Ius Novum
2/2019

THE SCOPE OF JUST COMPENSATION FOR COMPULSORY ACQUISITION OF REAL PROPERTY OWNERSHIP

ZBIGNIEW CZARNIK*

DOI: 10.26399/iusnovum.v13.2.2019.23/z.czarnik

The idea of personal freedom, which we strive for, is connected with the sense of economic independence possible only in societies that ensure that private ownership has an appropriate place among interests protected by law. The best example of the thesis is a totally different development of property ownership as well as freedom at the two ends of the European continent: England and Russia.[1] The former, developing ownership, created bases for a free democratic society, the latter, negating this value, cannot guarantee a minimum standard of the protection of rights against the influence of despotic authorities.[2] Due to that, determination of an appropriate standard of ownership becomes especially significant, especially as the Polish legal order is closer to the Russian rather than the English one. Obviously, such a statement is a certain simplification but may be a useful tool to present the topical issue.

There are alarming phenomena occurring in the binding law, which justify making reference to the above-mentioned comparison. However, not only the legislative process is affected by those deficiencies which induce this statement. The practice does not look better; with regard to determining the scope of ownership protection, it becomes a part of casuistry without a deeper vision of a direction as well as the scope of necessary activities that might result in the development of a coherent model of ownership protection, in particular the ownership of real

* PhD hab., Associate Professor, Head of the Chair of Administrative Law and Administrative Science, Department of Public Law of the WSPiA University of Rzeszów; e-mail: zbigniew.czarnik@wp.pl; ORCID: 0000-0001-8459-1108

1 For more, see: R. Pipes, *Własność jako instytucja*, [in:] L. Balcerowicz (ed.), *Odkrywając wolność. Przeciw zniewoleniu umysłów*, Poznań 2012, pp. 483–485; also by this author, *Własność a wolność*, Warsaw 2000, pp. 9–14.

2 See R. Pipes, *Własność jako…*, p. 485.

property expropriated for public purposes. The use of private real property by public entities for the purpose of implementing their tasks is a necessity that is hard to challenge.[3]

Nevertheless, one cannot agree with the affirmation of an assumption that starts dominating the judicature, and the doctrine silently admits that the protection of ownership should be in general subordinated to public interest. From this perspective, it is not noticed that there are threats resulting from all types of special legislation based on the assumption that it is indispensable in the period of political and social transformation. In the present circumstances, there are no justified grounds for such arguments except for ideological or political ones.

It is necessary to perceive the issue of the scope of compensation for expropriated real property in this context. The problem constitutes one of the components of the proper shape of ownership protection. It should be classified as fundamental because it determines the real sphere of protection in a situation when within the binding law an owner cannot oppose legal expropriation of the right to ownership. Thus, a properly built model of protection should take into account a lack of balance that in this situation occurs between an owner and the state. In practice, this antinomy is in general always solved in favour of the state, and it is so in various aspects of the issue analysed, including within the scope of determining the compensation that should be awarded to cover the harm resulting from expropriation of ownership rights. The above-indicated issue has been discussed in many scientific works and has become the subject of abundant case law.

Within the present analysis, the output of the doctrine and the judicature will be treated in general terms because the author's objective is not to get involved in a dispute with the use of detailed arguments raised in both areas, because they do not differ considerably, but to present general criticism of the vision of compensatory liability used in the doctrine and case law. Due to that, the presented opinions are rather summative in nature, and therefore they are not a detailed analysis of arguments offered in various works. Such an assumption allows a presentation with more formal freedom, which does not mean exemption from the need to refer to important issues related with the discussed topic, but is only justification of abandoning a thorough study of opinions that are the basis for generalisations.

The starting point is that the scope of just compensation for expropriated real property should cover full damages because just compensation means it is fair, and the constitutional principle of proportionality does not justify limitation of compensation to the loss[4] (*damnum emergens*) without the consideration of lost profits (*lucrum cessans*), thus just compensation means full compensation. At the same time, the concept of expropriation should be understood as deprivation of the right to own real property by a unilateral, authoritative and specific administrative

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[3] Indeed, the limitation of the right to real property ownership has never been challenged, even in liberalism in the 18th and 19th centuries, and the concept of "the divine right to ownership" was propagated by Marxists of different origin and has never had anything in common with science but was rather an ideology.

[4] For more on terminology, see M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warsaw 2008, pp. 270–272.

act. Having made this assumption, I shall continue discussing the issue of just compensation taking into account the fact that just compensation must be considered in various aspects.[5] With respect to such an assumption, it is necessary to determine the framework of a possible analysis.

It seems that within this scope, it will be appropriate to refer to the models operable in the European legal culture. Two solutions are possible based on the existing legal systems. In accordance with one of them, compensation for expropriated real property covers full damages. The opposite approach envisages limitation of compensation to the loss, which in some cases may be extended to cover lost profits. The above-mentioned solutions may take different forms and generate mixed models. In all those cases, it is assumed that the redress of harm legally done by the state should be limited because the harm caused by a legal reason is in some sense an owner's "advantage" as he/she will have the right to use the accomplished objective resulting from the activity violating his/her right.

There are different theories substantiating this approach, e.g. the German "victim in public interest" or the French "principle of equality in sharing public burdens".[6] Regardless of theoretical affiliation to the limitation of the scope of compensation, it should be assumed that at present it is admissible to limit the concept of damage caused by expropriation, and in general it does not refer to expropriation based on a unilateral administrative act because the concept of expropriation in many legal systems has a broader scope than expropriation in Polish law as it covers not only acts of depriving owners of property but also those that shape the content of this right, thus in fact determine its limits, e.g. neighbours' rights, etc.

