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## PERMITTED SELF-HELP AS AN INSTRUMENT OF PROPERTY PROTECTION

### **Summary**

*The paper indicates instruments of possession protection as well as description of their distinctive or dependent character. The differences between an owner-like and a subsidiary owner have been defined. Self-help nature was shown as an operating tool without authorities' approval. A time relationship nature was described, which must occur between threat and action. Moreover, a variety of rights concerning real property and movable property was mentioned. Also a distinction between self-help and self-defence was indicated. The development of self-help in Poland was described, as well as its progress from ancient times. Additionally, self-help was defined and its publication in provisions of Civil Code. Persons authorised to possession protection, were mentioned, including a term of owner, co-owner, holder, and a holder of precarium. The paper also describes premises concerning infringement of movable property and real property possession, as well as immediacy. Also a legal nature of an aggressor and a person entitled to protection was discussed.*

**Key words:** *possession, self-help, self-defence, movable property, real property*

### **Introduction**

Possession is regarded as a real power over an object held in one's own interest. Wielding is not possession, meaning a real managing for someone else, e.g. by a manager or a representative (Article 338 c.c.). It is important to mention that not each giving away of items results in possession transfer, due to an acquirer's will to wield a thing within certain law<sup>1</sup>.

Possession may be of a distinctive or subsidiary nature. An owner-like manages a property as an owner - *animus rem sibi habendi*, thus he

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<sup>1</sup> The Judgement of the Supreme Court of 4 October 200, I CKN 425/00, LEX No. 384439.

uses it, and gets benefits. Owner-like possession refers to a lack of subordination to another person within power over property<sup>2</sup>. Owner-like possession also takes place when an owner is convinced about ownership rights, thus owner-like possession is called an ownership.

In turn, a subsidiary owner of property is a person controlling a property in a way that corresponds to law different than property law. Thus, a dependent owner is a person managing a property on the basis of every other law than property law, including perpetual usufruct, cooperative right to premises, lending, use, renting and lease.

Self-help is one of the instruments of possession protection. Its main goal is to restore by own actions to a situation before infringement of condition. Self-help means the right of an individual to possession protection without referring to the competent authorities. In some cases, the law deems self-help as acceptable. It happens when judicial assistance is not on time, and there is a risk that repossession will be impossible or very difficult, unless it is an immediate owner's entry<sup>3</sup>. According to the Supreme Court, self-help eliminates criminal activity, provided keeping it within the law<sup>4</sup>.

Literature indicates that one should distinguish measures to repulse a danger that threatens specific rights (goods) and instruments designed to satisfy a claim. The first of the mentioned forms of self-protection is self-defence, the second one refers to self-help.<sup>5</sup>

Self-defence is understood as a possibility of taking action without help of competent authorities responsible for providing judicial protection. It refers to the use of coercion that is not provided by a competent authority responsible for protection against threatening damage.<sup>6</sup> Moreover, inability to get such help is a condition of taking the mentioned action.<sup>7</sup> It means that between a moment of threat and action

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<sup>2</sup> M. Warciński, *Ochrona posiadania nieruchomości i służebności gruntowych* [in:] *Prawo w działaniu*, no. 15, Warsaw 2013, p. 230.

<sup>3</sup> R. Longchamps de Berier, *Polskie prawo cywilne. Zobowiązania*, Lwów 1939, p. 16.

<sup>4</sup> The Judgement of the Supreme Court of 14 December 1934, 3 K 1362/34, Court reports 1935, n. 7, item 283 and The Judgement of the Supreme Court of 17 March 1936, 3K 2170/35, Court reports 1936, n. 10, item 369.

<sup>5</sup> R. Mikosz, *Prewencyjna ochrona praw rzeczowych*, Katowice 1991, p. 54.

<sup>6</sup> *Ibid.*, p. 53.

