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The Right to Housing and the Institution of Expropriation: A Comparative Analysis of Legal Regulations in Poland and the Legal Systems of the Other European Countries

[Prawo do mieszkania a instytucja wywłaszczenia – analiza porównawcza regulacji prawnych w Polsce i systemach prawnych innych państw europejskich]

Abstract

The aim of the article is to analyze how the right to housing, recognized as a human right, influences the shaping of national expropriation laws. The author provides a positive response, highlighting that both EU regulations and legal acts of the Council of Europe significantly impact the limitation of arbitrariness in expropriations and strengthen the protection of individuals against excessive state interference in this area.

The analysis is based on the Universal Declaration of Human Rights (which first established legal protection of housing as a right granted to every individual), the Charter of Fundamental Rights, and the Council of Europe system. The author also employs a comparative method, examining the impact of norms guaranteeing the right to housing on expropriation laws in the states that are signatories to each of these instruments. This emphasizes the importance of shared standards of human rights protection in shaping national legislation.

The final section focuses on an issue that has recently garnered significant interest: housing as a right or a commodity? The author believes that an attempt to answer this question – based on an examination of law and economics – will provide a better understanding of why housing should be regarded as a tool enabling the realization of values and freedoms established by both national and international law. By framing housing in this way, it becomes clear that access to adequate housing is not merely an economic transaction but a fundamental element of human dignity, social justice, and the fulfillment of rights enshrined in legal systems worldwide.

Keywords: right to housing, land expropriation, housing, human rights protection system.

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The Right to Housing as one of the Fundamental Human Rights

“Housing holds a pivotal role within the hierarchy of human needs, serving not only to fulfill basic necessities but also addressing more elevated ones. Often viewed through a pragmatic, utilitarian lens, its deeper psychological and sociological dimensions are frequently overlooked, despite their significant impact on the well-being and functioning of individuals and communities.”¹

The first legal act of an international nature that described the concept of housing as a legal good was Universal Declaration of Human Rights.² According to Article 25 UDHR “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”³ The right to housing should be regarded as a fundamental attribute of every human being’s existence, expressed not only in the creation of a personal living space for the individual but also in stability and security. The *ratio legis* of Article 25 of the Universal Declaration of Human Rights (UDHR) is based on guaranteeing every person a place where individual and family development can occur. It is evident that the right to housing, when compared to other fundamental human rights, such as the right to life, liberty, security, and equality, should be treated with due regard to its unique character. Its distinctiveness is primarily reflected in the substantial financial expenditures incurred by the state to ensure its provision.

The financial disparities within society, and even significant amounts of money from national budgets, are unable to guarantee access to homeownership for every individual. Therefore, in the author’s opinion, this right should be regarded as a direct directive aimed at ensuring housing for every citizen. It represents a specific course of action for the state to implement mechanisms that enable equal access to housing.

UDHR not only highlighted that the right to housing should be subject to special legal protection due to the fact that its realization enables every individual to live with dignity. In light of supranational regulations, an extremely important issue is also the promotion of non-discrimination in the context of

¹ M. Kędzierska, *Kształtowanie polityki mieszkaniowej w warunkach gospodarki rynkowej*, ‘Equilibrium’ 2009, 1, 2, *passim* [Shaping Housing Policy in a Market Economy]. Available at: https://cejsh.icm.edu.pl/cejsh/element/bwmetal.element.ojs-doi-10_12775_EQUIL_2009_014/c/EQUIL.2009.014-6886.pdf [accessed: 01.01.2025].

² United Nations General Assembly, Universal Declaration of Human Rights, Resolution 217 A (III), adopted 10 Dec. 1948.

³ *Ibid.*

this right. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child constitute key legal frameworks that prohibit discrimination on the grounds of sex, disability, or age in access to housing and in its use. This comprehensive protection against discrimination, combined with the clear positioning of the right to housing as a human right, demonstrates the strong determination of the international community in building a just and more equal society.

