Protection of private property expropriation

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Abstract— **The basic law related to real estate/property is the right of ownership. It is the basic institution of property law in Poland and together with property ownership and the right of inheritance, is constitutionally protected. The provisions of the Constitution of the Republic of Poland of 1997, which set the standards for protection of property rights, are heterogeneous. This results both from their location in the basic law and from the wording. There are provisions in the form of constitutional principles, provisions expressing subjective rights, as well as provisions providing procedural guarantees for the implementation of the former. This multitude of forms creates some interpretative difficulties, the resolution of which is often dealt with by the Constitutional Tribunal. The considerations in the paper are based on various research methods, especially on the dogmatic and legal method. The author discusses achievements of jurisprudence and doctrine with respect to property rights, regulations of the Constitution, expropriation in civil law, judicature of the Polish Constitutional Tribunal and other Polish courts as well as acts of international law e.g. the jurisprudence of the European Court of Human Rights.**

Index Terms— ownership, deduction of ownership, restriction of property rights, expropriation, compensation.

I. INTRODUCTION

The right to property is one of the oldest rights, defined in Roman law and guaranteed in legislation continuously since the Middle Ages. In the 20th century the state managed to take over many general social obligations which often collided with private property, this resulted in the need to introduce into legislation certain provisions regulating the possibility of depriving or even deducting this right (Michałowska, 2000).

The right to property is a subjective right with the widest content in relation to things, but it is not an absolute, unlimited right. On the contrary, for modern legislation the idea of social function of property is the source of rights of the owner as well as obligations. The rule "ownership obliges" gives the state legitimacy to interfere in the sphere of ownership. According to K. Wojtyczek, "by interfering in the sphere of a given human right, we will understand actions or omissions of the entity obliged to implement this right, violating the constitutional obligation of that entity to the subject of this right, regardless of whether this obligation is absolute or prima facie". The doctrine of constitutional law assumes that interference always involves narrowing the constitutional scope of protection of a given law in relation to at least one entity of this right. (Wojtyczek, 1994), (Alexy, 1985), (Pieroth and Schlinck, 1995).

II. CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS

Establishment of property rights in the Constitution of the Republic of Poland is treated as a constitutional principle. One of the aims of constructing constitutional principles is to shape certain directions of the state's activity, its objectives and tasks, in particular the directions of interpretation of other regulations. Property protection is such a task, regardless of any separate rights granted to individuals (Sarnecki, 1997). The state's compliance with its obligations towards property is guaranteed by general political measures, in particular legislation [decision of the Constitutional Tribunal of 12 January 1999, P 2/98, published by OTK 1999/1/2] (Banaszak, 2008). Safeguarding the protection of property through actual actions and establishing the right law is a constitutional duty of the state. This approach is recorded in article 21 of the Constitution of the Republic of Poland. In article 64, the Constitution deals with the recognition of property as a subjective right, that is, property in a subjective approach, in contrast to the objectively indicated principle. Guaranteeing individuals the right to property constitutes the basis for using the means provided for their protection against state interference. Article 64 paragraph 2 of the Constitution shapes equal legal protection of property for all. This means, in essence, setting the limits for property protection and inheritance protection for the sake of the greater good and for execution of public goals for which it becomes necessary to make expropriation. Contents of article 21 paragraph 2 of the Constitution provide protection against property and the right of inheritance. In this way the constitution-maker made self-limitation in the granted protection of property and the right of succession. The scope of property protection results from the will of the legislator. In this respect, the legislator has a far-reaching autonomy which

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allows to set the limits of this protection in the Constitution. It is a normative determinant for any ordinary legislator in creating statutory regulations affecting ownership and the right of inheritance in a manner not exceeding the limits of permissible interference resulting from the Constitution of the Republic of Poland (Skrzydło, 2000). In the judgment of 8 May 1990, the Constitutional Tribunal stated that expropriation is any kind of deprivation of property for public purposes, regardless of its form, not only on the basis of an administrative decision, and fair compensation [decision of the Constitutional Tribunal of 8 May 1990, K 1/90, OTK of 1990, v. 2, item 2].

In the judgment of 14 March 2000 [decision of the Constitutional Tribunal of 14 March 2000, P.5/99, OTK of 2000, No 2, item 60.] and the ruling of 12 April 2000 [decision of the Constitutional Tribunal of 12 April 2000, K. 8/98, OTK of 2000, No 3, item 87], the Constitutional Tribunal directly opted for a broad understanding of expropriation in terms of article 21 paragraph 2 of the Constitution of the Republic of Poland, as "any deprivation of property, regardless of form" or "any limitation or deprivation of the entity entitled by law by the public authority". In both judgments, the Tribunal made reservations, stating that a broad view of the scope of the concept of expropriation does not mean full discretion of the legislator in applying for various forms of deprivation of property. In the second judgement it was stated that despite broad understanding of expropriation, it is difficult to treat article 21 paragraph 2 of the Constitution as a standard for the control of all normative acts resulting in the deduction of specific components of their property to municipalities.

The provisions of the Constitution (in particular article 21 paragraph 2) do not indicate the form in which interference with expropriation may take place. From the perspective of the Constitution, the form of such interference in the ownership of an individual is irrelevant (Szewczyk, 2003). In earlier case law, the Constitutional Tribunal clearly stated that [decision of 17 December 2008, P 16/08, OTK-A 2008/10/181, decision of 9 December 2008, K 61/07, OTK-A 2008/10/174.] "art. 21 does not provide for the protection of property rights other than ownership", whereas granting all property rights to constitutional protection results from article 64 points 1 and 221. In a more recent case law this position was also confirmed in the judgment of 24 April 2007 (SK 49/05) concerning pre-war Treasury bonds. Referring to adequate control patterns in this case, it was stressed that article 21 of the Constitution establishes the protection of property and the right of inheritance. "Meanwhile, in the present case, the subject of analysis consists of normative acts concerning property rights, which due to their nature cannot be considered as falling within the notion of ownership in the sense of article 21 of the Constitution." It was about monetary claims incorporated in securities [similarly, in the judgment of the Constitutional Tribunal of 15 December 2004, Ref. act K 2/04 it was stated that article 21 of the Constitution has no direct application to the specific property law of public nature - on the grounds of the Constitution of the Republic of Poland of 1997].