<sup>7</sup> A. Agoszowicz, *Odpowiedzialność za szkodę wyrządzoną w stanie wyższej konieczności*, Wrocław 1992, p. 17.

defences, there must be such time relationship which eliminates a possibility of using other protection measures.<sup>8</sup>

Generally, self-help is treated as allowed in cases clearly provided by law. It also includes situations, which are not regulated by law, but which customarily accepted (explicitly or tacitly) a right to use force by state authority<sup>9</sup>. This opinion was criticised, stating that self-help depends on autonomous claim protection by an individual, whose interest was violated, whereas law fundamentally prohibits self-help.<sup>10</sup> Therefore only a provision of the Act may allow a concerned individual use self-help.

Self-defence, which may be found in many legal systems, is also of use to possession protection<sup>11</sup>. A holder may use self-defence in order to counter wilful infringement of possession, however it must be an immediate defence against direct violation of holder's possession, not an activity following accomplished infringement. The essence of self-defence is the unity of time and place, thus a holder's simultaneous action with violation of his assets conducted by the other side<sup>12</sup>. An owner acting in self-defence may, if necessary, assault a person making an attack and use necessary force against such person, even if goods protected by a holder are of less value compared to goods exposed to violation or damage in self-defence<sup>13</sup>.

In a case when self-defence appeared to be an insufficient measure of possession protection (because the infringement of a real power over possession had taken place) or a holder was not able to use it (as violation of actual power over asset occurred in his absence) – one may use so the called self-help which is supposed to restore power over possession, which was violated or lost. It should be noticed that literature distinguishes *sensu largo* self-help and *sensu stricte* self-help, though *sensu largo* self-help includes also self-defence<sup>14</sup>.

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<sup>8</sup>R.Mikosz, *Prewencyjna ...*, p. 20.

<sup>9</sup>A. Gubiński, *Wyłączenie bezprawności czynu*, Warsaw 1961, p. 64.

<sup>10</sup>J. Satko, Glosa the Supreme Court Resolutions of 27 April 1994 . I KZP 8, Palesa 1995 No. 3-4 p. 265.

<sup>11</sup>A.Stelmachowski, *Istota i funkcje posiadania*, Warsaw 1958, p. 251.

<sup>12</sup>The Judgement of the Supreme Court of 27 March 1968, II CR 69/68, RPEiS 1969, n. 1, p. 373.

<sup>13</sup>The Judgement of the Supreme Court of 27 May 1985, I CR 152/85, OSNC 1986/7-8/119.

<sup>14</sup>B. Lanckoroński [in] *Komentarz do kodeksu cywilnego*, v.1, K. Osajda (ed.), Warsaw 2013, p. 1449.

## 1. Self-help development in Poland

Possession protection measures were present in the legal system of ancient Rome. They were of interdict nature and were supposed to prevent from violation and protect holders in good and bad faith<sup>15</sup>. The old rule *vim vi repellere licet*, meaning it is permitted to repel force with force, was the source of self-help instrument.

In Poland, possession as a protected real power over an asset was only developed in the 15th century, in order to protect estates possession against wilful infringements, which violated social order and a state of possession<sup>16</sup>. In the Middle Ages, primarily in Silesia, already in the 13th century possession protection instruments appeared, without the need to examine the legal status of power over possession. In order to stop self-help use concerning the property, under a threat of invasion, the prince, later the king (or the head acting on his behalf) demanded paying a cash bet. It had to be paid by an individual who invaded. Otherwise, a prolonging process would have been unfavourable for him, as he would not have been able to derive profits from real estate.<sup>17</sup> In the Middle Ages, effective legal remedies in order to react in case of possession violation were not developed. Therefore, it was common to use allowed self-help. Only with time possession protection could have been implemented not only by self-protection measures but also by legal protection.

On Polish territory regulation of allowed self-help under civil law occurred when Poland was under occupation. In the Civil Code of Austria from 1811 possession was linked to a right to property defence at court, as well as by means of self-defence and self-help. In turn, the Napoleonic Code did not grant protection to possession based on straightforward admission and violation, and claims concerning possession protection were regulated by the Civil Procedures Code from 1806<sup>18</sup>.

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<sup>15</sup> M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne. Zarys wykładu*, Warsaw 2016, p. 181.