The answers to the question about the scope of just compensation for expropriated real property in Polish law should be looked for among those models. For a more complete presentation of this research, it is necessary to see two extreme solutions: Swiss law, in which Article 26 para. 2 of the Federal Constitution of the Swiss Confederation stipulates that the compulsory purchase of property and any restriction on ownership that is equivalent to compulsory purchase shall be compensated in full, and Spanish law, in which only loss is subject to compensation.[7] The above examples unequivocally confirm that there is no relation between full compensation for expropriation and the level of social development, which is reflected in the necessity of limiting compensation for the reason of achieving aims with a smaller input of public resources.

It seems that the consequences of full compensation are totally different. It is legal systems that guarantee not only an appropriate level of economic development but also full implementation of the idea of civil society. This comment confirms a thesis formulated by R. Pipes that only systems sufficiently protecting ownership have a potential to create institutions materialising citizens' rights. Additionally, one can formulate a statement that in contemporary times it is not possible to convincingly

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[5] See Z. Czarnik, *Sprawiedliwe odszkodowanie za przymusowe przejęcie własności nieruchomości*, Administracja. Teoria, Dydaktyka, Praktyka No. 1, 2013, pp. 23–40.

[6] For more on the characteristics of the principles, see J. Parchomiuk, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej*, Warsaw 2007, pp. 1–38.

[7] *Ibid*., pp. 39–44.

challenge the principle attributed to Seneca, in accordance with which "plenty of things belong to kings, and ownership to particular people".[8] Thus the state should guarantee proper protection of ownership and this is inseparably connected with the scope of compensation.

The above-presented assumptions determine the limits to the analysis of just compensation as a normative category indicating the scope of compensation for expropriated real property. In Polish law the provisions of the Constitution are the basis for such considerations. Their content leads to an unjustified, in my opinion, conclusion that the Constitution of the Republic of Poland[9] makes a definite differentiation of the scope of compensation based on the nature of the infringement, i.e. adopts the principle of full compensation in case of unlawful infringement, and its limited amount covering only actual loss in case of expropriation. This differentiation is justified by reference to Article 77 para. 1 and Article 21 para. 2 of the Constitution of the Republic of Poland. The above-mentioned provisions use the terms "harm" (Article 77 para. 1) and "just compensation" (Article 21 para. 2). A conclusion may be drawn from this terminological differentiation that full compensation is applicable only in case of unlawful infringement of ownership.

What supports this stand is the argument indicating that Article 77 para. 1 of the Constitution of the Republic of Poland lays down the right to redress harm done by unlawful activity of public authority bodies. This model of constitutional control should mean that there is a principle of full compensation laid down in this provision. This results from the fact that Article 77 para. 1 stipulates that harm must be compensated but does not state its scope. If it is assumed that reference should be made to the colloquial meaning of the term, harm referred to in this provision also covers lost profits. The concept of harm within the colloquial meaning always covers loss of property, in spite of the fact that it is imprecise and unclear. In addition, it is indicated that the elimination of doubts arising in this area cannot consist in simple reference to the statutory principle of full compensation because it would infringe the principles of interpreting the Constitution, the content of which cannot be determined by referring to the sense, scope and meaning of concepts defined in statutes.[10]

Based on this, it is also emphasised that the terminology used in Article 77 para. 1 of the Constitution of the Republic of Poland refers to the Civil Code, where the principle of full compensation is laid down. In fact, it cannot result in drawing a conclusion that Article 77 para. 1 provides grounds for full compensation, however, the concept of "harm" used in this provision should be interpreted in the manner adopted in civil law, and this means that the scope of harm that is subject to redress should be determined based on Article 361 §2 Civil Code. As a result, it should be assumed that Article 77 para. 1 of the Constitution covers every type of damage to a given entity's interests protected by law, both tangible and intangible, i.e. also one that is connected with the right to real property ownership. In the doctrine, it

[8] Quotation after R. Pipes, *Własność jako…*, p. 474.

[9] Journal of Laws [Dz.U.] of 1997, No. 78, item 483, as amended.

[10] Justification of the Constitutional Tribunal judgment of 23 September 2003, K 20/02, OTK-A 2003, No. 7, item 76.

is commonly assumed that, pursuant to Article 77 para. 1 of the Constitution, the principle of full compensation is binding.[11]

On the other hand, Article 21 para. 2 of the Constitution of the Republic of Poland regulates compensation for expropriation. The provision lays down just compensation, which means that every interference to the right to ownership that has the features of expropriation results in compensation. This does not always have to lead to full compensation.[12] Even complete deprivation of ownership will not always be connected with full redress of harm because the scope of compensation must meet the criteria of legitimacy, which does not mean that it must be full as the Constitution differentiates the scope of those consequences by the adoption of the criterion of legitimacy in Article 21 para. 2. This formal approach in the provision leads to a conclusion that the Constitution envisages an idea of incomplete compensation.

The differentiation of the amount of compensation derived from the difference in terminological determination of the scope of the two constitutional provisions must raise serious doubts, especially as the doctrine and the judicature have not made an attempt to make a critical reference to the thesis formulated this way. A brief analysis of doctrinal and judicial sources seems to indicate that the opinions of communitarian theorists – who solving the problem of compensation for unlawful activities of public authorities, formulated an ill-considered opinion about just compensation that is used in Article 21 para. 2 of the Constitution of the Republic of Poland – won in theoretical considerations concerning the topic.

It should be emphasised that the substantiation of such a controversial thesis was presented in a rather brief paragraph of the justification for the Constitutional Tribunal judgment of 23 September 2003[13] with no reference to former opinions presented in the Constitutional Tribunal rulings. This way, the actual state of the law in force was totally ignored and, as a result, the systemic context of Article 21 para. 2 of the Constitution was not taken into account. Undoubtedly, this is a weak point of the argument for the limitation of the scope of compensation, especially as a decade earlier the Tribunal had stated that just compensation means fair compensation, and it is fair only when it is equivalent because only such compensation does not infringe the essence of redress for real property expropriation.[14]

Such casualness is not understandable and has no grounds because the opinion about the necessity of full redress within compensation for expropriated real property resulted from the introduction of the concept of just compensation to the constitutional order, which took place on 29 December 1989;[15] thus, the change in

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[11] See J. Kremis, *Skutki prawne w zakresie odpowiedzialności odszkodowawczej państwa na tle wyroku Trybunału Konstytucyjnego*, Państwo i Prawo No. 6, 2002, p. 47.