In the judgment of 13 December 2012, the Constitutional Tribunal expressed the view that “the concept of ownership in the context of article 21 paragraphs 1 and 2 of the Constitution, must be understood in an autonomous way. It goes beyond the civil law approach to ownership, which is synonymous with all property rights” [decision of the Constitutional Tribunal of 3 April 2008, K 6/05]. As an argument in favour of this view, in the justification of the judgment, the Constitutional Tribunal also referred to the content of article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR). It gives the notion of ownership a broad meaning, having an autonomous and independent character in relation to the concepts and typologies of national law (Wróbel, 2011). The Strasbourg Tribunal has long held the view that some - other than property - property rights and benefits can also be considered property within the meaning of article 1. The condition, however, is to demonstrate the premise of having an economic value by a given law or interest, as well as the exclusive use of this right. Conventional protection also extends not only to the ownership right definitively acquired, but also to the expropriation of property rights, shaped by national law. As a consequence, the European Court of Human Rights recognizes property rights, personal rights and intangible intellectual property rights as property (Wróbel, 2011). The provision of article 1 of the First Protocol to the European Convention on Human Rights stipulates that every natural and legal person has the right to have their property respected. No one shall be deprived of their possessions except in the public interest and under the conditions provided for by law and in accordance with the fundamental principles of international law. Public authorities have the duty to protect property rights, like all other rights granted to an individual, and limit or deprive them of their own right only as the last resort and only on the basis of clearly defined provisions that in no way allow for any interpretation. Undoubtedly, it is right to recognize that the provisions of the First Protocol to the European Convention on Human Rights do not violate the right of the state to issue such laws as are necessary to regulate the use of property in accordance with the general interest.

In the judgment of 23 September 1982 ECtHR stated that expropriation may take place, not only as a result of legal decisions of the authorities. Extreme incidents of refusal to respect property must be treated as actual expropriation. The Tribunal pointed out that when issuing an opinion on whether the expropriation took place, one should not be guided only by formal reasons, because the convention is to protect its rights in a real and effective manner [Sporrong and Lönnroth v. Sweden 23.09.1982, A. 52 § 61; see also e.g. Holy Monasteries v. Greece, 9. 12. 1994, A. 301-A, § 56, Phocas v. France, 23 April 1996 RJD 1996-IV, §81; National & Provincial Building Society v. UK 23 October 1997, RJD 1997-VII.]. In the case under consideration, it should be examined whether the scope of interference in the use of property does not imply the actual deprivation of property. Under the European Convention on Human Rights, expropriation is understood as "a complete and irreversible reduction of the possibility of using property attributes without formal deprivation of the legal title" (Mik, 2003).

Another condition for the legality of expropriation is the

requirement of compensation, which in the light of article 21 paragraph 2 of the Constitution must always be accompanied by the deduction or limitation of the right to property or other property rights. Such an application also results from the case law of the ECtHR, even though article 1 no. 1 of the Additional Protocol to the European Convention on Human Rights does not explicitly mention compensation in the event of deprivation of property. According to the Strasbourg Court, the obligation to compensate in this case arises from the entirety of the provisions in relation to the principle of proportionality and the proper balancing of public and private interests [James and others v. UK], (Wróbel, 2011). One must also agree with the view that compensation does not belong to the essence of expropriation (Garlicki, 2011), (Szalewska, 1999), it is directed only to the deduction of a given property (Drozd and Truszkiewicz, 1995). Nevertheless, in the jurisprudence of both tribunals, "guaranteeing fair compensation is one of the factors determining the degree of nuisance resulting from the deprivation of property" [decision of the Constitutional Tribunal of 14 March 2000], (Szewczyk, 1999). Failure to meet this requirement is recognized in the Strasbourg case law as a manifestation of a violation of the proportion between the measures used and the objectives that are intended to be achieved by interference with property motivated by public reasons. Fair compensation, is therefore an element that restores the right balance between the needs arising from the general interest of society and the requirements related to the protection of basic individual rights [Sporrong and Lönnroth, 1982]. This balance, according to the ECHR, may also be maintained in case of expropriations aimed at the implementation of public projects on a large scale [decision of the Constitutional Tribunal in Aka v. Turkey, 1998]. While maintaining the position expressed in previous jurisprudence in the Constitution of 1997 [decision of the Constitutional Tribunal of 14 December 1988, K 2/88, and of 4 December 1989, K 3/88, and also judicature of 8 May 1990, K 1/90 of 19 June 1990, K 2/90], the Constitutional Tribunal indicates that just compensation is fair compensation, and that it is an equivalent compensation allowing the expropriated owner to make up for the property that has been taken over by the state (K 2/90) or even reconstitute his/her state of wealth from before the expropriation (P 5/99). The principle of equivalence also shows that compensation cannot be depleted in any way, either by way of calculating compensation (introducing deductions from other titles than those already imposed on the property), as well as the method of its payment, e.g. in instalments (K 1/90). Despite the lack of explicit instructions in article 21 paragraph 2 of the Constitution as to understanding of the concept of "fair compensation", it should be assumed that in principle it should be full compensation. On the other hand, it was not accidental - as it seems - to use the phrase "fair compensation" rather than "full compensation" by the legislator.

In connection with the above, the manner in which the State Treasury and territorial self-government units accept property by virtue of law, does not mean full discretion of the legislator in applying for various forms of deprivation of property. To assess the correctness of deprivation of property rights, it is necessary to refer to the principles of proportionality and rationality of the legislator. Finally, it should be noted that the principle of fair compensation expressed in article 21 paragraph 2 of the Constitution should also be a model for the compensatory mechanism in case of particularly severe interference in the exercise of the right to property 231, which without compensation would be in contradiction, in particular with the principle of proportionality expressed in article 31 paragraph 3 of the Constitution. The Constitutional Tribunal emphasizes that this principle "is universal and should be applicable in the event of interference with property due to a specific public purpose" (K 37/02). It means that it would be appropriate to introduce a kind of compensation mechanism covering not only the real damage which is related to the decline in the value of the real estate as well as alternative options to request the purchase of the real estate. Such mechanisms in the existing scope do not exist.