<sup>16</sup> W. Uruszczak, *Spoliatus Ante Omnia Restituendus. Znaczenie prawa kanonicznego w rozwoju ochrony posiadania* [in:] *Posessio ac iura in re. Z dziejów prawa rzeczowego*, M. Mięka, W. Pęksa, K. Stolarski (eds.), Cracow 2012, p. 25.

<sup>17</sup> J. Bardach, *Historia państwa i prawa polskiego*, Warsaw 1985, p. 125.

<sup>18</sup> W. Uruszczak, op. cit., p. 24.

Self-help instrument was a subject of doctrine and judiciary discussion after Poland regained its independence, most of all as justification in criminal law. Self-help in criminal law was however perceived as independent from civil law<sup>19</sup>.

In Poland the unification of civil law took place after the end of the Second World War. The legislator decided that possession was a subject to a separate legal protection and he prohibited a wilful breach of somebody else's possession. Property law from 1946, and then Civil Code from 1964 protected each possession, including defective possession. Establishing possession protection, a legislator referred to various methods, distinct nature, depending on the specific real situation of threat or violation of possession. Firstly, self protection measures were regulated, thus self-defence and allowed self-help. Subsequently, the legislator regulated the judicial system of possession protection, providing a holder with property claims.

In the property law from 1946 self-help instrument was regulated in Article 303 §2, according to which, in case of a risk of irreparable loss, a holder may immediately after the infringement of possession use necessary self-help in order to restore the original state<sup>20</sup>. In turn, in Civil Code, self-help institution was regulated in Article 343 § 2 c.c. Under the property law from 1946, self-help was regulated uniformly concerning real estate and movable property. However, in civil law, protection measures applicable in a case of real estate and movable property possession violation, were separately and more specifically regulated. It is interesting that a Codification Committee considered applications for allowing self-help within a wider range than it is currently expected in Article 343 c.c., however for fear of implications of wilfulness to a wider extent, a possibility of a property holder to restore to a previous state by self-help within a month, or possibly two weeks, have not been taken into consideration<sup>21</sup>.

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<sup>19</sup> J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1938, p. 560.

<sup>20</sup> The Decree of 11.10.1946 – Property law (Journal of Laws No. 57, item 319 as amended).

<sup>21</sup> K. Przybyłowski, *Roszczenia posesoryjne z artykułu 344 kodeksu cywilnego*, p. 153. <https://repozytorium.amu.edu.pl/bitstream/10593/18479/1/015%20KAZIMIERZ%20PRZYBY%20%81OWSKI.pdf>

## 2. Self-help institution in Civil Code

According to Article 342 c.c., it is not allowed to violate one's possession, even if a holder was in bad faith, a common and absolute ban of arbitrary violation of possession was established. This ban is applicable even if infringement of possession is characterised by negative qualities, thus also in case of unlawful possession, or defective possession, finally possession in bad faith. Allowed self-help is possible, as a way of restoring possession by an individual according to law, whose possession was violated, by independent activities in order to recover assets from an infringer.

Currently, the institution of allowed self-help is regulated in Article 343 § 2, Article 432, and Article 461 of Civil Code. The most often used form of self-help is a right referred to in Article 343 § 2 of Civil Code. The provision enables a property holder to use self-help due to arbitrary possession violation, in order to restore to a previous state, as well as a movable property holder, in case of a risk of irreparable damage.

*Ratio legis* of the described regulation is preventing acts of mutual violence, based on a desire to possess property. It is about protection of property possession, not to cause any further damages, on a behalf of a holder while using self-help, not even taking into consideration the fact of an earlier arbitrary possession violation<sup>22</sup>. The behaviour of assets holder, who does not use legal protection possession measures, is not synonymous with the fact that he agrees with violation of his right to conduct power over possession. Such argument is supported by the Supreme Administrative Court in the Judgement 1 July 2008, however stating that 'lack of legal protection measures of violated possession use not always means reconciliation with the situation'.<sup>23</sup>

In a case of restoration of lost possession with the use of self-help, possession is considered to be uninterrupted (Article 345 c.c.). Therefore, according to jurisprudence, a complainant who lost possession because of a respondent's wilfulness, who then regained assets by wilfulness, before