It should be pointed out that the provision concerning the right to housing does not *ipso iure* impose the obligation to provide a home for every individual. The Human Rights Committee has stated that Article 11 of the Covenant does not impose an obligation on the state to provide housing to all persons under its jurisdiction. The state's obligations concerning the realization of the right to housing have two dimensions. The first, basic dimension involves creating the conditions necessary for everyone to be able to provide a place to live for themselves and their family. The second-dimension concerns subsidiary obligations, which come into play when the subject of the right is unable to meet their housing needs independently.

Thus, the right to housing involves ensuring effective state mechanisms to support housing policy. From a normative perspective, "housing" constitutes a principle that allows an individual to realize their right to their own, secure living space, considered a foundation of civil rights.

Protection of the Right to Housing in the Council of Europe System and European Union Law

The following chapter focuses on the guarantee of the right to housing in the legal systems of the European Union (EU) and the Council of Europe. Highlighting these two systems is essential, as they provide distinct instruments for protection and enforcement mechanisms for the right to housing. In the first part, the author will analyze the right to housing within the legal framework of the Council of Europe (the European Convention on Human Rights and the European Social Charter), followed by an examination of the legal acts developed under the auspices of the Council of Europe.

In the European system of values, housing is considered an essential right that belongs to every individual and their family. This concept is based on the assumption that housing allows for the fulfillment of both basic needs and those of a higher order.⁴ The first legal act established by the Council of

⁴ K. Nowak, *Krajowy i lokalny wymiar polityki mieszkaniowej*, Warszawa–Kraków–Gdańsk 2021, p. 21 [The National and Local Dimensions of Housing Policy].

Europe regulating the right to housing was the Convention for the Protection of Human Rights and Fundamental Freedoms. Since its adoption in 1950, it has been the primary document protecting human rights in the member states of the Council of Europe. The ratio legis for introducing this legal act stems from the necessity to guarantee certain rights outlined in the Universal Declaration of Human Rights. The Convention imposes on its signatories the obligation to ensure the rights and freedoms listed within it, and additionally provides a range of international mechanisms for the proper monitoring of their implementation.⁵

Although the treaty does not explicitly define the concept of the right to housing (its interpretation must be sought in the case law of the European Court of Human Rights), Article 8 of the European Convention on Human Rights (ECHR) lists housing alongside the right to respect for private and family life. Therefore, it can be inferred that, indirectly, this article acknowledges the right to housing as a human right and imposes an obligation on signatories not to interfere with the private space of one's home, as it is a place where individuals have the right to feel safe and secure.

Furthermore, paragraph 2 of Article 8 prohibits arbitrary interference with an individual's enjoyment of their home. This provision is of significant importance to the topic of this paper. It stipulates that interference in this sphere of an individual's life is only permissible in strictly defined circumstances. Any such interference must be based on law and deemed necessary in a democratic society. Alongside these restrictions, the ECHR also refers to "national security, public safety, or the economic well-being of the country, the protection of order and prevention of crime, the protection of health and morals, or the protection of rights and freedoms."

As stated in Article 46 of the ECHR, states that have ratified the treaty are obligated to comply with the rulings of the European Court of Human Rights. The author wishes to emphasize that, although the rulings of the Court are not legally binding for all Council of Europe member states, decisions issued by the ECtHR can still be regarded as interpretative guidance for the rights expressed in the Convention. In the context of the right to housing, it is essential to reference the judgments of the European Court of Human Rights (ECtHR), which define the very concept of "home" as used in Article 8 of the European Convention on Human Rights (ECHR). As previously indicated, a home is not only a physical space but also the primary place of an individual's activities and a refuge.⁶ "Whether a property should be classified as

⁵ European Court of Human Rights, European Convention on Human Rights, 1950, Article 34, right to submit individual complaints to the European Court of Human Rights in Strasbourg.