III. OWNERSHIP AS THE BASIS FOR EXPROPRIATION IN A PUBLIC LAW INSTITUTION

In the subject literature a frequently reoccurring question asks about the eternal nature of ownership. J. Wasilkowski stated that "it is impossible to talk about the right of ownership, as the reflection in the legal superstructure of some perpetual idea, it is impossible to detach this right from specific rights which are reflected in the legal norms and shape the content of the right of ownerhip" (Wasilkowski, 1972). This view is partly accepted by W. Pańko, stating that the dependence and variability of the right of ownership depends, inter alia, on economic conditions (Pańko, 1984). He emphasizes that variability and dependence do not deny the existence of a permanent idea of ownership as a prescription for a specific person or group of people presuming exclusive use and disposal of real estate or other material goods (Pańko, 1984). Pańko refers to the idea only, not to the content of the right of ownership. A different position is represented by W. Rozwadowski, who says that private property is a material and autonomous right of an individual to wield a material thing, unlimited in its content, as long as it does not violate the obligatory legal order (Rozwadowski, 1984). Private property thus understood will always remain private, regardless of the legal system that grants its protection. The legal order in which restrictions on the right of ownership are formulated in terms of subject-matter, are the very content of the right of ownership. W. Rozwadowski also determines the class character of this basic subjective right in every socio-economic formation from slavery to the present time. “The history of ownership is nothing more than the history of restrictions on private property or history of the inflow of public property into private hands and vice versa, or finally the history of the use of public property” (Rozwadowski, 1984).

Not taking into account only the theoretical assumptions about the essence of the right of ownership, none of the authors is questioning the fact that numerous limitations to this right operate in a positive way. M. Safjan explicitly states that "longing for the absolutization of property rights" is today

anachronistic (Safjan, 1999). In a judgment of 28 May 1991, the Constitutional Tribunal, speaking about the essence of the right of property, stated that protection of property rights is not absolute, since the very right of ownership cannot be treated as a *jus infinitum* [decision of the Constitutional Tribunal of 28 May 199, K 1/91, OTK of 1991, No I, item 4, and decision of the Constitutional Tribunal of 11 May 1999, 13/98, OTK ZU of 1999, No 4, item 74]. Admissible scope of public law interference in the right of ownership is "a look at the question of the relationship between the state and property in a historical perspective, can (...) shed a broader relationship between the individual and the whole, between individual and social interests, between private and public" (Sojka-Zielińska, 1984). Therefore, "the history of ownership can be taken synthetically, as a continuous struggle of two elements: individualistic and public. If the legal order tolerates the existence of individual property in the interest of the individual, it usually associates it with public interest, although the latter leads to an increasingly limited freedom of the owner through various legal acts, especially in times of social crises and new political orientations"(Rozwadowski, 1984). It is vital to answer the question to what extent the property right has retained its individual character, and how much it gained in terms of the social dimension [back in the mid 19th century A. Comte wrote that "in every normal state of humanity, every citizen is in fact a public official whose attributions more or less defined at the same time determine duties and claims. This general principle should of course go back to the property, in which positivism sees above all the necessary social function to create and manage capital, where every generation prepares the work of the next generation"]. According to R. Ihering, "all rights in the field of private law, even when they first aim at the interest of the individual, are addicted and bound by social considerations"(Sojka-Zielińska, 1984). The individualistic theory of ownership, based on abstract and formal recognition emphasises one's absolute power over a possession. In the theory of social solidarity represented by e.g. L. Duguit, ownership is not treated as a subjective right, but a "social function, while the owner is not an authorized person, but a" social officer "who manages property in the public interest (Sojka-Zielińska, 1984). These thoughts in their extreme form have not been accepted, although undoubtedly their influence on the rules of the program of Christian-democratic parties is noticeable, in opposition to the theory of social solidarism. According to L. Duguit, the concept referring to the dual nature of property rights assumes that the right to property has a personal function. The desire to possess results from the very nature of humanity, it guarantees the survival of an individual, and the personal benefit ensures optimal production. "Consequently, ownership is carried out individually and socially. Ownership is not, therefore, a social function in itself, but only serves this function. The individual and social aspect, in the light of this concept, interpenetrate and coexist together" (Jarosz-Żukowski, 2003). The accepted expression of this concept is the return of the "ownership obliges" principle, scientifically understood as the so-called social connection of property rights. It provides justification for the gradation of the degree of intensity of the legislator's powers to determine the content and limits of the right of ownership, depending on the social function of the subject of ownership. The higher the value of the ownership fulfilling a social function, the greater the legislator's powers. Real estate is of particular interest for the legislator, as in the hierarchy of property it plays the greatest role, due to its considerable social usefulness. The principle "property obliges" has not been explicitly expressed in the Polish constitution where its content can be derived from the principle of a democratic state of law or the principles of social justice. This standpoint was repeatedly presented by the Constitutional Tribunal, stating that "ownership results not only in entitlement, but also obligations, especially obligations justified by public interest" [decision of the Constitutional Tribunal, justification of 12 January 2000, P 11/98, OTK ZU of 2000, No 1, item 3; compare: decision of the Constitutional Tribunal of 4 December 1990, K 12/90, OTK of 1990, v. 2, item 7, decision of the Constitutional Tribunal of 28 May 1991,. K 1/91, OTK of 1991, No 1, item 4, decision of the Constitutional Tribunal of 5 November 1997, K 22/97, OTK ZU of 1997, No 3-4, item 41, p. 366].

