutional Tribunal of 23 September 2014, SK 7/13, Journal of Laws 2014, item 1354; judgement of the Constitutional Tribunal of 14 July 2015, SK 26/14, OTK-A 2015, no. 7, item 101.

[11] Judgement of the Constitutional Tribunal of 7 February 2001, K 27/00, OTK 2001, no. 2, item 29; judgement of the Constitutional Tribunal of 13 December 2012, P 12/11, Journal of Laws 2012, item 1472.

[12] Act of 10 April 2003 on special principles of preparation and realisation of public road investments (consolidated text, Journal of Laws 2020, item 1363).

[13] Act of 12 February 2009 on special principles of preparation and realisation of public airport investments (consolidated text, Journal of Laws 2018, item 1380, as amended).

[14] Act of 28 March 2003 on rail transport (consolidated text, Journal of Laws 2020, item 1043, as amended).

[15] Act of 8 July 2010 on special principles of preparation and realisation of flood prevention facilities investments (consolidated text, Journal of Laws 2021, item 484).

[16] Act of 24 April 2009 on investments in the liquefied natural gas regasification terminal in Świnoujście (consolidated text, Journal of Laws 2020, item 1866, as amended).

[17] Act of 22 February 2019 on preparation and realisation of strategic investments in the oil sector (consolidated text, Journal of Laws 2020, item 2309, as amended).

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Transmission Act,[18] or the Central Polish Airport Act.[19] In the special laws cited above, we have to deal with expropriation in the broad sense. In the European constitutional tradition, expropriation is identified with seizure of private property entity for reasons of necessary realisation of a specific public purpose (substantive condition) connected with a compensation for a seized good awarded to an expropriated person on the basis of statutory regulations in compliance with a statutory procedure (formal condition).[20]

Realisation of public purposes that serve the society are implemented in the general interest, are universal and generally available, is the determinant of expropriation.[21] A concise definition of the concept is impossible due to its nature and connections to the legal, political, social or economic situation in the state,[22] which causes its continuing transformations, while attempts at more specific definitions lead to the conclusion there is no absolute, constant or fixed definition, since its object is not constant, fixed or permanent.[23]

Executive interference with property rights may be restricted for the public purposes contemplated by Article 21 (2) of the Polish Constitution as well as for the purposes laid down in Article 31 (3) of the Polish Constitution. The need must be adduced for statutory establishment of public purposes as emphasised in Article 31 (3) and Article 64 (3) of the Polish Constitution, although it can also be derived from the constitutional formula of the rule of law.[24] Such a normative definition of a public purpose secures rights of owners, which are subject to execution as part of the expropriation mechanism by force of specific statutory solutions. Only in this perspective can the constitutional guarantee of property right protection, including an adequate expropriation mechanism, be said to meet standards of the democratic rule of law.

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[18] Act of 24 July 2015 on preparation and realisation of strategic transmission network investments (consolidated text, Journal of Laws 2021, item 428).

[19] Act of 10 May 2018 on the Central Polish Airport (consolidated text, Journal of Laws 2020, item 234, as amended).

[20] L. Garlicki, M. Zubik, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. L. Garlicki, M. Zubik, vol. 1, Warszawa 2016, pp. 544–545.

[21] Judgement of the Constitutional Tribunal of 17 December 2008, P 16/08, OTK-A 2008, no. 10, item 181; judgement of the Constitutional Tribunal of 9 December 2008, K 61/07, OTK-A 2008, no. 10, item 174; M. Gdesz, *Cel publiczny w gospodarce nieruchomościami*, Zielona Góra 2002, p. 24; S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*, Kraków 2003, p. 250.

[22] M. Stahl, *Cele publiczne i zadania publiczne*, [in:] *Koncepcja systemu prawa administracyjnego*, ed. J. Zimmermann, Warszawa 2007, p. 95.

[23] M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym*, Warszawa 1986, p. 13.