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<sup>22</sup> The Judgement of the Regional Court in Cracow, II Ca 2210/16, [www.orzeczenia.krakow.so.gov.pl](http://www.orzeczenia.krakow.so.gov.pl)

<sup>23</sup>The Judgement of the Supreme Administrative Court, II OSK 760,07, LEX no. 496180.

the deadline in Article 344 § 2 c.c., is not eligible to claim redemption of lost possession.<sup>24</sup>

Allowed self-help is only possible after possession violation, and inter alia is different form self-defence, which may be used by a holder while repulsing arbitrary possession infringement, thus in a moment when a holder catches an infringer red-handed. Self-defence is supposed to prevent possession violation, while self-help aims at restoration of already violated assets.

One can distinguish possession violation in broad terms, as every physical and psychical activity leading to problems of conducting power over assets as well as possession violation in a narrow perspective, by actions which only result in external consequences making power over an asset difficult, e.g. verbal threats<sup>25</sup>.

Generally speaking, violation of someone else's possession may take a form of getting out of possession (possession deprivation), which results in loss of power over assets, or possession disruption by entering someone else's possession, though not depriving a holder of power over assets<sup>26</sup>. Possession deprivation means a real action, that is a physical entrance into borders of someone else's power by taking over assets, trespassing someone else's land, digging the ditch, fence damage etc., they all justify self-help.

Self-help may be employed only to complete or partial loss of power over possession. In case of power over asset disruption, only judicial protection applies. Possession violation may also occur with a risk of disruption or power deprivation, providing the threat manifests itself in actions directly targeted at possession object<sup>27</sup>. Verbal threats or behaviour manifestations, that do not implicate an actual possession impairment, do not justify use of self-help<sup>28</sup>.

One may talk about possession violation only if it is a result of a man's deed, and consequences of nature forces, or animals, do not

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<sup>24</sup>Resolution of the Supreme Court SN III CZP 26/76, LEX Polonica no. 296567.

<sup>25</sup>J. Gołaczyński [in] *System Prawa Prywatnego*, v.3. E. Gniewek (ed.), Warsaw 2012, p. 119.

<sup>26</sup>A. Kunicki, [in:] *System prawa cywilnego*, v. 2., J. Ignatowicz (ed.), Ossolineum 1977, p. 871.

<sup>27</sup>J. Gołaczyński... op. cit., p. 120.

<sup>28</sup>A. Stelmachowski, Glosa The Judgement of the Supreme Court of 20 April 1963, I CR 225/63, *Państwo i Prawo* 1965, n. 7, p. 157.

constitute possession impairment, and are not premise of using self-help<sup>29</sup>.

Use of allowed self-help is permissible, if return to the original state is objectively possible<sup>30</sup>. At the same time, as in the case of self-defence, employment of allowed self-help should occur by taking action proportional to the actions leading to possession violation. It is a result of self-help indispensability, thus protection measures used should be appropriate to a type of possession impairment and a form of its restoration, so a proportion of target measures is required<sup>31</sup>.

Self-help may be employed if between possession violation and use of allowed self-help the time sequence occurs, manifesting itself within relatively short time. It has been profoundly explained by the Supreme Court that denotes 'Article 343 § 2 c.c., concerning the so called allowed self-help, it is an exception to the general rule, stating a prohibition of all self-help and due to this fact cannot be interpreted broadly. The provision explains that it is possible to restore to the original state by own actions, however provided that it will be a very short time between possession violation and restoration to what was before. As far as a property holder is concerned, a legislator demands an immediate action, and in case of a movable property holder sets a further requirement of using necessary self-help immediately after arbitrary asset violation. Such provision formulation indicates that time frames in relation to the moment of breach of possession are very narrow'.<sup>32</sup>

Borders of allowed self-help were defined quite differently in relation to real estate and movable property. It should be presumed that it is a result of specific, distinct features of possession object for example, theoretically, real estate cannot be completely destroyed.<sup>33</sup> Restoration of property, whose possession had been violated, to the original state, may, for example, rely on the removal of placed border marks, burial of a ditch, liquidation of installation, fence shifting, etc. Whereas restoration

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<sup>29</sup> T. Dybowski, *Ochrona własności w polskim prawie cywilnym (rei vindicatio actio negatoria)*, Warsaw 1969, p. 313.