[12] Justification of the Constitutional Tribunal judgment referred to in footnote 10.

[13] *Ibid*.

[14] See the Constitutional Tribunal judgment of 8 May 1990, K 1/90, OTK 1990, No. 1, item 2; also the Constitutional Tribunal judgment of 19 June 1990, K 2/90, OTK 1990, No. 1, item 3.

[15] The concept of just compensation was introduced to the Polish legal order in Article 1(4) of the Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Journal of Laws [Dz.U.] No. 75, item 444), which amended Article 7 of the Constitution and stipulated that the Republic of Poland shall safeguard ownership and the right to inherit and

the scope of interpretation of just compensation required that the reasons for such activities be thoroughly presented. Apart from the fact that they were not advanced, the actual state of binding law was ignored and admissibility of such conduct was uncritically adopted in the doctrine and case law.[16] It should be presumed that it was due to conformist reasons rather than the substantial ones, which should meet with an even more critical assessment because justification for the presented opinion is looked for in judgments that do not refer to compensation for expropriated real property at all or in the theses from the past epoch.[17]

Criticism of the above-discussed opinions should be started from a more general issue concerning the differentiation in the constitutional provisions on just compensation (in Article 21 para. 2) and harm (in Article 77 para. 1). It seems that drawing too far-reaching conclusions from this fact may be unjustified and even risky. Undoubtedly, the above-mentioned provisions result in the fact that Article 21 para. 2 of the Constitution lays down the principle of just compensation for legal expropriation and Article 77 para. 1 provides for the principle of harm done by action contrary to law. As far as the latter case of liability is concerned, there is no doubt that public authorities must cover the harm done by unlawful action and, at the most, it can be surprising that admitting that required the Tribunal's intense adjudication activities and not just recognition that the provisions that do not meet this criterion cannot constitute grounds for shaping the sphere of subjective rights. On the other hand, in case of Article 21 para. 2 of the Constitution, approval of the limitation of compensation only to loss seems to ignore that the legislator uses the term "expropriation" in a broad sense in this provision,[18] and this means that the scope of compensation must be referred to various forms of deprivation of the ownership right. While it is possible to state that expropriation consisting in nationalisation or another form of acquisition of property by the state may result in incomplete compensation, this rule cannot be transferred to any other particular procedures resulting in compulsory deprivation of ownership.

The justification of this stand may consist in striving to ensure axiological coherence of the legal system. The current situation resulting from case law and the opinions of the doctrine does not meet this requirement and, at the same time, leads to fragmentation of the issue of compensation connected with legitimate deprivation of the right to real property ownership. The situation should be disapproved of because, in fact, it constitutes confirmation that there is no uniform principle of the protection of ownership, which results in jeopardising the constitutional assumption

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guaranteed complete protection of personal property. Expropriation was admissible exclusively for public purposes and for compensation.

[16] See T. Woś, *Wywłaszczenie nieruchomości i ich zwrot*, Warsaw 2007, pp. 170–171; J. Stelmasiak, [in:] R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego*, Vol. 7: *Prawo administracyjne materialne*, Warsaw 2017, p. 600; also: J. Parchomiuk, *Odpowiedzialność…*, pp. 169–170; also M. Kaliński, *Szkoda na mieniu…*, p. 585.

[17] See the Constitutional Tribunal judgment of 8 April 1998, K 10/97, OTK 1998, No. 3, item 29; also E. Łętowska, *Charakter odpowiedzialności za szkody wyrządzone przy wykonywaniu funkcji publicznych i jej stosunek do odszkodowawczej odpowiedzialności kodeksowej*, [in:] Z. Radwański (ed.), *Studia z prawa zobowiązań*, Warsaw–Poznań 1979, p. 99 ff.

[18] For more, see J. Parchomiuk, *Odpowiedzialność…*, pp. 141–170.

that such protection exists. This state leads to much pathology, first of all, to situations in which the state undertakes more and more resolute steps towards unprecedented limitation of owners' rights within all types of special statutes,[19] which depart from the classical model of expropriation in favour of solutions that are legally doubtful. This way of acting means flagrant evasion of rules that are to safeguard at least minimal protection of ownership, thus it should be stigmatised.

The main axiological reservation in relation to the limitation of the scope of compensation pursuant to Article 21 para. 2 of the Constitution consists in the fact that the approval of such a state must be connected with an inevitable infringement of the constitutional principle of proportionality. If an entity deprived of the right to real property is to be treated in the same way as an entity deprived of this right in an extraordinary situation, in the evaluative dimension, it is not a standard situation and it cannot be accepted, by any means. For example, it is enough to indicate the regulations concerning extraordinary situations[20] and the Act on redressing loss resulting from emergency-related situations.[21]

Article 2 para. 2 of the Act on compensation clearly stipulates that everyone who has suffered from property loss as a result of the introduction of a state of emergency has the right to compensation covering the redress of property loss, without the profits they could obtain if the loss had not occurred. In case of this regulation, the narrowing of the scope of compensation does not raise any doubts and the legislator clearly excluded profits from the scope of compensation. There are clear grounds for such action in Article 228 para. 4 of the Constitution of the Republic of Poland, which imposes an obligation on public authorities to compensate for loss of property resulting from limitation, due to the introduction of extraordinary measures. There is also its non-legal justification because the state of emergency is an extraordinary situation, thus it is fair to introduce limitations to the scope of compensation in such a situation. It is hard to approve of such arguments in case of expropriation, which is neither an extraordinary situation nor incurred in an owner's interest.