[24] M. Wolanin, *Cel publiczny jako normatywne kryterium oddziaływania na stosunki cywilnoprawne w gospodarce nieruchomościami, cz. I*, "Nieruchomości" 2009, no. 9, p. 4, 6.

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From the viewpoint of securing rights of expropriated real estate owners, meeting the condition of fair compensation payment is of great significance. This is mostly seen in financial terms. Compensation can be described as fair if it repairs any financial damage suffered by the owner, while the compensation cannot be in any way reduced by methods of its calculation or of payment.[25] Fair compensation is treated as just and equivalent, that is, allowing for reproduction of a lost good or property position prior to expropriation.[26] Equivalence of compensation remains a distinguishing feature of the fair compensation condition.

What's more, a continued, benefit-free and indefinite removal of a key ownership right by law is deemed unacceptable. Admissibility of interference with property rights is decided not only by a reason for which the interference is undertaken but also by its legislative framework.[27] Thus, any legal regulations governing dates of compensation, methods of its calculation or payment must provide for compensation of losses sustained by the existing owner. The Polish Constitution employs the concept of fair compensation, which doesn't warrant the conclusion it should be identified with a full compensation.[28] The principle of hierarchy of values protected by law allows the legislator, in some cases, to make its amount relative for reasons of balancing the public and private interests, though subject to the principle of proportionality. The constitutional standard of expropriation encompasses the condition of restorative justice to assume expropriation is permissible in return for a compensation that is fair, determined by expropriation regulations, and payable without undue delay.[29]

This paper analyses selected legal remedies, contained both in the Real Property Administration Act and in the above-mentioned special laws, serving to secure interests of expropriated real estate owners in order to establish whether the constitutional framework of expropriation is maintained. The author believes these remedies can be evaluated from the perspective of constitutional understanding of

[25] Judgement of the Constitutional Tribunal of 19 June 1990, K 2/90, OTK 1990, no. 1, item 3.

[26] Judgement of the Constitutional Tribunal of 21 June 2005, P 25/02, OTK-A 2005, no. 6, item 65.

[27] Judgement of the Constitutional Tribunal of 25 November 2003, K 37/02, OTK-A 2003, no. 9, item 96.

[28] It should be noted that T. Woś (*Wywłaszczenie nieruchomości i ich zwrot*, Warszawa 2011, p. 262) admits a concept of fair compensation that should occasionally include lost profits. The Constitutional Tribunal decisions have evolved in this respect as well. In the Court's opinion, seizure of property won't always involve a full compensation for a loss to property of an expropriated party as the criterion of fair compensation payment doesn't assume a full repair of a sustained loss. Fair compensation is measured not only with interests of an expropriated party but also capabilities of a public authority, in particular, state budget capacities. Cf. judgement of the Constitutional Tribunal of 23 September 2003, K 20/02, OTK ZU-A 2003, no. 7, item 76; judgement of the Constitutional Tribunal of 20 July 2004, SK 11/02, OTK-A 2004, no. 7, item 66.

[29] Judgement of the Constitutional Tribunal of 25 May 2016, Kp 2/15, Polish Monitor 2016, item 792.

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expropriation with reference to substantive legal conditions of expropriation. The statutory expropriation procedure requires consideration with regard to constitutional standards of property right protection as supplemented with an adequate expropriation mechanism. These standards are part of both the Real Property Administration Act, which contains the classic expropriation procedure, and a range of special laws, whose force leads to seizure of property rights *ex lege*. The special laws are expressions of a broad understanding of expropriation and categories of public purpose indicated there in connection with strategic state interests that authorise the legislator to reach for the expropriation instrument, provided however this is within the constitutional expropriation framework of, first of all, adequately selected mechanisms limiting the extent of the interference and guaranteeing owners of expropriated real estate compensation for any restrictions they suffer as a result. Such an assumption requires addressing key legal regulations including the institution of expropriation, specialist literature and judicial interpretations. To achieve the aim of the article, the formal and dogmatic method of law review was used.