The ideology of the social function of property is accepted by the doctrine (Sieg T. J., 1993). The individual rights of the owner are not strictly subordinated to the interests of society or the general public. According to T. Dybowski, the principle of ownership obliges one to be more cautious that the performance of property should not interfere with the good of the whole. In a situation where a collision occurs, one cannot a priori assume the superiority of the public interest over individual interests (Dybowski, 1996). However, basic principles of modern rule of law as well as the principle of proportionality, which creates a system of protection and guarantee of individual rights, defined by human rights, seem to defy what was said above. According to K. Wojtyczek, human rights are a concept that can refer to both moral and legal plane (Wojtyczek, 1999). Human rights understood as moral values are frequently defined as postulates concerning the protection of values of special importance for the development and self-realization of individuals which consequently shape their position in society in a way that guarantees the protection of these values. In the extended system of human rights, representatives of the doctrine of constitutional law distinguish rights - institutions to which they include, among others, ownership (Kędzia, 1989). A characteristic feature of this category of rights is their complex structure, in which one derivative of the legal situation cannot be indicated as a basic element of a given type of rights (Wojtyczek, 1999). At least two components of their legal structure are distinguished: the right to establish specific legal institutions by the state and to protect legal situations shaped on the basis of these institutions. The prohibition against infringement of established legal situations is valid in every case. The law provides for cases when interference in the sphere of private individual situation is admissible. The task of the guarantee function of powers of the institutions is not their absolutization, consisting in an absolute prohibition to violate these rights, but the creation of clear and constitutionally consistent regulations giving legitimacy to interfere in these

rights (Wojtyczek, 1999).

IV. EXPROPRIATION AS A LEGAL INSTRUMENT TO INCREASE PUBLIC OWNERSHIP

The legal order which is established by the state becomes the guarantor of the realization of the social function of ownership and the weighing of individual and social interests. In positivist legal science, there are three types of property restrictions:
1.) limitations due to a higher necessity which do not need a specific legal basis, because they are imposed in cases of emergencies: flood, fire etc.;
2.) police administrative restrictions, for which the legal norm of authority is the legal basis e.g. damage to property as a result of military exercises (Aust, Jacobs and Pasternak, 2002);
3.) restrictions on the so-called legal (statutory) easements, resulting from a special legal provision, which may consist in a prohibition of certain activities (*non-facere*) or a requirement to admit an action or condition (*pati*), but also to prohibit the development of a specific activity (*facere*); these restrictions may create not only the subject property restrictions, but also establish subjective rights for third parties (Kumaniecki, Wasiutyński and Panejko, 1929).
Another classification is carried out by S. Kasznica, distinguishing the following methods of private property violation:

1) destruction of a property considered dangerous;
2) confiscation of objects of crime;
3) violation of someone's possession as a result of conducting legal activities;
4) deprivation of workshops due to the introduction of a state monopoly;
5) private property infringement in cases of higher necessity (Kasznica, 1946).

The provisions of the Constitution of the Republic of Poland directly regulate three ways of public legal interference in the ownership of an individual (Szewczyk, 2003). The nature of such interference in the light of constitutional regulations is expropriation (article 21 paragraph 2 of the Constitution), confiscation (article 46 of the Constitution) and limitation of the right to property (article 64 paragraph 3 of the Constitution). According to article 64 item 3 of the Constitution "ownership may be limited only by way of a statute and only to the extent that does not infringe the essence of the right of ownership". According to the Constitutional Tribunal, this provision has a dual role. First of all, it is an explicit constitutional basis for introducing restrictions on the right to property. Secondly, the conditions of admissibility of a restriction of property contained in it may constitute a criterion for controls to be conducted by the employer of restrictions. Noting the fact that the determination of the premises for limiting the right to property contained in article 64 section 3 of the Constitution does not contain an indication of the values and assets whose protection supports recognizing the admissibility of interference with the owner's rights [decision of the Constitutional Tribunal of 11 May 1999, K. 13/98, OTK 1999, no 4, item 74], this provision is limited only to the indication of the formal premise and the delineation of the maximum limit of interference. In connection with this, the issue of mutual relations between the regulations contained in article 64 section 3 of the Constitution and in article 31 paragraph 3 of the Constitution, article 31 paragraph 3 of the Constitution states that "restrictions on the use of constitutional freedoms and rights may be established only by law and only if such restrictions are necessary for security and public order of a democratic state, or for protection of the environment, health and public morals, or freedoms and rights of others. These limitations shall not violate the essence of freedoms and rights". Therefore, one can ask whether article 64 section 3 of the Constitution constitutes a *lex specialis* against article 31 paragraph 3 of the Constitution? Both in the jurisprudence of the Constitutional Tribunal [decision of 11 May 1999, K. 13/98, OTK 1999, No 4, item 74; decision of 12 January 1999, P. 2/98, 0TK ZU of 1999, No 1, item 2] and in the doctrine, the answer to this question is negative (Jarosz-Żukowski, 2003). It has been assumed that the constitutional pattern of control of public law restrictions on the right of ownership in addition to article 64 section 3 of the Constitution, is also article 31 paragraph 3 of the Constitution.

According to M. Safijan, article 64 section 3 of the Constitution determines the depth of interference in the sphere of property rights, while article 31 paragraph 3 specifies its legitimacy and purposefulness, requiring the inclusion of other constitutionally protected values, such as the freedoms and rights of others (Safjan, 1999). The adoption of such a finding allows to conclude that in the light of constitutional provisions, public law restriction of the right to property is interference in this law made in an established way, due to the necessity to introduce restrictions in a democratic state, remaining in a functional relationship with the implementation of the values indicated in article 31 paragraph 3 of the Constitution of the Republic of Poland.

This shape of the Constitution differs fundamentally from the constitutional pattern of expropriation under which expropriation is an interference with property rights made for public purposes and for compensation. However, it is necessary to resolve the issue of which element of expropriation and restriction of property rights in the final and unambiguous manner separates the two institutions. The Constitutional Tribunal expressed its position according to which the basic criterion distinguishing between both institutions is the form of restricting the right of ownership and expropriation. In a judgment of 28 May 1991, the Constitutional Tribunal stated that in cases of restrictions established by means of ordinary statutes and cases of expropriation, there are completely different legal situations. “In the first case, the restrictions are to be achieved by means of a general normative act, coming from a representative body, established in the general interest. In the second case, it is all about limiting or deducting in whole, for the public purpose, the ownership right to a particular real estate for a specific entity by way of an individual act, that is, by way of an administrative decision” [decision of the Constitutional Tribunal of 28 May 1991 K. 1/91. OTK 1991 No 1, item 4]. The concept of distinguishing expropriation and public law restrictions on the right of ownership presented by