Therefore, the right solution to the problem of just compensation for expropriation requires a systemic approach to the institutions that are connected with the acquisition or limitation of ownership if it takes place based on a decision. It is important to compile a coherent system of rules and a mode of granting compensation and, moreover, to make it clear within the scope of values that constitute its basis. The current state does not meet those requirements. It is commonly assumed

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[19] For instance, Act of 10 April 2003 on special rules of preparing and implementing investment in the area of public roads, Journal of Laws [Dz.U.] of 2018, item 1474.

[20] See the Act of 18 April 2002 on the state of natural disaster, Journal of Laws [Dz.U.] of 2017 item 1897; also the Act of 21 June 2002 on the state of emergency, Journal of Laws [Dz.U.] of 2017, item 1928; also the Act of 21 June 2002 on martial law, Journal of Laws [Dz.U.] of 2017, item 1932. For more on the issue of limitation of freedoms and rights in the extraordinary situations, see K. Eckhardt, *Stan nadzwyczajny jako instytucja polskiego prawa konstytucyjnego*, Przemyśl–Rzeszów 2012, pp. 208–229.

[21] Act of 22 November 2002 on compensating tangible assets loss resulting from the limitation of human and civil freedoms and rights in the period of the extraordinary state, Journal of Laws [Dz.U.] of 2002, No. 233, item 1955, as amended; hereinafter Act on compensation.

that the amount of compensation for expropriated real property is established within the scope of loss (*damnum emergens*) resulting from the deprivation of the right of ownership and the value of the loss is equal to the market value of the expropriated real property.[22] With respect to this, Article 130 para. 1 in conjunction with Article 134 para. 1 of the Act on real property management are referred to.[23] There are exceptions to the solutions adopted there in favour of lost profits (*lucrum cessans*) but only in cases laid down in statute. In general, these are some profits from the use of land, such as perennial agricultural cultivations and crops. This regulation is treated as a standard and a universal solution because special statute refers to the rules adopted there in all situations when property is acquired by a public entity or when it is necessary to determine compensation for the acquisition of real property ownership.

However, even within the Act on real property management, there is no consistency in the way of determining compensation, which has been rightly noted,[24] but no conclusion has been drawn from that fact in order to properly define just compensation. In my opinion, this state cannot be approved of because there are no arguments for it, except for excessive dogmatism of those who justify a different amount of compensation in case of expropriation and a different one in case of the "temporary expropriation".

Temporary expropriation means limitation of ownership referred to in Article 120 and Articles 124–126 ARPM. Thus, it concerns compensation to third parties in relation to expropriation that may cause harm or inconvenience to them in the area of exercising their right as a result of expropriation (Article 120 ARPM), or compensation for temporary acquisition of real property (Article 124 ARPM), or limitation of the use of real property in connection with mining ownership (Article 125 ARPM), or finally compensation for harm done as a result of force majeure or connected with the prevention of substantial harm (Article 126 ARPM).

In all those cases, it is assumed that a harmed person is entitled to full compensation because it results from the content of Article 128 para. 4 ARPM, which stipulates that compensation should be adequate to the value of harm. The principle of full compensation is derived from this linguistic formulation of the provision, while in case of expropriation, it is believed that compensation covers only loss because Article 128 para. 1 ARPM does not use the phrase from para. 4 of the provision, and only stipulates that expropriation is subject to compensation corresponding to the value of the acquired right, and this means just compensation, i.e. one that must be limited. The logical aspect of this argument does not meet the criterion of rationality because no one can justify a stand that full compensation is required in case of temporary limitation of the right to real property ownership and, at the same time, state that an entity permanently deprived of that right is not entitled to full compensation. This way of reasoning is in conflict with the basic inferential *a minori ad maius* principle because if full compensation is awarded for a less painful

[22] See T. Woś, *Wywłaszczenie nieruchomości…*, p. 17.

[23] Act of 21 August 1997 on real property management, Journal of Laws [Dz.U.] of 2018, item 121, as amended; hereinafter ARPM.

[24] See J. Parchomiuk, *Odpowiedzialność…*, pp. 352–370.

infringement of rights, it should be granted all the more for deprivation of that right. Such a conclusion is an obvious consequence of the interpretation of Article 128 paras 1 and 4 ARPM in conjunction with Article 21 para. 2 of the Constitution.

The adoption of the principle of full compensation for expropriation of real property poses new challenges to compensatory proceedings due to the necessity of determining the amount of harm and compensation for it. The present procedure of establishing compensation does not meet the requirements for adjudicating on such compensation. Real property appraisers certainly should not do this because they are not prepared to establish that. They can only determine the value of tangible assets of the real property subject to expropriation but the amount of compensation may be established only within a process of litigation because a court is the proper place where that can be determined. However, problems connected with the establishment of full compensation are nothing new. The procedure in compensatory proceedings is standard so a decision determining the amount of compensation will never play this role, although it may be an element of such proceedings if the person whose real property has been expropriated accepts the proposed compensation.

This means that the main direction of action aimed at ensuring an appropriate standard of protection of real property ownership should strive to guarantee a judicial method of claiming compensation. The first steps have already been taken in Article 33 para. 2 of the Act of 29 June 2011,[25] which stipulates that the party dissatisfied with the awarded compensation pursuant to the AINP provisions may initiate lawsuit in common courts. Obviously, it concerns those forms of interference into the right of ownership for which the legislator designed an administrative compensatory mode; however, with respect to this, Polish legislation is not consistent.[26] The adoption of the proposed solution is of key importance because it is an argument against a thesis on a limited scope of compensation for expropriation. If a court should decide about compensation, it is obvious that it should do this with the application of the provisions constituting compensatory liability, i.e. with the adoption of the principle of full compensation because it is a principle used in civil law.