PRE-EXPROPRIATION NEGOTIATIONS

Degree of limitations to incidents of ownership should be reflected in appropriate, statutorily guaranteed compensatory mechanisms. The duty of negotiations is laid down in Article 114 (1) RPA. The requirement of the indispensability of expropriation makes that this institution is treated as an *ultima ratio* remedy. The indispensability of expropriation is determined first of all by the necessity of realizing public purpose and the impossibility of acquiring a specific real estate without compulsory state intervention in the good of the citizen.[30] From this perspective, negotiations are prerequisite to initiation of expropriation proceedings.[31] In spite of the fact they are held in circumstances of compulsory expropriation, they should meet criteria of negotiations under civil law.[32] The duty of negotiation is fulfilled where a public entity for whose benefit an expropriation is to take place invites a real property owner to negotiate a relevant agreement that will above all set out terms and conditions of property acquisition.[33] Failure to designate *essentialia negotii* of such an agreement will affect negotiations since consent to property acquisition will require consensus as to all parts of agreement subject to negotiation.[34]

[30] M. Szalewska, *Wywłaszczenie nieruchomości*, Toruń 2005, pp. 108–109.

[31] J. Szachułowicz, *Gospodarka nieruchomościami*, Warszawa 2001, pp. 185–187.

[32] M. Zdyb, *op. cit.*, p. 15.

[33] T. Woś, *op. cit.*, p. 203.

[34] Judgement of the Supreme Administrative Court of 31 May 2012, I OSK 794/11, LEX no. 1264940.

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Nature and aim of the negotiations are best characterised by judicial decisions that stress the need for purposeful, specific and real, not apparent negotiations to be conducted by a public entity.[35] The Constitutional Tribunal has commented on their special nature as well, highlighting absence of the freedom to contract as part of this procedure. Owner of a property subject to a local development plan or a decision on a site location of a public-purpose project is aware they are not in a position equal to an authority ready to act in its sovereign capacity in order to take over an estate. This particular nature of the civil law agreement preliminary to expropriation, which has essentially the same effects as an expropriation decision, has predetermined the Constitutional Tribunal to allow owners of real estate taken over by way of negotiations to demand return of the same, which is supposed to guarantee actual protection of property against unconstitutional interference with this right.[36] Such an approach to the negotiations conforms to constitutional standards of expropriation and is worthy of approval, since absence of the civil law freedom to contract, given that owners of real estate assigned to public purposes are ultimately liable to executive seizure of property rights, anyway must be assessed in terms of proper security of rights of owners of real estate subject to expropriation.

The issue of pre-expropriation negotiations is not expressed in the special laws stipulating expropriation *ex lege*, an undoubted difference between the classic expropriation procedure and these special legal solutions. Article 24 (1) and (2) of the Airport Act is noteworthy as it allows a region administrator to acquire a real property subject to a public airport investment permit from the existing owner or perpetual user within 7 days after such decision becomes final at the latest. Understandably, a decision to set amount of a compensation is not issued in the circumstances. Rules of the same law providing for compensations by way of decisions are applied to compensations payable by force of a contract, even though the contract itself may envisage other solutions in this respect. I believe this regulation is highly unfortunate, since a contractual procedure where an expropriation has already been executed is not legally reasonable. These are not pre-expropriation negotiations, after all, since the material legal effect is already in place. Added to all that, use of expressions like "acquisition of real estate" or determining "amount of compensation" in connection with the acquisition is unauthorised. This regulation should be removed from the legal system, therefore. It can be pointed out, by the way, the seven-day term for executing a contract seems unfeasible, in particular given the rules of setting compensation.

[35] Judgement of the Supreme Administrative Court of 27 September 2017, I OSK 3024/15, LEX no. 2454740; judgement of the Supreme Administrative Court of 7 July 2017, I OSK 2668/15, LEX no. 2347631; judgement of the Voivodeship Administrative Court in Lublin of 5 March 2020, II SA/Lu 772/19, LEX no. 2939008.