<sup>30</sup> S. Rudnicki, *Komentarz do kodeksu cywilnego. Księga druga. Własność i inne prawa rzeczowe*, Warsaw 2011, ed. X, p. 514-515.

<sup>31</sup> J. Gołaczyński, op. cit., p. 122.

<sup>32</sup> The Judgement of the Supreme Court II RC 69/68, RPEiS 1969, no. 1, p. 373.

<sup>33</sup> E. Skowrońska – Bocian, *Kodeks cywilny. Komentarz do artykułów 1 – 449<sup>1o</sup>*, K. Pietrzykowski (ed.), Warsaw 2015, p. 1233.



to the original state in case of movable property, may take place already during the chase after the attacker. Application of self-help when admissibility conditions are not met may result in committing an unlawful act.

### **3. Individuals authorised to use self-help**

A ban of wilful possession violation refers to all legal entities, but the exception is allowed self-help. Allowed self-help institution is available for real estate holder, however it concerns both owner-like, who acts as an owner, as well as a dependent owner, who wields assets according to other law. Moreover, use of self-help neither depends on a holder's good will nor on possession compliance with law.

An individual who takes in usufruct an item is particularly entitled to employ self-help. A lending agreement is a real contract, within which a lender, who does not have to be an asset owner, gives a thing to a person to use free of charge. After giving an item to an individual, it is a taker who becomes an owner and may exercise proprietary protection. At the same time, within time of lending, a lender is not allowed to use a given item and should stop actions that make it difficult for a taker to apply entitlements<sup>34</sup>.

Regulations concerning possession protection within self-defence and allowed self-help are respectively applied to a holder. Such solution is worthy of approval, as it refers to possession wielding by a holder. A holder has a direct and physical power over items, without willingness to use it for oneself<sup>35</sup>. So it is a holder who wields assets on a behalf of someone else, and may react within a given time, using self-defence or allowed self-help against someone else's lawless actions. A legislator was right to deprive a holder of a proprietary claim. In such a case, during a court proceedings, a plaintiff's valid ID linked to possession is required. It is unlikely that a holder, who wields an asset on a behalf of an owner, in relation to an owner, would be able to use own protection measures. Thus, a holder has no right to judicial protection; such protection is only

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<sup>34</sup> J. Górecki [in] *Komentarz do Kodeksu Cywilnego*, v. 2, K. Osajda (ed.), Warsaw 2013, p. 1447-1448.

<sup>35</sup> M. Warciński, *Ochrona posiadania...*, p. 235.

available to an owner, who is substituted by a holder in the possession of a given item.<sup>36</sup>

A holder of precarium is not entitled to use allowed self-help. Precarium means giving an item or a right to use to another person, to be returned at the will of the grantor. There is a courtesy relation between a holder of precarium and the grantor, not a legal node. Precarium refers to use of a someone else's possession free of charge, with a consent of an owner, who allows it due to hospitality or someone's request, or even consciously accepts using his assets by someone else, but it is often an actual, not legal agreement. Precarium dominion occurs when one individual is willing to do a favour to another individual, based on a hospitality or humanitarian reasons<sup>37</sup>.

Precarium should also be distinguished from lending, which is based on subsidiary possession, however a practical distinction between lending and precarium may appear to be extremely difficult, as an intention to do kindness to someone fully corresponds to the social function of lending<sup>38</sup>. Precarium may be equated with lending, but its distinguishing feature is cancellation at any time, short duration, and no legal relationship between parties concerned. Precarium also does not provide protection to an individual who gives courtesy<sup>39</sup>. The essence of precarium is its cancellation on every request of a lender<sup>40</sup>. A lender who gives an item in precarium, may request a return of things at any time, ask to leave the premises, an abandonment of the use of land, etc. A holder of precarium must meet the lender's demand, as there is no law concerning possession wielding on a holder's side except for giver's courtesy. If a holder of precarium does not meet the demand, he will become a defective holder and his behaviour becomes possession violation. Then, the giver may use proprietary protection measures, thus remove an individual out of accommodation or take away the movable property.<sup>41</sup>

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<sup>36</sup>T. A.Filipiak, [in:] K.A. Dadańska, T.A. Filipiak, *Kodeks cywilny. Komentarz, v. II, Własność i inne prawa rzeczowe*, A. Kidyba (ed.), Warsaw 2012, Note no. 7 to Article 343, LEX.