Using bases determined this way as a starting point, it is necessary to formulate a radical thesis that just compensation must be fair compensation, and this requirement is met only when equivalence is maintained, which is feasible when the principle of full compensation is adopted. The support for this stand is a guarantee of the state's lawful operation and sufficient protection of real estate ownership, which is a fundamental institution. Departure from those assumptions results in various types of pathology of present times. Thus, based on this assumption, it should be said that Article 128 para. 1 ARPM, stipulating that expropriation is

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[25] Act of 29 June 2011 on preparation and implementation of investment in nuclear power plants and accompanying investments, Journal of Laws [Dz.U.] of 2018, item 1537; hereinafter AINP.

[26] In many situations the law envisages pursuing claims concerning harm done in compliance with law via litigation, e.g. Articles 29 and 30 of the Act of 23 July 2003 on the protection of antiquities and taking care of them, Journal of Laws [Dz.U.] of 2017, item 2187, as amended.

subject to compensation, lays down a principle of full compensation within the meaning of Article 21 para. 2 of the Constitution.

Full compensation covers loss, expenditures and lost profits.[27] Loss (*damnum emergens*), called the "real harm" [28] consists in the decrease in assets or the increase in liabilities.[29] In case of expropriation, loss consists in the decrease of assets because an owner loses the right to real property ownership. In reality, loss means the market value of this right, which must be established pursuant to Article 134 para. 1 ARPM. It should be added that in case of expropriation, the state is in a more advantageous position than any other entity obliged to redress harm in accordance with civil law because statute lays down that only the market value of real property is to be taken into account and not, e.g. the loss of value of the owner's interests connected with expropriation, which also constitutes loss in civil law. In addition, the *damnum illicitum*,[30] i.e. damage to property within unlawful interest,[31] is recognised as loss in the Civil Code. Similarly, loss of claims connected with real property subject to expropriation is also loss because every claim should belong to property assets. Finally, liabilities also constitute loss.[32]

Such a conclusion can be carefully drawn based on the content of Article 130 para. 1 ARPM, which indicates that the amount of compensation is established in accordance with the state, purpose and value of real property subject to expropriation on the day of the issue of an expropriation decision. The content refers to the state and purpose of real estate, but not land, thus it seems that it clearly indicates the formal (legal) use of the term, and not just a physical way of land utilisation as it functions in practice. Consistent derivation of such results from the terminology used in Article 130 para. 1 ARPM is reasonable because real property is a legal category and land is determined as a parcel. It may be surprising that the doctrine and judicature do not draw any normative conclusions from this differentiation. The phenomenon is symptomatic because it indicates legal ignorance or defective interpretation of the indicated provision. The first option should be in general refused so it is necessary to look for an error in the interpretation because it is hard to assume that the legislator introducing such terminology acted irrationally since, in accordance with Article 56 paras 2 and 3 of the Act on land management of 1985,[33] the phrase "when establishing compensation for land", and not real estate, is used; however, in Article 56 para. 1 of the same statute, the legislator emphasised that compensation should correspond to the value of real estate subject to expropriation.

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[27] See W. Czachórski, *Zobowiązania. Zarys wykładu*, Warsaw 1994, pp. 78–79.

[28] It is rightly raised in jurisprudence that such a term is erroneous because all types of harm are always real; see M. Kaliński, *Szkoda na mieniu…*, p. 271.

[29] For more on the issue, see W. Czachórski, *Zobowiązania…*, p. 76; also M. Kaliński, *Szkoda na mieniu…*, pp. 270–273.

[30] See M. Kaliński, *Szkoda na mieniu…*, p. 273.

[31] For instance, the value of a building raised with no building permit.

[32] For instance, due based on a contract entered into in favour of a third party; however, the issue may be resolved in various ways in civil law; see T. Wiśniewski, [in:] G. Bieniek (ed.), *Komentarz do kodeksu cywilnego. Księga trzecia: Zobowiązania*, Vol. 1, Warsaw 2002, p. 76.

[33] Act of 29 April 1985 on land management and expropriation of real property, Journal of Laws [Dz.U.] of 1991, No. 30, item 127, as amended.

Compensation for expropriation should cover expenditures that an owner must incur. Although a doubt can arise here which expenditures that an owner can incur result from expropriation alone, this element of harm cannot be eliminated from the scope of harm only because it is difficult to determine it. It can be cautiously assumed that such expenditures directly resulting from expropriation concern loss that the owner incurs in connection with the conducted expropriation proceedings, e.g. the cost of expert opinions developed for this purpose.

Finally, the scope of compensation for expropriation must cover lost profits (*lucrum cessans*), e.g. at least for historical reasons.[34] Obviously, the historical aspect cannot constitute sufficient justification for admission of this element of harm, however, it shows how far contemporary law has departed from reasonable roots; and all this takes place in the era of growing ideologies concerning human rights.[35] The law in force does not define the concept of lost profits because the term refers to different forms of benefits, profits from future transactions, loss of profits and income from things and the possibility of using things.[36] Proper determination of profits in expropriation proceedings is not simple. By the way, there are no proceedings in which it is easy but it seems that in this case it encounters difficulties and the perception of lost profits functions erroneously in legal conscience.

In general, it is assumed that lost profits are values connected with the loss of elements of land utilisation referred to in Article 135 paras 6–7 ARPM.[37] The stand is a certain simplification because the indicated provision applies to profits from things but their loss does not always have to be assessed as lost profits; this can be just loss. Classification of lost benefits as lost profits within the legal meaning may only take place in case of benefits from things or rights that have not been received and are future in nature in relation to an event that requires the redress to harm. In case of expropriation, it will be the result of an expropriation decision, thus concerns only the benefits under Article 135 paras 6–7, which might occur after the implementation of the decision, so it can be stated that these are lost profits within the meaning of civil law.