[36] Judgement of the Constitutional Tribunal of 12 December 2017, SK 39/15, Journal of Laws 2017, item 2375.

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SECURE ADVANCE PAYMENT

The option of demanding the so-called secure advance payment under Article 132 (1b) RPA is another means to protecting rights of real estate owners. It is paid at the request of an expropriated party and equal to 70% of a compensation set in an expropriation decision where the latter provides for a prompt seizure of real estate. An owner who questions amount of compensation as part of appeals procedure is thereby guaranteed that constitutional standards of expropriation, including compensation payment by a reasonable date, will be observed. The right to advance payment is treated as compensation for those who have been deprived of control over their property as non-final decisions become instantly enforceable, on the one hand, whereas payment becomes impossible as such decisions are not final yet (e.g., due to appeals).[37] Due dates of advance payment are linked to dates of requests, therefore, regardless of the stage of expropriation proceedings, the duty of payment arises 50 days after submission of a request.[38] Where the amount of compensation is determined in the expropriation decision, this due date of advance payment can't be found reasonable. Appropriate regulations in this respect are also provided for by some of the special-purpose laws, e.g. the Road Act (Article 12 (5a)), the Central Polish Airport Act (Article 69 (1) and (2)), the Flood Prevention Act (Article 21 (1)1), the Transmission Act (Article 21 (12)), and the Railroad Act (Article 9z (1)). Date of its payment is set at 30 days from a request, however. It should be stressed, though, amount of a compensation is determined under a separate administrative procedure, therefore, a request can only be submitted once a decision setting the amount of compensation is issued. I believe, nonetheless, a *de lege ferenda* standardisation of due dates of advance payments by force of both the Real Property Administration Act and the discussed special-purpose acts is grounded in the condition of fair compensation.

One more question should be raised, namely, absence in the cited special-purpose acts of advance payment regulations. Some don't provide for such a solution explicitly, e.g. the Airport, Terminal, and Oil Acts. They do contain references on foot of which provisions of the Real Property Administration Act apply to amounts and payments of compensations or other unregulated matters. They fail to narrow this applicability to any specific provisions, only referring to the Real Property Administration Act in its entirety. This appropriate applicability means possible application of a provision directly, with appropriate modifications or not at all, whereas the scope

[37] Judgement of the Supreme Administrative Court of 21 July 2017, I OSK 2803/15, LEX no. 2347095.

[38] P. Wojciechowski, *Komentarz do art. 132 ustawy o gospodarce nieruchomościami, pkt 16*, [in:] *Ustawa o gospodarce nieruchomościami. Komentarz*, ed. P. Czechowski, Warszawa 2015.

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of the reference should address purpose of a regulation it is to apply to.[39] In practice, however, this may give rise to certain interpretative doubts, a frequent subject of court resolutions.[40] In such an important matter of possible advance payments to secure rights of expropriated owners, legislative accuracy is desirable to eliminate any interpretative doubts.

A construct adopted by Article 21 (11) of the Flood Prevention Act that raises some objections needs to be mentioned. Payment of a compensation determined in a non-final decision is subject to appeal by a party to compensation proceedings requesting such payment. In effect, where an investor appeals against a decision, a former owner is restricted in their options to submit such a request. *Ratio legis* of this solution is seen in the fact the question of paying compensation by force of a non-final decision only to an appealing party results from the possibility of determining an undisputed amount of compensation, since another decision in the case cannot, in line with the principle prohibiting decisions to the detriment of parties (Article 139 of the Code of Administrative Procedure), reduce such amount. A serious interpretative problem arises, nonetheless, where appeals would be filed by both an investor and a party to whom compensation is due. Therefore, *de lege ferenda* amendments are in order, since the literal wording of the provision is contrary to its functional understanding.[41] The Railroad Act (Article 9z (1) and (2)) resolves the issue along similar lines.