the Constitutional Tribunal, has been verified along with the assumption that in the light of constitutional provisions there is no basis for assuming that expropriation can only be effected by means of an individual act. The admissibility of *ex lege* expropriation, confirmed by the Constitutional Tribunal, breaks the concept of distinguishing the expropriation from the public law restrictions of the right of ownership using the legal form criterion. In this respect, the criterion of compensation is unsuitable for a definitive distinction between the two institutions. In case of compensation, it is a necessary element, while in case of public limitations of ownership nothing stands in the way. There is no obligation to determine damages, but the legislator is not deprived of the possibility of awarding compensation (Zimmermann, 1939). As compensation the expropriated owner may be given e.g. a plot of land that has been taken over by the state for unpaid public obligations Legal systems of countries in which statutory expropriation of property for the so-called public interest (schools, roads, hospitals, etc.) regulate the manner of this expropriation, guarantee e.g. fair financial compensation. However, in most such cases, there are force solutions which include, among others: no right to refusal on the part of the owner, arbitrariness in formulating the public interest, issues of the amount of compensation granted to the owner for the lost property, as well as resignation of the owner from plans related to the expropriated property. This may evoke a feeling of harm on the part of the owners caused by taking away their right to choose and may impact the change in the allocation of the expropriated good (Fijor, 2012).

A number of tenement houses in Nowy Świat Street in Warsaw was confiscated by the state on account of unpaid taxes. The city of Warsaw is the largest single owner of real estate in Poland. It was partly based on the nationalization law, but also as a result of expropriations carried out from 1918. The Warsaw Metropolis possesses tens of thousands of residential premises as well as several thousand commercial sites. They are administered by a separate department called the Real Estate Management Department. The re-privatization which has been announced for years, is delayed for public reasons (Fijor, 2012).

The etymology of the two institutions under consideration i.e. expropriation and restrictions in this respect is similar. They serve a broadly understood general good and public interest and are an expression of the social concept of ownership. Public purposes, referred to in article 21 paragraph 2 of the Constitution of the Republic of Poland, are located in the canon of values contained in article 31 paragraph 3 of the Constitution. The last element of the construction of restrictions on the right of ownership, which will allow to distinguish these restrictions from expropriation, is the criterion of the essence of the right of ownership. Article 31 paragraph 3 of the Constitution and article 64 section 3 of the Constitution condition the admissibility of constitutional restrictions on property rights, including rights and freedoms, also property rights, from the inviolability of the limited right. A similar solution adopted in the Constitution is article 19 of the German Basic Law of 1949, according to which: "the essential content of the fundamental right cannot be infringed upon." The rich German literature on the prohibition of violation of the essential content of fundamental rights doctrine, claims that a satisfactory definition of the concept of "essential content of fundamental rights" has been formulated (Sikorska-Dzięgielewska and Kędzia, 1986). On this matter, the Constitutional Tribunal stated in a judgment of 14 March 2000 that "having regard to the regulations of the issue of expropriation in art. 21 par. 2 of the Constitution of the Republic of Poland, it can be concluded that there is no justification for the interpretation of regulations forming the grounds for an acceptable restriction of the right to property (primarily Article 64 paragraph 3 of the Constitution), whose purpose would be to extend their application, e.g. by argumentation *a minori ad maius,* also on the issue of total deduction of ownership" [decision of the Constitutional Tribunal of 14 March 2000, P. 5/99, OTK of 2000, No 2 item 60]. An opposite opinion is presented by B. Banaszak, who considers expropriation to be a certain type of restriction in the use of the right to property falling within the scope of the regulation of article 64 section 3 of the Constitution of the Republic of Poland (Banaszak, 2008). In this matter, the Constitutional Tribunal also commented on the "essence of ownership" as a clear boundary separating restrictions on the right to property from expropriation. In the opinion of K. Ziemski "assuming the legislator's rationality, it should be stated that interference with the right of the owner further and thus affecting the essence of ownership can take place only on the principles set out in art. 21 of the Constitution of the Republic of Poland" (Ziemski, 2000). M. Szewczyk defines expropriation as interference of public authority in the broadly understood right of property consisting in the violation of the essence of this right (Szewczyk, 2003). Likewise, F. Zoll stated that expropriation is an act of public authority that violates the essence of property rights. Other violations of property rights are not eligible as expropriations, they are admissible if they are based on statute (Zoll, 1998).

In 1950s, in German law, there was a theory of the so called ‘diminishing the substance’, which is a test of material rather than formal determination of expropriation, emphasizing the weight and intensity of interference. However, contrary to the old theory of "deserving protection" (W. Jellinka), which used the subjective criterion: whether the right deserves protection when balancing the common good and individual interest (Badura et al., 1986), the theory of reducing the substance uses objective criteria: whether the right has been preserved despite the interference in its current function; or whether it has been depleted in its substance (Huber, 1954), (Hippel, 1965).

Taking into account that the criterion of the violation of the essence of the right of ownership is to be the basis for distinguishing expropriation and public property rights restrictions, the very notion of the essence of the right of ownership should be explained. For the first time, in the absence of a textual support, this concept appeared in the ruling of the Constitutional Tribunal of 12 January 2000, which stated that “with obvious inspiration from the German construction, under no circumstances may the essential content of the fundamental right be affected” [decision of the Constitutional Tribunal of 12 January 2000, P 11/98, OTKZU of 2000, No 1,

item 3; in accordance with article 19 section 2 of the German Constitution of 1949]. Despite very rich German literature on the prohibition of violation of the essential content of fundamental rights in doctrine, it is argued that a satisfactory definition of the concept of "essential content of fundamental rights" has not been formulated, the construction of the essence of law and freedom "developed by the Constitutional Tribunal is based on the assumption that within a specific right and freedom one can distinguish certain basic elements, such as the core and the nucleus. There is no right or freedom without them and without other additional elements that can be modified by the ordinary legislator in various ways without destroying the identity of a given right or freedom". For the first time, this definition was applied in Polish law in the Constitution of the Republic of Poland. In this regard, the Constitutional Tribunal also expressed an opinion in the judgment of 12 January 1999 arguing that the interpretation of the prohibition of violation of the essence of limited law should not be limited only to the negative level, stressing the appropriate mitigation of the restrictions made. "One should also see its positive side related to the strive to indicate a certain inviolable core of a given right or freedom, which should remain free from the interference of the legislator even in the situation when the legislator acts to protect the values indicated in art. 31 para. 3 of the Constitution of the Republic of Poland" [decision of the Constitutional Tribunal of 12 January 1999, P 2/98, OTK 1999, No 1, item 2]. Regarding property rights it should be recognized that an infringement of the substance of the right would occur from the introduction of a restriction with respect to basic powers that constitute the content of a given right. Such constraints also prevented the exercise of the right of a function which it should fulfill in a legal order based on the assumptions indicated in article 20 of the Constitution of the Republic of Poland which provides that "social market economy based on freedom of economic activity, private property and solidarity, dialogue and cooperation of social partners is the basis of the economic system of the Republic of Poland".