Earlier they do not constitute profits but loss, which must be established even in case of a very restrictive approach to the scope of compensation. This means that if real property subject to expropriation is used for agricultural purposes and there are crops there, the value of the crops should be recognised as loss if the effect of expropriation occurs before harvest. In such a situation, the addition of not harvested crops to the value of land constitutes the determination of the right subject to expropriation as the content of Article 130 para. 1 ARPM stipulates that compensation should cover the state and purpose of land. Crops would constitute lost profits if an owner claimed compensation for them in future periods following expropriation. All types of land purposes and its business utilisation should be treated in the same way, regardless of whether this concerns economic operations

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[34] This type of damage is laid down in Articles 644 and 657 of Vol. X of *Zwód praw*, quoted after M. Kaliński, *Szkoda na mieniu…*, p. 285.

[35] See L. Kołakowski, *Czy Pan Bóg jest szczęśliwy i inne pytania*, Kraków 2009, p. 234.

[36] For more considerations on the issue, see M. Kaliński, *Szkoda na mieniu…*, pp. 284–302.

[37] See T. Woś, *Wywłaszczenie nieruchomości…*, p. 172.

conducted on that land or profits resulting from the use of real property by third parties based on a legal title.

Determination of harm in the field of lost benefits is connected with the necessity to indicate the probability of the occurrence of such benefits in the future. This requires that complicated evidence-related and deductive procedures should be conducted in strictly administrative proceedings because each party deriving effects in favour of them from specific facts must provide evidence confirming or denying such harm. Such a standard is not available in proceedings conducted by a public body, and thus compensatory proceedings need thorough remodelling into court proceedings if a compensatory offer presented by this body is not accepted by an owner of expropriated real property. The Polish legislator should pursue such a model if the model of real protection of ownership resulting from the content of Article 21 of the Constitution of the Republic of Poland is to be implemented.

In the constantly changing contemporary world, legislators, scientists and law practitioners should be involved in attempts to keep balance between protection of private property and the need to ensure harmonised implementation of the objectives of the public by broadening the area of public ownership. Taking those steps, it is necessary not to lose sight of the apparent truth that "the state may print a beautiful edition of Shakespeare's works, but cannot get them written".[38] Thus, it is necessary to ensure that private ownership should be subordinate to other objectives only when there are important public interests that cannot be implemented with the use of common legal measures.

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[38] See A. Shleifer, *Własność państwowa a własność prywatna*, [in:] L. Balcerowicz (ed.), *Odkrywając wolność…*, p. 493.

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THE SCOPE OF JUST COMPENSATION FOR COMPULSORY ACQUISITION OF REAL PROPERTY OWNERSHIP

Summary

Expropriation of real estate is connected with the necessity to pay compensation. Such a necessity results directly from Article 21 para. 1 of the Constitution of the Republic of Poland, which stipulates that expropriation may be allowed solely for public purposes and for just compensation. The concept of just compensation has not been normatively defined. The binding regulations stipulate the rules and procedure of determining compensation. In its basic scope, it is a solution adopted in law before the changes of the social and political system took place after 1989, i.e. before the Constitution of the Republic of Poland entered into force. In this context, there are many theoretical and practical problems connected with defining the

amount of compensation, and first of all, its scope. In other words, legal regulations do not explicitly resolve the issue whether just compensation is only the one which covers the actual, real loss, thus a market value of the real estate, or the one which includes lost profits, i.e. the profits that the property title would gain in future if it was within the area of the influence of the given entity. In jurisprudence and jurisdiction no clear solution to this problem was offered, thus the article deals with this aspect, indicating the imperfections and insufficiency of the existing special regulation evaluated from the perspective of the principles defined in the Constitution. The basic assumption presented on the basis of the considerations of the law in force is that just compensation as a condition for expropriation should also take into account the right level of protection of the real estate ownership, which can take place only if such ownership has actual economic significance.

Keywords: expropriation, just compensation, real harm, lost profits, value of the expropriated right

ZAKRES SŁUSZNEGO ODSZKODOWANIA ZA PRZYMUSOWE PRZEJĘCIE WŁASNOŚCI NIERUCHOMOŚCI

Streszczenie

Wywłaszczenie nieruchomości wiąże się z koniecznością wypłaty odszkodowania. Taki obowiązek wynika wprost z art. 21 ust. 1 Konstytucji RP, który stanowi, że wywłaszczenie jest dopuszczalne tylko wtedy, gdy dokonywane jest na cele publiczne i za słusznym odszkodowaniem. Pojęcie słusznego odszkodowania nie zostało normatywnie określone. Obowiązujące przepisy przewidują zasady i tryb ustalania odszkodowania. W swoim zasadniczym ujęciu jest to rozwiązanie przyjęte w prawie jeszcze przed zmianą systemu społeczno-politycznego, jaka dokonała się po 1989 roku, a więc przed wejściem w życie Konstytucji RP. Na tym tle rodzi się wiele problemów teoretycznych i praktycznych związanych z określeniem wysokości odszkodowania, a przede wszystkim z jego zakresem. Inaczej rzecz ujmując, przepisy prawa nie rozstrzygają jednoznacznie, czy słuszne odszkodowanie to tylko takie, które obejmuje faktyczną, rzeczywistą stratę, zatem wartość rynkową nieruchomości, czy też takie, w którego skład powinny wchodzić utracone korzyści, a więc zyski, jakie przyniosłoby prawo własności w przyszłości, gdyby było w sferze oddziaływania podmiotu. W nauce i orzecznictwie ten problem nie znalazł jednoznacznego rozwiązania, a zatem artykuł podejmuje te zagadnienia, wskazując na ułomność i niedostatek istniejącej regulacji szczególnej, ocenianej z perspektywy zasad określonych w Konstytucji. Podstawowym założeniem prezentowanym na kanwie rozważań nad obowiązującym prawem jest to, że słuszne odszkodowanie jako warunek wywłaszczenia powinno uwzględniać również wartość utraconych korzyści, gdyż jedynie przy takim założeniu można osiągnąć należyty poziom ochrony własności nieruchomości, co może nastąpić tylko wtedy, gdy ta własność będzie miała rzeczywiste ekonomiczne znaczenie.