<sup>37</sup>P. Księżak, *Prekarium w prawie polskim*, Rejent 2007, no. 2, p. 57.

<sup>38</sup>The Judgement of the Supreme Court of 8 July 1992, III CZP 81/92, OSNC 1993, No. 3, item 30.

<sup>39</sup>J. Górecki, op. cit., p. 1449.

<sup>40</sup>J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warsaw 2012, p. 291.

<sup>41</sup>J. Gołaczyński, [in:] *Kodeks cywilny. Komentarz*, E.Gniewka, P.Machnikowski (eds.), Warsaw 2013, p. 527.

#### **4. Reasons for self-help in violation of property possession**

Premises for using allowed self-help with respect to violation of property possession, refer to the infringement of possession and an immediate action leading to restoration of the original order. They also apply to a holder, who wields wilful power, and against whom self-help is used, because bad faith of a holder does not authorise one's possession violation.

By defining a notion of arbitrary possession violation as a reason for using allowed self-help regarding property, one may understand all forms of infringement, including both deprivation and possession disruption. A real threat of breach, possession disruption, and its deprivation as results of violation acts, or threats of infringement of material nature, are thought to be violation of possession<sup>42</sup>. It is about the existence of property possession violation in any case, even when a holder has not been deprived of possession.

Arbitrariness of violation depends on prohibited exemption of competent authorities to deal with disputes, whereas real circumstances determine infringement, not a subjective attitude of a disturber in relation to violation<sup>43</sup>. In the light of jurisprudence 'arbitrary violation means unlawful entry into a holder's real dominion. A qualification of infringement as a wilful one, needs to be determined, that a infringer was not authorised and the situation was objectively unlawful, however a concept of good or bad faith has no significance. Possession infringement will not be perceived as arbitrary, when there is legal basis justifying an offence regarding someone else's possession<sup>44</sup>.

Arbitrary violation of someone else's possession occurs when an infringer has no right to any interference in someone else's power over assets, thus does it unlawfully<sup>45</sup>. Therefore, possession violation is wilful, when it is prohibited. Arbitrariness of possession infringement occurs when a holder is limited in possession, due to transient use of someone else's belonging or other use limiting free power over something, possession violation occurs against the will to own, as well as possession

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<sup>42</sup> M. Warciński, *Ochrona posiadania...*, p. 245.

<sup>43</sup> A. Kunicki, [in:] *System...*, v. II, p. 872.

<sup>44</sup> The Judgement of the Regional Court in Cracow, II Ca 2210/16, [www.orzeczenia.krakow.so.gov.pl](http://www.orzeczenia.krakow.so.gov.pl)

<sup>45</sup> S. Rudnicki, *op. cit.*, p. 549.

is against the law<sup>46</sup>. Legal actions of a person, who has an effective subjective right, absolute, or relative laws, are not arbitrary violation<sup>47</sup>.

To employ allowed self-help, arbitrary possession violation must actually take place, not just appear to be a possession threat. Such interpretation is a result of codex wording regarding a possibility of taking actions after arbitrary possession infringement. It seems that the idea of possession violation includes only cases of interventions made into the owner's power. They will need an evaluation in every case, taking as a starting point circumstances of an actual state of affairs. Undoubtedly, individual cases of possession violation may differ from each other, as various forms of possession may be breached.<sup>48</sup>

Taking actions leading to restoration of the original state must occur immediately after arbitrary property possession violation. Therefore, a holder's activity should take place immediately after possession infringement, so without unjustified delay, in a relatively short time after interference in possession. The time should be defined individually in each case, according to circumstances<sup>49</sup>. *At once*, means as quickly as possible in a given situation<sup>50</sup>. It does not have to be an immediate action, it is enough that it is taken without unjustified delay, according to circumstances of a specific case. Consequently, one can talk about time and place unity of an entity's action, who violates possession, and the holder's actions leading to removal of violation consequences.