⁶ The European Court of Human Rights emphasizes that Article 8 of the ECHR protects an individual's right to respect for their private and family life, as well as their home and correspondence. "Although the purpose of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, it may also entail the adoption of measures by the authorities aimed at securing respect for private life, even in the

a ‘home’ depends on the facts rather than whether the property is occupied in accordance with national law.”⁷ In the ECtHR’s case law, it is also highlighted that the right to housing incorporates an individual’s entitlement to enjoy all the amenities of the property, including the right to sleep.⁸

In its rulings, the European Court of Human Rights has repeatedly addressed the issue of expropriation, analyzing cases where states interfered with citizens’ property rights in the name of public interest. The Court’s case law serves as an important source of interpretation for the principles that signatories should follow when applying national regulations on expropriation, particularly regarding the principles of rule of law, proportionality, and the protection of individual interests.⁹

Alongside the European Convention on Human Rights (ECHR), the European Social Charter¹⁰ also played a significant role in the protection of housing rights. The treaty was adopted in 1961 by the Committee of Ministers of the Council of Europe in Turin. It obligated state parties to effectively implement the right to housing and to undertake measures aimed at: promoting access to housing of an adequate standard, preventing and reducing homelessness with the goal of its elimination. In 1996, the European Social Charter was revised, and Article 31 shifted the emphasis on the right to housing from family protection to an individual right to housing. Based on the 1991 European Social

sphere of relations between individuals.” – Judgment of the European Court of Human Rights of 14 Oct. 2021, Application No. 75031/13.

⁷ Judgment of the European Court of Human Rights of 13 May 2008, *McCann v United Kingdom*, No. 19009/04

⁸ Judgment of the European Court of Human Rights of 8 July 2003, *Hatton and Others v. the United Kingdom*, No. 36022/97.

⁹ For example, see the judgment of the European Court of Human Rights (ECtHR) of March 25, 1999, in the case of *Iatridis v. Greece* (Application No. 31107/96). In this judgment, the Court found a violation of Article 1 of Protocol No. 1, as the Greek state took over a cinema owned by the applicant without a proper legal basis. In paragraph 54 of the judgment, the Court stated that the authorities must respect the rule of law, which requires a clear and predictable legal basis for the restriction of property rights. In the case of *Iatridis*, there was a lack of legal framework, resulting in a disproportionate interference with the right to property. Also, see the judgment of the ECtHR dated March 29, 2006, in the case of *Scordino v. Italy* (Application No. 36813/97). In this case, the applicant, Mr. Scordino, was the owner of a property that was expropriated by the Italian authorities for the purpose of a public project. Despite the state’s takeover of the land, he was not provided with appropriate compensation, which led to a violation of his right to protection of property. The Court found that the Italian authorities failed to ensure fair compensation, and the expropriation procedure itself was inconsistent with the principle of property protection, constituting a violation of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Court emphasized that states must provide adequate, fair compensation in cases of expropriation, and if the compensation is not appropriate, it violates the individual’s right to property. This judgment was significant for the interpretation of the legitimacy of expropriation and the necessity of providing fair compensation, establishing an important precedent in international property protection law.

¹⁰ “In order to ensure the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal, and social protection of family life, particularly by such means as social and family benefits, fiscal arrangements, the encouragement of housing construction suitable for the needs of families, benefits for young couples, and any other appropriate measures.” – Article 16 of the European Social Charter, *Journal of Laws* 1999.8.67 – European Social Charter drafted in Turin on 18 Oct. 1961.

Charter (ESC), citizens of the state parties can enforce their right to housing, including demanding access to housing of an adequate standard, national actions aimed at preventing homelessness, and ensuring affordable residential property prices. Although Poland, pursuant to Article 20 of the ESC, is not bound by the provisions of Article 31, the values expressed in the ESC can serve as interpretative norms and guidelines for Poland's housing policy.

The Charter of Fundamental Rights¹¹ is part of the primary law of the European Union (Article 6 of the Treaty on European Union).¹² The right to housing under the CFR is regulated in Article 34(3). It should be noted that the cited provision does not explicitly use the term "right to housing" but refers to the necessity of ensuring housing assistance as part of broader social assistance. Additionally, it emphasizes that implementing mechanisms to facilitate access to housing helps combat social exclusion and poverty. Article 34(3) also focuses on the need to ensure adequate housing conditions, which are recognized within the framework of EU social policy as providing "a decent existence for all those who lack sufficient resources, in accordance with the principles laid down by Union law and national laws and practices." It is also worth emphasizing that the fundamental rights contained in the CFR must be interpreted in a manner consistent with the interpretation derived from the ECHR, as well as with due regard to the case law of the European Court of Human Rights, as explicitly provided for in Article 52(3) of the CFR.