Review of other special-purpose acts in respect of advance payments suggests a varied subject matter. It needs to be pointed out advance payment of compensations in light of the Road Act depends on according immediate enforceability to a road investment permit. The Central Polish Airport Act, on the other hand, only allows such a request where expropriation involves a property including a residential building or a building that contains a separate flat. Without questioning in principle the need for a range of special legal laws that provide for expropriation *ex lege* in the Polish legal system, reasons for diversification in the matter seem insufficient. It should be noted, by the way, what all of these regulations have in

[39] Judgement of the Supreme Administrative Court of 5 February 2015, I OSK 1225/13, LEX no. 1658023.

[40] In the judgement of 14 May 2014 (VIII SA/Wa 46/14, LEX no. 1476924), the Voivodeship Administrative Court in Warsaw stresses absence of a right to resign from compensation, negotiations or other arrangements as part of proceedings under the Road Act. In the judgement of 10 November 2016 (II SA/Bk 412/16, LEX no. 2165380), the Voivodeship Administrative Court in Białystok affirmed authorities are not bound to conduct negotiations and seek replacement plots when determining amounts and payments of compensation under the Road Act, whereas in the judgement of 7 May 2018 (II SA/Kr 283/18, LEX no. 2497003), the Voivodeship Administrative Court in Kraków emphasised an authority's decision to deposit compensation with a court must be grounded in law, i.e. a competence regulation that would clearly authorise an authority to take such an action.

[41] Judgement of the Voivodeship Administrative Court in Wrocław of 20 November 2018, II SA/Wr 585/18, LEX no. 2590624.

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common is facilitation of investments in development of national infrastructure which are grounded in a specific category of public purposes authorising interference with the constitutionally protected property right.

THE GAINS PRINCIPLE IN DETERMINATION OF COMPENSATION

Rights of expropriated property owners are secured according to the so-called gains principle adumbrated in Article 134 (3) and (4) RPA. It assumes value of a real estate for the purposes of compensation is determined appropriate to its use if purpose of an expropriated estate does not cause its value to rise. If purpose of an expropriated estate increases its value, on the other hand, real estate value for the purposes of compensation is determined as per the alternative use resulting from that purpose. This principle reaffirms the constitutional standard of expropriation by guaranteeing fair compensation. Addressing the actual use of a property at the time of expropriation as part of determining its value serves adequacy of a compensation to the way expropriated individuals exercised their right assuming that way was optimally useful to them.[42] Expert research of the real estate market is expected to show which valuation variant will be better and produce a higher compensation.[43] A possible rise in the value of real estate once it is assigned to a public purpose cannot be ignored, which means comparison of a property being valued to a property of an identical use is necessary for the purposes of valuation.[44] The gains principle determines the method of expert valuation and obliges an expert to establish necessary facts that will decide methodology of the valuation.

Some peculiar solutions for compensating damage to owners are envisaged by the cited in this paper special-purpose acts, which introduce added compensation mechanisms. Increasing the amount of payable compensation by 5% of property value where owners or perpetual users deliver their property by the statutory date or increasing compensation by PLN 10,000 for real estate containing residential buildings or buildings including residential flats if the existing owners or perpetual users have lived in such building or flat (the Road Act – Article 18 (1e) and (1f), the Railroad act – Article 9y (3e) and (3f), the Airport Act – Article 23 (6) and (7), the Flood Prevention Act – Article 21 (7) and (8), the Oil Act – Article 29 (8) and (9), the Transmission Act – Article 21 (8) and (9), the Terminal Act – Article 23 (8)

[42] E. Bończak-Kucharczyk, [in:] *Ustawa o gospodarce nieruchomościami. Komentarz*, ed. E. Bończak-Kucharczyk, Warszawa 2021, commentary on Article 134 (2).

[43] Judgement of the Voivodeship Administrative Court in Warsaw of 1 April 2014, I SA/Wa 1850/13, LEX no. 1485253.

[44] Judgement of the Voivodeship Administrative Court in Gdańsk of 23 October 2018, II SA/Gd 349/18, LEX no. 2569969.