An analogical concept of the essence of property rights is outlined in the case law of the French Constitutional Council. It distinguishes the "deprivation" of property (allowed under Article 17 of the Declaration of Rights stipulating the rules of expropriation) from the "limitation" of the right to property. In the view of the Constitutional Council, these restrictions are admissible if they do not deprive the content of the right of ownership, impose on the owner a "burden not to endure", do not impede the implementation of other constitutionally recognized rights and freedoms, or do not lead to "perversion" of the property right, or interfere with its essence (Zattara, 2001). F. Zoll argues that it is difficult to specify the concept of "the essence of law", as subjective rights have no encoded Platonic idea from which their content would follow (Zoll, 1998). The subjective rights are just arbitrary resolutions of the legislator resulting from the functions assumed in the system for a given right. In the doctrine of German law, there was a dispute between proponents of "absolute" and "relative" theories of the essential content of fundamental rights. Proponents of the first theory strived to define a certain minimum and unchanging extent to which individual rights must be implemented, regardless of the circumstances. The other side believed that it is impossible to define such an immutable scope, and the essential content of a given right can be determined only on the basis of a specific situation, taking into account the need to protect other constitutional values. The view of the Constitutional Tribunal defining the essence of the right of ownership must refer to the basic components of this right, i.e. in particular to the possibility of using the subject of property and collecting benefits. The statements of the Constitutional Tribunal regarding the essence of the right of ownership are evaluated by the doctrine as "overly general, not to say vague" (Radecki, 2000). Convergent criticism, in French literature, meets the rulings of the French Constitutional Council regarding the subject matter discussed. It criticizes the pragmatism that accompanies the Council in analyzing the essence of the right of property, which aims to leave the constitutional judges a wide margin of appreciation of property restrictions, whereas the appeal should have the opposite effect of extending the scope of control of interference with property rights. It is also alleged that on the basis of the case law of the Council, the notion of the essence of law remains enigmatic (Zattara, 2001). The author maintains that observations of A. Stelmachowski are accurate in this regard: "it is extremely difficult to specify what is the content and the essence of the right of ownership. This is one of those things that is quite well sensed and understood instinctively, and it is much more difficult to determine when it comes to a more accurate analysis that has a claim to accuracy" (Stelmachowski, 1984). It would be an exaggerated simplification to assume that the violation of the essence of property, resulting in the deprivation of this right, fills the hallmarks of expropriation as an interference with the essence of the right of ownership. A limitation that exceeds the boundaries of the essence of property by its intensity, may become an expropriation. In the judgment of 12 January 2000, the Constitutional Tribunal stated that the assessment of each specific law interfering with the right to property must be made against all existing restrictions. It is important to determine whether the essence of the right of ownership has been retained. The analysis of the sum established by the right of ownership and restrictions is necessary. The Constitutional Tribunal in the judgment of 12 January 1999 explicitly points to the possibility of violating the "essence" of the right of excessive accumulation of restrictions. The Constitutional Tribunal and the doctrine consider this type of expropriation as factual expropriation. In the opinion of M. Szewczyk this concept would include manifestations of interference of public authorities, resulting in violation of the essence of the right of ownership, which would not be accompanied by the formal withdrawal of this right (Szewczyk, 2003). In the judgment of 19 January 2000, the Constitutional Tribunal stated that the scope of restrictions may cause destruction of the fundamental elements of the subjective right, causing the actual content to be hollowed out and leading to the transformation of the appearance of law. Following the Strasbourg ruling, the Constitutional Tribunal assumes that in cases of interference in the sphere of legally protected property, when the interference occurs without depriving the holder of

the legal title, and in its essence by the actual actions of public authority the right holder cannot exercise his/her rights to the property, one can speak of *de facto* expropriation [decision of the Constitutional Tribunal of 19 December 2002, K 33/2002, OTKZU 2002, No 7a, item 97]. In practice, the criterion of violation of the essence of the right of ownership, due to the insufficient definition of the very concept of the essence of the right, may pose considerable difficulties. This leaves the Constitutional Tribunal a large freedom in their settlement.

It is therefore appropriate to pay attention to additional discriminatory criteria. The analysis of the constitutional principle of equality expressed in article 64 section 2 of the Constitution of the Republic of Poland is especially vital. Pursuant to this article, ownership, inheritance and other property rights are subject to equal legal protection for all. On the basis of this provision, two aspects of constitutional protection of property rights should be presented from the point of view of the subject. First of all, it has the principle that everyone is entitled to such protection, regardless of their personal or other characteristics. As a result, statutory property right is protected regardless of who is entitled to it. Secondly, protection of subjective rights must be equal for all these entities. It does not concern the guarantee of a specific content law, but it relates to the existence of property rights provided for in the legislation and to equal treatment of right holders. In the view of M. Zimmermann, who indicates that expropriation and restriction of property rights are different notions, “expropriation is intended to take away the right of an individual, while maintaining all other rights. The reasons of such situation lie outside the individual right itself, while in case of the statutory limitation of the right to property, a certain category of rights is withheld altogether, in all detected cases. The abrogation is general and has the same effect on everyone” (Zimmermann, 1933). The objective content of the law changes here. In German literature, the criterion of individual interference is combined with the violation of the principle of equality (Badura et al., 1986). Expropriation is understood as such cases of interference in property rights that break the principle of equality and require a specific holder of the property right to sacrifice it for the benefit of all (Badura et al., 1986). The particularity of this sacrifice is determined by reference to the situation of other persons entitled in the given legal system and in a comparable position. S. Czuba emphasized that it is not important whether the ownership is taken away, transferred to another person, or only limits the owner in exercising his/her property rights (Czuba, 1980). M. Zimmermann, in turn, states that "expropriation, by the very fact of its existence, weakens the inviolability of rights, does not modify their content, only introduces the possibility of modification in the possession of the individual" (Zimmermann, 1933). The theory of an individual act, combined with a violation of the principle of equal protection of property rights, is a material and not a formal concept of expropriation. Speaking of an individual act, one can indicate the subject of the violation, the individual right, and not the form of this violation (individual administrative act) - administrative decision. The fact is that the most common form of intrusion into individual right will be an individual administrative act. Therefore, it cannot be inferred that this is an exclusive form, excluding any other means of violation, e.g. a general act. M. Zimmermann states that “the difficulty lies elsewhere, namely in a certain relative difference between abstract (general norm) and concrete (individual law)” (Zimmermann, 1933).