'Immediately after one's wilful violation' refers to a relatively short period of time after infringement (e.g. after the holder's return from the market, concerning violation, which occurred during his absence). Another example is a situation when a holder of agricultural real estate came to a town in the early morning, a neighbour using his absence moved border marks; the mentioned holder returned home late at night and noticed possession violation only the next day; despite this fact, it would be an immediate action to return to the old order.<sup>51</sup> However, an

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<sup>46</sup> J. Gołaczyński, *System....*, p. 120.

<sup>47</sup> P. Machnikowski [in:] *System prawa prywatnego*. Volume 3. *Prawo rzeczowe*, E. Gniewek (ed.), Warsaw 2013, p. 62.

<sup>48</sup> R. Mikosz, *op. cit.*, p. 47.

<sup>49</sup> The Judgement of the Supreme Court of 24 February 2005, file no. V KK 435/2004, LEX no. 390199.

<sup>50</sup> B. Lackoroński, *op. cit.*, p. 1451.

<sup>51</sup> S. Grzybowski, *Prawo cywilne. Zarys prawa rzeczowego*, Warsaw 1976, p. 224.

action taken three weeks after possession infringement does not meet the requirement of fast reaction, which is demanded by Article 343 § 2 c.c. for the sanctioning of self-help<sup>52</sup>.

Taking self-help, a property owner cannot use violence against people<sup>53</sup>. It means a permissibility of using all necessary measures to return to the previous state, except for use of violence against people. In case of resistance against self-help, action of an individual who makes a breach of possession (his representative, family members, etc.) proprietary claim should be employed. It is justified by a fear of an actual fight in such circumstances and with such consequences for health and life of the participants.<sup>54</sup>

## **5. Self-help premises regarding property possession infringement**

In case of an infringement of movable property possession, the legislator lets such a holder use allowed self-help, only in case of wilful possession deprivation. As far as property is concerned, it is deprivation of the possession that matters. The nature of property justifies this fact, which can be moved and hidden to a different place.

A self-help premise concerning property, is a presence of risk of irreparable loss. A notion of irreparable loss in literature is perceived as a damage to property, which cannot be compensated by subsequent return of the benefit or restoration to the previous state. It refers to the loss of a chance to retrieve movable property in future<sup>55</sup>. Generally, a risk of irreparable loss occurs when there is a threat of loss or an asset damage to a holder, and therefore self-help should be applied immediately, that is directly after wilful violation. If movable property may be taken of the attacker later by a competent authority, and there is no risk of irreparable loss, self-help is prohibited.<sup>56</sup>

One may speak about irreparable loss when there is a risk of a final loss or an asset damage, and asking for help of a competent state authority would not prevent a damage. Though while evaluating whether an individual who used self-help, presumed that not employing self-help,

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<sup>52</sup> The Judgement of the Supreme Court of 27 March 1968, II CR 69/68, LEX no. 6305.

<sup>53</sup> B. Lanckoroński, op. cit., p. 1452.

<sup>54</sup> J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warsaw 2003, p. 299 – 300.

<sup>55</sup> M. Warciński, *Ochrona posiadania...*, p. 246.