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and (9), the Central Polish Airport Act – Articles 64 and 65) are some examples. *Ratio legis* of these legal solutions indubitably lies in facilitation of investment processes associated with a specific public purpose and quick delivery of real estate without engaging law enforcement remedies. They should be approved in principle, although PLN 10,000 for reorganising the centre of your life is inadequate to expropriator's expectations and would need to be revised to become a real impulse and encouragement to a conflict-free provision of real estate.

ACQUISITION OF PROPERTY PORTION REMAINING AFTER EXPROPRIATION

The demand to acquire the part of real estate remaining post expropriation is a means of securing rights of expropriated estate owners. The normative meaning of this regulation, incorporated in Article 113 (3) RPA, consists in the option of requesting the entity for whose benefit an expropriation has taken place to acquire the unexpropriated portion of real estate that is not fit for earlier use. Analysis of court decisions[45] implies the conditions of submitting such request give rise to interpretative doubts, while a civil law claim can only be effectively sought in a general court, which may be cumbersome to owners. This is a separate procedure, though, and such a claim is met independently from expropriation after part of real estate is finally expropriated. Expropriation cannot depend on satisfaction of a claim to purchase the remaining part of real estate, either.[46]

The different treatment of these procedures results from a number of factors. First, the institution of expropriation must be interpreted restrictively, therefore, its extension to cases where the postulate of necessity and indispensability of acquiring real estate for the realisation of a public purpose by the executive interference with property rights isn't fulfilled are unacceptable. Second, the civil law procedure of seeking fulfilment of a request to acquire part of real estate remaining after expropriation is similar to other regulations in the Polish legal system that concern restrictions on the property right, e.g. Article 37 (10) of the Planning and Devel-

[45] In the judgement of 13 February 2020 (I ACa 758/19, LEX no. 3033408), the Voivodeship Administrative Court in Białystok points out this provision doesn't establish a general principle of demanding purchase of real estate extant after an expropriation – the claim was based on effects of the expropriation decision, therefore, it must be referred to actual purpose of a property, not to a local development plan or decision to locate a public-purpose investment. On the other hand, in the judgement of 4 February 2019 (I ACa 814/18, LEX no. 3096771), the Court of Appeals in Wrocław stresses impossibility of using a real property for earlier purposes must be determined on the basis not of a temporary use of property at the time of a final expropriation decision, but of its earlier, long-term use and impact of an expropriation on that method of usage.

[46] E. Bończak-Kucharczyk, *op. cit.*, commentary on Article 113 (2).

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opment Act,[47] Article 131 (2) and Article 132 of the Environment Protection Act.[48] Despite the substantial differences between these regulations, Article 136 (4) RPA is notable, added on foot of an amendment to the Real Estate Administration Act of 4 April 2019,[49] according to which provisions on return of expropriated estate apply to parts of real estate acquired by force of a contract under Article 113 (3) RPA as appropriate. This predetermines the administrative procedure of request consideration prevails in this case as well and returns are resolved as part of administrative decisions issued by staroste.[50] The legislator is somewhat inconsistent here, since a refusal to acquire the so-called remnant following expropriation is to be resolved in court proceedings, whereas if an expropriated property is returned, the former owner's right to have their whole estate returned is realised administratively.

CONCLUSIONS

This analysis of selected legal remedies owners may employ to demand compensation for harm sustained from ruling interference with their constitutionally protected property rights offers a few conclusions and *de lege ferenda* postulates. It must be stressed, to begin with, the public purposes specified in legislation limit the mechanism of expropriation. The catalogue of public purposes in Article 6 RPA gives rise to virtually no interpretative doubts, while the reference in point 10 of Article 6 RPA to other public purposes set down in other legislation should be seen as a need to make such purpose more specific by virtue of statutory regulation. The category of public purposes, meanwhile, as the grounds for the above-mentioned special legal laws providing for expropriation by force of law meets the standard of constitutional understanding of expropriation. The public purposes contained in these acts correspond to the values indicated in Article 31 (3) of the Polish Constitution, namely, they all serve the common good, expected to provide economic welfare and development that will benefit the public.