Implementation of the Right to Housing Its Impact on Expropriation

The implementation of the right to housing within the framework of the Polish legal order is based on the Constitution. Article 75(1) of the Constitution of the Republic of Poland states that "public authorities shall pursue policies conducive to meeting the housing needs of citizens, in particular by combating homelessness, supporting the development of social housing, and promoting citizen initiatives aimed at obtaining their own housing."¹³

¹¹ European Union (2012) Charter of Fundamental Rights of the European Union. Official Journal of the European Union, C 326, 26.10.2012, pp. 391–407.

¹² "The protection of human rights, expanded and strengthened by the Charter, now has its foundation in the primary law of the European Union. By granting the CFR a legal status equal to that of the Treaties, the Charter of Fundamental Rights has acquired the rank of primary law." – Ł. Bojarski, D. Schindlauer, K. Władach, M. Wróblewski, *Karta praw podstawowych Unii Europejskiej jako żywy instrument. Podręcznik dla prawników*. Warszawa 2014, p. 23 [The Charter of Fundamental Rights of the European Union as a Living Instrument: A Handbook for Lawyers].

¹³ Konstytucja Rzeczypospolitej Polskiej, Dz.U. z 1997 r. nr 78, poz. 483, z 2001 r. nr 28, poz. 319, z 2006 r. nr 200, poz. 1471, z 2009 r., nr 114, poz. 946. [Constitution of the Republic of Poland, Journal of Laws of 1997].

The constitutional basis for the functioning of expropriation in Poland is Article 21(2) of the Constitution of the Republic of Poland. According to this provision, expropriation is permissible only if it is carried out for public purposes and with just compensation. The legislator aligns expropriation with opposing institutions, such as inheritance and property boundaries, thereby creating a mechanism of self-regulation and oversight. In this context, the legislator enjoys broad autonomy in defining the limits of protection within the Constitution, which serves as a normative point of reference for ordinary legislators in the process of drafting laws regulating ownership and inheritance rights, without exceeding the permissible boundaries of interference specified by the Constitution.

Although property rights are fundamentally granted and protected to the extent recognized by the legislator, the currently adopted concept of the state and the relationship between authorities and citizens assumes that the source of property rights is not merely the will of the legislative authority. Instead, it is a right—one of the entitlements inherent to the human being—that the legislative authority may shape but does not have the power to entirely deprive individuals of. Therefore, ownership is not the result of the legislator's will but an entitlement inherent to the individual by virtue of their existence, and the legislative authority has the ability to shape this ownership.

The Constitutional Tribunal, in its judgment of December 9, 2008,¹⁴ indicated that expropriation is a particular type of intervention in property rights, applied only in exceptional cases where a public purpose exists. This involves the limitation or complete removal of property rights concerning a specific property in favor of a designated entity. The process includes the state's acquisition of ownership rights to a property or other rights related to the property, which belongs to a private entity, through formal administrative proceedings while ensuring the expropriated owner receives compensation determined in accordance with expropriation regulations. The Constitutional Tribunal emphasized that expropriation should only be applied in cases that are absolutely necessary and justified by public purposes, which cannot be achieved through other legal means. A public purpose must be understood as the welfare of society or a regional community, encompassing the entire society or specific regional communities.

It is also worth noting that expropriation involves the deprivation of ownership, not actual possession of the property:

“Expropriation is a legal instrument for acquiring, limiting, or extinguishing property rights to real estate. It does not result in the removal of possession of the property unless the legislator assigns the expropriation decision the effect of initiating administrative enforcement of possession of the prop-

¹⁴ Wyrok Trybunału Konstytucyjnego z 9 grudnia 2008 r., K 61/07, Legalis nr 112749 [Judgment of the Constitutional Tribunal of 9 Dec. 2008].

erty. As a result of expropriation, involving the deprivation of ownership rights or perpetual usufruct rights, the previous holder of these rights loses the legal title to continue possessing the property. Their possession ceases to align with the legal state. The right to possess the property is acquired by the public-law entity for which the expropriation was carried out.”¹⁵