Słowa kluczowe: wywłaszczenie, słuszne odszkodowanie, rzeczywista szkoda, utracone korzyści, wartość wywłaszczonego prawa

ÁMBITO DE JUSTIPRECIO POR LA EXPROPIACIÓN FORZOSA DE UN INMUEBLE

Resumen

La expropiación forzosa de un inmueble está relacionado con la necesidad de pagar el justiprecio. Tal obligación resulta directamente del art. 21 ap. 1 de la Constitución de la República de Polonia que prescribe que la expropiación forzosa es admisible sólo cuando se efectúa con fines públicos y contra el justiprecio. El concepto de justiprecio no ha sido definido normativamente. En su planteamiento básico es una solución adoptada en el derecho antes del cambio del sistema social-político que se efectuó tras el año 1989, o sea antes de la entrada en vigor de la Constitución de la República de Polonia. Surgen muchos problemas teoréticos y prácticos relacionados con la determinación del importe de justiprecio y sobre todo con su alcance. Dicho de otra manera, la regulación no resuelve si el justiprecio sólo incluye la pérdida real, o sea el valor del mercado del inmueble, o si incluye también el lucro cesante, o sea los beneficios que generaría el derecho de propiedad en el futuro, si perteneciese al sujeto. La doctrina y la jurisprudencia no resuelve de manera uniforme este problema, por lo tanto el articulo trata de estas cuestiones, señalando la insuficiencia y pobreza de la regulación especial existente, valorada desde la perspectiva de los principios plasmados en la Constitución. La premisa básica presentada a la luz del derecho vigente parte de que el justiprecio, como la condición de la expropiación forzosa, debería incluir también el valor de lucro cesante, ya que sólo entonces se puede conseguir el nivel adecuado de la protección de propiedad de inmueble, lo que tiene lugar sólo cuando la propiedad representará la importancia económica real.

Palabras claves: expropiación forzosa, justiprecio, daño real, lucro cesante, valor de derecho expropiado

РАЗМЕР СООТВЕТСТВУЮЩЕЙ КОМПЕНСАЦИИ ЗА ПРИНУДИТЕЛЬНЫЙ ЗАХВАТ ИМУЩЕСТВА

Резюме

Принудительное отчуждение недвижимости предполагает выплату компенсации. Это обязательство напрямую касается ст. 21 п. 1 Конституции Республики Польша. В данной статье предусматривается положение, что отчуждение допустимо только в том случае, когда оно осуществляется для общественно полезных целей и справедливой компенсации. Понятие справедливой компенсации не получило своего нормативного определения. В действующих положениях предусматриваются принципы и порядок определения размера компенсации. Согласно базовому подходу, это является решением, принятым в законодательстве ещё до реформы общественно-политической системы, которая имела место после 1989 года, то есть до вступления в силу Конституции Республики Польша. В данном контексте возникает множество теоретических и практических проблем, связанных с определением размера компенсации, и прежде всего ее объёма. Другими словами, правовые нормы не позволяют установить однозначным образом, учитываются ли при определении справедливой компенсации фактический, действительный ущерб, аналогичный рыночной стоимости недвижимости; или же необходимо принимать во внимание упущенную прибыль, а, следовательно, ту прибыль, которая гарантировала бы право собственности в будущем, если бы она находилась в рамках сферы влияния субъекта. Как в теории, так и в судебной практике, упомянутая проблема не решена окончательно и однозначно, вследствие чего в статье рассматриваются связанные с этим

вопросы, с указанием на ущербность и недостатки существующего специального регулирования, оцениваемого с точки зрения принципов, определяемых в Конституции. Основное предположение, представленное на основе рассуждений относительно действующего законодательства, исходит из предпосылки, что при определении размера справедливой компенсации как условия отчуждения следует учитывать также размер упущенной прибыли, так как только при таком подходе можно достичь надлежащего уровня защиты прав собственности на недвижимость, который может считаться обоснованным, если эта собственность имеет реальное экономическое значение.

Ключевые слова: отчуждение, справедливая компенсация, фактический ущерб, упущенная прибыль, стоимость отчуждаемого права

UMFANG GEBÜHRENDER ENTSCHÄDIGUNG FÜR ZWANGSMÄSSIGE IMMOBILIENÜBERNAHME

Zusammenfassung

Die Immobilienenteignung ist mit der Erforderlichkeit einer Entschädigungsbezahlung verbunden. Solch eine Pflicht ergibt sich direkt aus Art. 21 Abschn. 1 des Grundgesetzes (GG) der Republik Polen, welcher bestimmt, dass eine Enteignung nur dann möglich ist, wenn es für öffentliche Zwecke und entgegen einer richtigen Entschädigung erfolgt. Der Begriff einer rechten Entschädigung wurde bislang normativ nicht bestimmt. Die geltenden Vorschriften sehen die Prinzipien und den Modus einer Entschädigungsbestimmung vorher. In ihrer Grundfassung ist das eine Lösung rechtlich angenommen noch vor der gesellschaftlich-politischen Systemänderung stattgefunden nach 1989, demnach vor dem Inkrafttreten des Grundgesetzes der Republik Polen. Auf diesem Gebiet werden zahlreiche theoretische und praktische Probleme erwogen, verbunden mit der Feststellung (Evaluierung) der Entschädigungshöhe, aber vor allem deren Umfangs. Andererseits dirimieren die Rechtsvorschriften nicht eindeutig, ob rechte Entschädigung eine solche ist, welche einen tatsächlichen, wirklichen Verlust umfasst, ergo den Immobilienmarktwert, oder vielleicht auch eine solche, welche entgangene Benefits, also auch Profite beinhaltet, eben solche Profite, welche durch das Eigentumsrecht künftig hätten generiert werden können, falls diese im Bereich der Subjektwirkung gewesen wäre. Weder in der Wissenschaft, noch in der Rechtsprechung, hat dieses Problem keine eindeutige Lösung gefunden, ergo berührt dieser Artikel die vorliegenden Angelegenheiten, die Gebrochenheit und den Mangel an vorhandener Sonderregulation, die von Seiten der GG-Prinzipien einzuschätzen und abzuwägen sind. Die Hauptvoraussetzung vorgeführt anhand Erwägungen über das geltende Recht setzt voraus, dass eine rechte Entschädigung als Enteignungsbedingung auch den Wert entgangener Profite und Nutzen berücksichtigen soll, weil ausschließlich unter einer solchen Voraussetzung ein gebührendes Schutzniveau des Immobilieneigentums erzielt werden kann, was nur dann stattfinden kann, wenn dieses Eigentum eine tatsächliche wirtschaftliche Bedeutung ausweisen wird.