The comparison of two basic, constitutionally regulated institutions of public law: interference in the right of ownership, i.e. expropriation and public law restriction of ownership, makes it possible to state that they are separate institutions with differentiating elements. Consequently, these elements include the infringement of the essence of the right to property, and the violation of the principle of equality, in relation to the object of the infringement. Violation of the principle of equality is a construction of the theory of an individual act, i.e. directed to an individual right, while maintaining a given category of rights vested in other entities (Szalewska, 2005).

The consequence of the differences between the two institutions are their different functions. In his view, M. Zimmermann stated that “the evolution of expropriation is not, however, an evolution of the law itself: it falls within certain limits and is utterly useless where property wants to engage in regular public service. For this purpose, it is necessary to have general norms, and thus "restrictions on the right to property", changes in the content itself, and the very nature of the law. Hence, the development of property rights must go above its limitations. The main instrument of tomorrow's state will be partial socialization and restrictions on property rights. Expropriation and confiscation will remain as auxiliary instruments. Expropriation will remain and must remain an institution of a separate "safety flap" for unforeseen accidents or special sentences” (Zimmermann, 1933).

V. CONCLUSIONS

Granting individuals the right to property constitutes the basis for using the means provided for their protection against state interference. Article 64 paragraph 2 of the Constitution of the Republic of Poland shapes equal legal protection of property for all. In the light of article 64 section 3 and article 31 paragraph 3 of the Constitution, the conditions of admissibility of restrictions on the right to property are: the statutory form of limitation, the existence of the necessity of limitation, the functional relationship of limitation with the implementation of values indicated in article 31 paragraph 3, and the prohibition of violating the essence of the right of ownership. The premises of legal expropriation in the Constitution of the Republic of Poland were formulated primarily in article 21 paragraph 2. However, this provision should be read in conjunction with other constitutional provisions, in particular article 31 paragraph 3 and article 64 section 3 of the Constitution. The formal premise of expropriation is the requirement to base it on a statutory basis. Admittedly article 21 paragraph 2 does not mention it, but it is undoubtedly against the background of article 31 paragraph 3 and article 64 section 3, requiring a statutory basis for all restrictions on the right of ownership and

prohibiting the violation of the "essence of property rights". Expropriation, which, at least in most cases, means no restriction, but total deprivation of property, constitutes the most far-reaching interference with the right to property. The material premise of expropriation, which has the force of a constitutional principle, is a condition for realizing the purpose of public expropriation. The premise of the "public purpose" is general in the sense that it is sufficient to link the expropriation with any public goal, even if it exceeds the objectives indicated in article 31 paragraph 3. In this respect, article 21 paragraph 2 contains its own content, different from the content of article 31 paragraph 3.

The notion of a public purpose as a condition of lawful expropriation should be understood as the interest of the whole society or local community (Dybowski, 1996). It is obvious that the public interest (purpose) is not the interest of the state or the interest of public administration, moreover, it is not a simple sum of private interests (Blicharz, 2004). There are therefore some collective, supra-unit goals (P12 / 11). Expropriation cannot be aimed at satisfying the needs of a legally limited number of persons, moreover, no person who is individually identified or defined strictly by a group of persons can be denied access to the benefits of expropriation in advance (Modliński, 1932). The notion of a public purpose should be connected with the nature of entities requesting expropriation, whereas a project to justify expropriation must fall within the framework of tasks and functions that are binding for a state or commune and serve their implementation [judgement of the Supreme Administrative Court of 1982, SA/Po 553/81, ONSA 1982, no 1, item 6].

Therefore, the restriction must also correspond to the principle of proportionality [decision of the Constitutional Tribunal of 12 January 1999, P 2/98, OTK 1999/1/2]. This principle is expressed in the application by the state authorities only of such measures that are necessary to achieve the stated objective. This goal, which is synonymous with the good of the general public, with acting in the public interest, must be achieved with the least possible restriction of the rights of the individual. This principle should be expressed in particular in terms of compensation, it cannot be depleted in any way, both by the method of its calculation and the method of payment (Wróbel, 2011). The statutory definition of public goals is an effective tool for creating limits of admissibility of imperious state interference in the sphere of the right of ownership of an individual. The normative determination of public interest catalogue will decide on the actual intensity of the use of the expropriation institution. This fact does not change that the final limit of expropriation interference will always be the criterion of the public level of the objectives, eliminating the possibility of expropriation for private or individual purposes.

The institution of expropriation should be treated as the sum of two basic functions of ownership and a guaranteed function of protection of subjective rights. *Ratio legis* is not only a necessity to equip the state with an effective tool for solving the conflict of public interest and individual interest, in a situation where individual rights make it impossible to achieve public goals. They also contribute to the creation of guarantees for the right holders that the violation of their rights is an exception that is allowed under strictly defined law cases. Expropriation is the institution of protection of property rights, thus, as a legal institution, it has the right to exist.

VI. REFERENCES

Alexy, R. (1985). *Theorie der Grundrechte*. Baden Baden, p.274.

Aust, M., Jacobs, R. and Pasternak, D. (2002). *Die Enteignungsentschaedigung*. Berlin, p.90.

Badura, P., Erichsen, H., Martens, W., von Münch, I., Ossenbühl, F., Rudolf, F., Rüfner, W. and Salzwedel, J. (1986). *Allgemeines Verwaltungsrecht*. Berlin, New York, p.281-282.

