

MODIFICATIONS TO THE CLASSIC CONCEPT OF EXPROPRIATION V. THE RIGHTS OF THE INDIVIDUAL

The aim of this publication is to provide a comprehensive presentation of the issue of expropriation in Poland. In other words, it has been compiled for reference purposes. For historical reasons the issue of expropriation is particularly sensitive in Poland. Bearing in mind the transformation of the Polish political system and the adoption of a new system of values with the 1997 Constitution confirming the European standards for the protection of individual property that has been in force for twenty years, it becomes clear that the issue of expropriation merits a new evaluation. Even more so, since the year 2000 there have been more cases of special measures being applied with the aim of simplifying and speeding up the realisation of public investment projects. This unfortunately happens at the cost of the safeguarding the rights of the dispossessed individual owner, which is not necessarily compatible with the system of values contained in the Constitution.

This publication is divided into two parts, each of which is composed of four chapters. Part One contains the issues related to the broadly understood notion of expropriation. This is where the classic definition of the term is also provided, which in its simplified form refers to the act of divesting an individually specified addressee of singular right deemed to be for public interest and for compensation based on an administrative decision (administrative act). The analysis here leads to the conclusion that this approach guarantees the most complete level of safeguarding individual rights, as it makes it possible to weigh up properly the balance between public and personal interest, and therefore provides for the revision of the future conditions of expropriation. These deliberations are preceded by an explanation of basic terms, including the essence of expropriation. This is because its *essentialia negotii* still generates considerable controversy, both from the point of view of the legal doctrine, as well as case law, despite the fact that this notion is defined in the Real Estate Management Act of 21 of August 1997.

This monograph puts forward the proposition that expropriation is not solely related to the deprivation of a right, especially the right to possession, but should also include cases of any public or legal intervention that does not lead to the right deprivation, but which as a result of imposed limitations creates an 'unbearable burden'. The latter type of limitation has been more and more frequently referred to as de facto expropriation, using the ECHR terminology, and is yet to be classified unequivocally. These deliberations are of utmost importance, also because the realisation of the public interest does not necessarily include the transfer of property rights or any other *in rem* rights.

This part of the publication will also provide evidence that the issue of expropriation is directly related to human rights, including a person's dignity, which, as interpreted in line with the Article 31 of the Constitution of the Republic of Poland, is the source of rights

and freedoms of an individual. Moreover, the notion of expropriation is also determined by such constitutional rules as equality before the law, including the equal distribution of public burden, trust in the state authority and its law establishment (loyalty rule), in the democratic rule of law or in justice. Only applying all these directives simultaneously can lead to a proper formulation of expropriation rules. Additionally, a separate chapter in this part of the publication deals with the relationship between constitutionality and the classic concept of expropriation. The proposition suggested here is that expropriation is such a public or legal intervention into the possession right that interferes with its essence, whereas the Constitution of the Republic of Poland uses this term only in its material sense. The crucial importance of urban planning and management for the issue of expropriation, which in fact constitutes the first phase of the realisation of the public purpose, has been highlighted here, too.

The first part of this book therefore has a theoretical dimension. The model that is created at this level is then helpful in the second part of this publication for the evaluation of the modifications that the classic concept of expropriation has undergone in the Polish legal system. In the first place, the legal forms that interference of the right to possession can take place are presented. It transpires that such a situation is not necessarily the result of an individual administrative act, but can also stem directly from a legal act (*ex lege*), an expropriation agreement, the legal divisions of a property, and ultimately, it can also be the actual result of the legal actions of the public administration (*a de facto* expropriation). The most obvious examples of the latter are urban planning measures, but there are other acts of local legislation where it is possible to point to a similar level of the intensity of interference.

The issue of compensation is also discussed extensively here, from the point of view of the moment at which it is issued and its payment, as well as estimating its size, both of which are of fundamental importance for the proper safeguarding of individual rights within the expropriation procedure. This part of the publication includes legal comparison, which leads to the conclusion that the Polish measures do not safeguard individual property rights to the same extent as regulations in England, Germany, France, or Slovakia and the Czech Republic, mostly because they take minimal care of the so-called side-effect loss, whereas the compensation should be equivalent and appropriate. Moreover, it is argued here that on the basis of the Constitution of the Republic of Poland there are no obstacles to the establishment and payment of the compensation to take place before the act of expropriation. The rule of simultaneous deprivation of the right to property and the compensation payment is also deemed constitutional.

The last chapter deals with the relation between expropriation law (public) and civil law (private). Among other things, the issue of the legal nature of the right to compensation as stemming from expropriation is discussed extensively here, and also the arguments in favour of treating it as part of public law. The issue of the expiry of the compensation demand is also analysed with the overarching proposition to exclude such a possibility. A separate section is devoted to the discussion on the admissibility of the expropriation to the advantage of a subject of private law.

This analysis is based mostly on the dogmatic method, with the historical and comparative elements. To a considerable extent it is of evaluative character on the grounds of the objectives set out by the Constitution of the Republic of Poland as realised by Polish public administration. This study is intended as another important element contributing to the discourse on shaping the expropriation procedure in accordance with the legal system of the Republic of Poland.