Schlüsselwörter: Enteignung, rechte Entschädigung, tatsächlicher Schaden, entgangene Profite und Nutzen, Enteignungswert

LA PORTÉE DE JUSTE COMPENSATION POUR LA PRISE DE CONTRÔLE FORCÉE DE LA PROPRIÉTÉ

Résumé

L'expropriation de biens immobiliers implique le versement d'une indemnité. Cette obligation est strictement basée sur l'article 21 paragraphe 1 de la Constitution de la République de Pologne, qui stipule que l'expropriation n'est autorisée que si elle est faite à des fins publiques et moyennant une juste compensation. Le concept de juste compensation n'a pas été défini de manière normative. Les dispositions applicables prévoient des règles et une procédure pour la détermination du montant de la compensation. Dans son approche fondamentale, il s'agit d'une solution juridique adoptée avant le changement de système social et politique intervenu après 1989, c'est-à-dire avant l'entrée en vigueur de la Constitution de la République de Pologne. Dans ce contexte, de nombreux problèmes théoriques et pratiques se posent concernant la détermination du montant de la compensation et, surtout, de son étendue. En d'autres termes, la loi ne détermine pas explicitement si une juste compensation couvre uniquement la perte réelle, donc la valeur marchande du bien immobilier, ou qui devrait inclure la perte de profit, et donc le bénéfice qui donnerait le droit de propriété à l'avenir s'il était dans la sphère d'influence de l'entité. En science et dans la jurisprudence, ce problème n'ayant pas trouvé de solution définitive, l'article aborde ces problèmes en soulignant l'imperfection et les faiblesses de la réglementation spéciale existante, évaluée du point de vue des principes énoncés dans la Constitution. L'hypothèse présentée sur la base de considérations relatives au droit applicable suppose qu'une juste compensation, en tant que condition d'expropriation, devrait également tenir compte de la valeur des profits perdus, car seule cette hypothèse permet d'atteindre un niveau de protection de la propriété adéquat, ce qui ne peut se produire que si cette propriété a une importance économique réelle.

Mots-clés: expropriation, juste compensation, dommages réels, pertes de profits, valeur du droit exproprié

PORTATA DELL'EQUO COMPENSO PER L'ACQUISIZIONE FORZATA DI PROPRIETÀ

Sintesi

L'espropriazione immobiliare è legata alla necessità di pagare un compenso. Tale obbligo deriva direttamente dall'articolo 21. paragrafo 1 della Costituzione della Repubblica di Polonia, che stabilisce che l'espropriazione è consentita solo se effettuata per scopi pubblici e con un equo compenso. Il concetto di equo compenso non è stato definito a livello normativo. Le disposizioni vincolanti prevedono norme e procedure per la determinazione del compenso. Nel suo approccio di base, si tratta di una soluzione adottata nella legge anche prima del cambiamento del sistema sociale e politico avvenuto dopo il 1989, ossia prima dell'entrata in vigore della Costituzione della Repubblica di Polonia. In questo contesto, sorgono molti problemi teorici e pratici relativi alla determinazione dell'importo del compenso e, soprattutto, alla sua portata. In altre parole, le disposizioni di legge non determinano in modo inequivocabile se l'equo compenso sia tale da includere solo le perdite effettive e reali, quindi il valore mercantile degli immobili, o tali, che dovrebbero includere lucro cessante, vuol dire i profitti che il diritto di proprietà porterebbe in futuro se fosse nella sfera di influenza del soggetto.

Nella scienza e nella giurisprudenza questo problema non ha trovato una soluzione univoca, per cui l'articolo affronta tali questioni, evidenziando la debolezza e la carenza della normativa specifica esistente, valutata dal punto di vista dei principi stabiliti nella Costituzione. L'ipotesi principale presentata sulla base di considerazioni sul diritto vincolante parte dal presupposto che l'equo compenso, in quanto condizione di espropriazione, dovrebbe tenere conto anche del valore dei mancati profitti, perché solo con tale presupposto si può raggiungere un adeguato livello di protezione della proprietà immobiliare, il che può avvenire solo quando questa proprietà

Parole chiave: espropriazione, equo compenso, danno effettivo, lucro cessante, valore del diritto espropriato

Cytuj jako:

Czarnik Z., *The scope of just compensation for compulsory acquisition of real property ownership [Zakres słusznego odszkodowania za przymusowe przejęcie własności nieruchomości]*, „Ius Novum" 2019 (Vol. 13) nr 2, s. 207–224. DOI: 10.26399/iusnovum.v13.2.2019.23/z.czarnik

Cite as:

Czarnik, Z. (2019) 'The scope of just compensation for compulsory acquisition of real property ownership'. *Ius Novum* (Vol. 13) 2, 207–224. DOI: 10.26399/iusnovum.v13.2.2019.23/z.czarnik