<sup>56</sup> B. Ziemiński, K.A. Dadańska, *Prawo rzeczowe*, Warsaw 2012, p. 271.

will cause him irreparable loss, a liberal interpretation should be applied, as a person using self-help must make quick decisions (immediately) and in conditions hindering knowledge.<sup>57</sup> While discussing neighbours relationships, especially regarding arguments about rooms in premises, self-help should be limited, because usually there is no risk of irreparable loss, and self-help employment could cause far worse consequences.<sup>58</sup>

A movable property holder's reaction within allowed self-help should be taken immediately, not promptly, as in a case of real estate. Therefore, the legislator clearly indicated that in relation to movable property, the holder's actions should occur very quickly after possession violation. Self-help may then be applied directly after possession infringement, as wording 'immediately' should be understood as permission of self-help only when there is a very close time sequence in relation to a moment of possession breach, when possession has no durability features, it is possible to retrieve assets, and the whole action taken directly after possession violation has not been interrupted. There is no discount period, necessary to preparatory actions, as far as real estate and movable property are concerned.<sup>59</sup> Thus, collection of movable property of an attacker, until the second meeting, even if it was within a short period of time after possession infringement, could not have been accepted as self-help implementation.

In case of allowed self-help in relation to movable property, its owner, in a light of irreparable loss, may immediately after wilful possession deprivation use necessary self-help in order to return to the previous state. It is confirmed by G. Bieniek, who claims that in case of arbitrary possession of movable property, self-help may be applied, if an owner is at risk of irreparable loss; a reaction to possession violation may occur immediately after wilful possession infringement, and must intend to restore the previous state.<sup>60</sup>

The owner of movable property may use all necessary self-help, including self-defence measures, if they are proportional to the intended goal and they do not rely on using unnecessary violence. The Act does not limit self-help measures in this case, meaning the owner of movable property may, using self-help, employ violence against the attacker of

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<sup>57</sup>W. Bryl, [in:] *Kodeks cywilny. Komentarz*, Z. Resich (ed.), Warsaw 1972, p. 786.

<sup>58</sup>A.Stelmachowski, *Istota...*op. cit. , p. 254.

<sup>59</sup>A.Stelmachowski, *Istota ...*op. cit., p. 253 - 254.

<sup>60</sup>G. Bieniek, S.Rudnicki, *Nieruchomości. Problematyka prawna*, Warsaw 2013, p. 369.

possession infringement. Violence refers to such physical means influence which prevents or breaks one's resistance or precludes formulation and implementation of one's decision of will, using pressure of an actual condition on the motivation processes, in order to address a decision in the right direction by a perpetrator of the direction<sup>61</sup>.

The holder may use such means, as they are necessary in an individual case in order to restore possession. It is assumed that the holder is allowed to use only means suitable for his permission within self-help (permission to restore to the previous state of possession), thus within necessary limits to restore possession.

It is also presumed that self-help will include a situation when the infringer is in peaceful possession of a stolen item, but possession still does not present durability features. Then, it is possible to regain it, if an action itself was not directly interrupted after possession violation<sup>62</sup>.

## **Conclusions**

Self-help is designed to restore lost power. Generally, the legislator allows possibility of using self-help, however considerable moderation is indicated. The legislator formulates premises for using self-help with great caution, and also limits the range of allowed self-help measures. Employing allowed self-help clear restrictions, the legislator obeys the above mentioned rule that no one may wilfully violate someone else's possession. The rule denotes that no one wilfully may (without court) violate someone else's possession, except for allowed self-help. The exception to this rule is precisely self-help. Self-help employment without competent state authorities occurs and is – according to the principle – prohibited, due to the danger it poses for the law order.

The use of allowed self-help is the most essential with regard to arbitrary possession infringement and must remain in close time relationship with wilful violation, and used self-help must intend to restore by its actions a holder of a previous state. Article 343 § 2 c.c. is an exception to the general rule, consisting of the prohibition of all self-help, and thus it cannot be interpreted broadly.

The Civil Code distinguishes premises of using self-help in case of wilful real estate and movable property possession violation. Therefore,

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<sup>61</sup> T. Hanausek, *Przemoc jako forma działania przestępnego*, Cracow 1966, p. 65

<sup>62</sup> J. Satko, op. cit. p. 261.

the owner a movable property may employ self-help immediately, and the owner of real estate promptly, moreover the holder of movable property may use violence against individuals, whereas the holder of real estate may use violence against animals, but never against people.

Other forms of allowed self-help refer to the possibility of apprehending items or animals in order to secure claims of the holder's movable property, or land. In this case, the claim for damages, or the claim for reimbursement, are conditions for self-help.

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