Expropriation seen as the final instrument of acquiring property for public resources is only initiated in exceptional circumstances that point to a lawful and reasonable need for this legal public interference. These assumptions are certainly corroborated with compulsory pre-expropriation negotiations whose especial nature is noted by the Constitutional Tribunal decisions awarding former owners

[47] Act of 27 March 2003 on spatial planning and development (consolidated text, Journal of Laws 2020, item 293, as amended).

[48] Act of 27 April 2001 – Environment Protection Law (consolidated text, Journal of Laws 2020, item 1219, as amended).

[49] Act of 4 April 2019 amending the Act real estate administration (Journal of Laws 2019, item 801).

[50] E. Bończak-Kucharczyk, *op. cit.*, commentary on Article 136 (12).

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the right to return of real estate acquired in this manner. There still remains the question of *ratio legis* for such a solution, oriented above all towards an amicable acquisition of real estate, although its effects are equal to those of a compulsory seizure of property rights. Special-purpose acts, meanwhile, reduce the civil law parts of arrangements for property acquisition or payment of compensation to a minimum, with the prevailing regulations failing to provide for any statutory solutions that would encourage amicable end of proceedings. Institution of certain statutory bonuses (like raising the amount of compensation by 5% or PLN 10,000) certainly could minimise the need for occasionally protracted and time-consuming administrative proceedings, while the principle of fair compensation would become palpable with a quick and amicable compensation to owners.

Solutions addressing the gains principle in payment of compensation appear desirable. This is applied by way of exception to property valuations, however, its assumption relates to the constitutional condition of fair compensation payment for executive seizure of the property right.[51] This condition can also be seen at work in the so-called secure advance payment in cases of earlier decisions of instant property seizure, expected to liquidate cases of actual expropriation without compensation. Fair compensation is understood with regard to its payment at reasonable dates, hence this instrument is an undoubted expression of constitutional standards of expropriation, although I find the due date itself, i.e. 50 days from the date of request, unreasonable, since the amount of compensation has already been determined by an authority in its expropriation decision. The demand to acquire part of property extant after expropriation under civil law procedures should be assessed in the same light. Disciplining solutions are absent, however, that would designate a deadline for handling requests in such a case, for instance, therefore, the remedy is not perfect. Detriment to property of an expropriated party should be determined with a view to constitutional standards of expropriation that include an effective and quick legal path for seeking your rights.

[51] J. Dydenko, T. Telega, *Komentarz do niektórych przepisów ustawy o gospodarce nieruchomościami*, [in:] *Wycena nieruchomości. Komentarz*, Warszawa 2018.

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ABSTRAKT

Instytucja wywłaszczenia jest narzędziem w rękach władzy publicznej urzeczywistniającym realizację zadań publicznych ważnych z punktu widzenia potrzeb ogólnospołecznych. Materialnoprawne przesłanki wywłaszczeniowe determinują aktywność organów administracji publicznej w sięganiu po ten instrument, będąc jednocześnie dookreśleniem ochrony prawa własności w polskim porządku prawnym. Ponadto stanowią gwarancję dochowania konstytucyjnych standardów wywłaszczenia, przez które rozumie się także ustawowo uregulowane procedury wywłaszczeniowe, w ramach których chronione są interesy właścicieli przed nadmierną publicznoprawną ekspansją w ich prawa. Zabezpieczenie praw właścicieli nieruchomości wywłaszczanych ma ogromne znaczenie z punktu widzenia zarówno standardów demokratycznego państwa prawnego, jak i ich zgodności z aksjologią przepisów Konstytucji RP. Poczynione w niniejszym artykule ustalenia pozwolą na ich ocenę pod względem spełnienia konstytucyjnych determinantów wywłaszczenia.

Słowa kluczowe: wywłaszczenie; prawo własności; organy administracji publicznej; polski porządek prawny; procedury wywłaszczeniowe; właścicieli nieruchomości