Banaszak, B. (2008). *Prawo konstytucyjne*. Warszawa, p.253.

Blicharz, J. (2004). Kategoria interesu publicznego, jako przedmiot działania administracji publicznej. *Przegląd Prawa i Administracji*, LX, p.40.

Czuba, S. (1980). *Cywilnoprawna problematyka wywłaszczenia*. Warszawa, p.24.

Drozd, E. and Truszkiewicz, Z. (1995). *Gospodarka gruntami i wywłaszczanie nieruchomości. Komentarz,*. Kraków, p. 240.

Dybowski, T. (1996). Własność w przepisach konstytucyjnych wedle stanu obowiązywania w 1996. In: *Konstytucja i gwarancje jej przestrzegania. Księga Pamiątkowa ku czci prof. Janiny Zakrzewskiej,*. Warszawa, p.326-327.

Fijor, J. (2012). *Austrian critique of the private property paradigm in terms of economics of well-being*. [online] Available at: http://mises.pl /.../ fijor-austrian-criticism-paradigm-private-property [Accessed 22 Dec. 2012].

Garlicki L. (2011). ed., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, tom II. Komentarz do artykułów 19–59 oraz Protokołów dodatkowych*. Warszawa, pp. 13-14.

Hippel, v. (1965). *Grenzen und Wesengehalt der Grundrechte*. Berlin, p.31 and n.

Jarosz-Żukowski, S. (2003). *Konstytucyjna zasada ochrony własności*. Zakamycze, pp.162,176.

Kasznica, S. (1946). *Polskie prawo administracyjne. Pojęcia i instytucje zasadnicze*. Poznań, p.150.

Kędzia, Z. (1989). Pojęcie prawa i wolności obywatelskiej - Uwagi na tle ustawy o Rzeczniku Praw Obywatelskich. *Państwo i Prawo*, (3), p.27.

Kumaniecki, K., Wasiutyński, B. and Panejko, J. (1929). *Polskie prawo administracyjne w zarysie*. Kraków, p.897 and n.

Michałowska, G. (2000). *Prawa człowieka i ich ochrona*. Warszawa, p.96.

Mik, C. (2003). *Prawo własności w Europejskiej Konwencji Praw Człowieka*. Państwo i Prawo, p.30.

Modliński, E. (1932). *Pojęcie interesu publicznego w prawie administracyjnym*. Warszawa, p.58.

Pańko, W. (1984). *O prawie własności i jego współczesnych funkcjach*. Katowice, p.15.

Pieroth, B. and Schlinck, B. (1995). *Staatrechcht II. Grundrechte*. Heidelberg, p.59.

Radecki, W. (2000). Ograniczenia własności ze względu na potrzeby szczególnej ochrony przyrody. In: J. Sommer, ed., *Ochrona środowiska a prawo własności*. p.42.

Rozwadowski, W. (1984). Definicja prawa własności w rozwoju dziejowym. , *Czasopismo Prawno -Historyczne*, 36(2), p. 4, 21, 24.

Safjan, M. (1999). Konstytucyjna ochrona własności. *Rzeczypospolita*, p.2.

Sarnecki, P. (1997). *Prawo własności w Konstytucji.*

Sieg T. J., K. (1993). Prawa i obowiązki prywatnych właścicieli dóbr gospodarczych, jako problem etyki gospodarczej. In: T. Wawak, ed., *Własność prywatna*. Kraków, p.7 and n.

Sikorska - Dzięgielewska, K. and Kędzia, Z. (1986). Prawa zasadnicze. In: L. Janicki, ed., *Ustrój państwowy Republiki Federalnej Niemiec*. Poznań, p.139.

Skrzydło, W. (2000). *Konstytucje Rzeczypospolitej Polskiej - Komentarz*. Zakamycze, p.77.

Sojka-Zielińska, K. (1984). Państwo a własność u progu powszechnej industrializacji. *Czasopismo Prawno-Historyczne*, 36(2), p.58, 61.

Stelmachowski, A. (1984). *Wstęp do teorii prawa cywilnego*. Warszawa, p.462.

Szalewska, M. (1999). Odszkodowanie według ustawy o gospodarce nieruchomościami. In: E. Knosala, A. Łaszczyca and G. Matan, ed., *Prawo administracyjne w okresie transformacji ustrojowej*. Zakamycze, p.545.

Szewczyk, M. (1999). Konstytucyjna zasada słusznego odszkodowania i jej realizacja w ustawodawstwie zwykłym. In: E. Knosala, A. Matan and G. Łaszczyca, ed., *Prawo administracyjne w okresie transformacji ustrojowej*. Zakamycze, p. 545.

Szewczyk, M. (2003). Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawa. In: J. Filipek, ed., *Jednostka w demokratycznym państwie prawa*. Bielsko-Biała, p. 143, 653-654.

Wasilkowski, J. (1972). *Pojęcie własności we współczesnym prawie polskim*. Warszawa, p.1.

Wojtyczek, K. (1994). *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*.. Zakamycze, p.34 and n., 64.

Wojtyczek, K. (1999). *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*. Zakamycze, p.15.

Wróbel, A. (2011). Komentarz do art. 1 Protokołu nr 1. In: L. Garlicki, ed., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, tom II. Komentarz do artykułów 19–59 oraz Protokołów dodatkowych*. Warszawa, pp.481,485, 508 and n.

Zattara, A. (2001). *La dimension constitutionnelle et europeenne do droit de propriete*. Paris, pp.459-460.

Ziemski, K. (2000). Wywłaszczenie nieruchomości. In: Z. Leoński, ed., *Węzłowe problemy materialnego prawa administracyjnego v. II,*. Poznań, p.148.

Zimmermann, M. (1933). *Wywłaszczenie. Studium z prawa publicznego*. Lwów, p.90-94.

Zimmermann, M. (1939). *Wywłaszczenie. Studium z prawa publicznego*. Lwów, p.89.

Zoll, F. (1998). Prawo własności w Europejskiej Konwencji Praw Człowieka z perspektywy polskiej. *Przegląd Sądowy*, 24(5), p.30.