The Act on Real Estate Management¹⁶ specifies the detailed conditions, including the entities for which expropriation may be carried out, as well as the procedures for this process. However, for the purposes of this analysis, it is crucial to identify the relationship between the possibility of expropriating property and an individual’s right to housing. To this end, it is necessary to define the criteria for permissible restrictions on property rights. The Constitutional Tribunal cumulatively outlined the criteria for deprivation of property based on Article 31(3) of the Constitution in its judgment of May 11, 1999.¹⁷ These criteria include: a statutory basis for the restriction, the necessity of introducing the restriction in a democratic state, a prohibition against violating the essence of specific rights and freedoms, and a functional relationship between the restriction and achieving certain values derived from Article 31(3) of the Constitution, such as state security, public order, environmental protection, health, morality, as well as the rights and freedoms of others.

The Constitutional Tribunal devoted significant attention to the criterion of the “necessity of introducing the restriction in a democratic state” which relates to the essence of the principles stemming from the rule of proportionality. The discussed basis for applying property restrictions aligns with the principles of proportionality. This principle imposes on the legislator an obligation to justify the actual need for interference with an individual’s specific rights or freedoms and to employ effective measures to achieve the intended goals. Such restrictions must not only be necessary but also as minimally burdensome as possible for the entities whose rights or freedoms are being restricted. Therefore, the interference must be proportional to the objectives that justify the introduction of the restriction.

This analysis requires taking into account both the values and goods protected by the given regulation and those subject to limitation, as well as an evaluation of the methods used to implement the restriction. Thus, meeting the demands of proportionality requires a detailed analysis in every case, considering the protected values and goods, as well as the methods of restriction, within the context of specific circumstances. “Legal literature also emphasizes that in assessing the admissibility of property rights restrictions, gen-

¹⁵ J. Jaworski, A. Prusaczyk, A. Tułodziecki, M. Wolanin, Ustawa o gospodarce nieruchomościami. Komentarz [komentarz do art. 112], Warszawa 2023 [The Real Estate Management Act: Commentary: Article 112].

¹⁶ Ustawa z 21 sierpnia 1997 r. o gospodarce nieruchomościami, Dz.U. 1997 nr 115, poz. 741, tekst jedn. Dz.U. z 2023 r. poz. 344 [Act on Real Estate Management, Journal of Laws 1997].

¹⁷ Wyrok Trybunału Konstytucyjnego z 11 maja 1999 r., K 13/98, Legalis nr 43532 [Judgment of the Constitutional Tribunal of 11 May 1999].

eral constitutional standards play a significant role, such as the principle of equality, the principle of protecting legitimate expectations, the requirement for explicit statutory foundations, the legality and fairness of interference procedures, and the right of the affected party to judicial review. A crucial and doctrinally contentious element in determining the admissibility of property rights restrictions is the identification of the values justifying the interference.”¹⁸

When seeking an answer to the question of the logical legislative basis justifying the necessity of depriving private property, it is essential to focus on several key reasons that may legitimize expropriation actions. First and foremost, expropriation often arises from public interest. The implementation of public utility projects, such as the construction of roads, railways, airports, or water infrastructure, is considered fundamental for the common good, thereby justifying the necessity of acquiring private property.

The socio-economic aspect is also significant. Expropriation may be essential for projects that contribute to economic and social development, such as industrial, commercial, or residential investments, which foster job creation and economic growth.

Urban planning, justified by the need for cohesive spatial planning, environmental protection, or ensuring the appropriate use of land, is another reason. Finally, when public or general interest outweighs individual interests, expropriation may be justified. The aim is typically to ensure societal well-being or maintain harmony within society, even at the expense of individual property rights.

It is also worth noting that a prerequisite for expropriation is the award of appropriate compensation based on the Constitution and the Act on Real Estate Management. The provision in Article 21(2) of the Constitution serves a protective function. Although the obligation to provide compensation arises *ex lege* under this provision, the term “just compensation” does not, in the author’s opinion, necessarily imply equivalence between the compensation and the expropriated property.

The principle of balance between compensation and expropriation is expressed in Article 130 of the Act on Real Estate Management, which states: “The amount of compensation is determined based on the condition, purpose, and value of the expropriated property on the day the expropriation decision is issued.” The criteria for determining the value of compensation reflect the principle of maintaining such equivalence.

The concept of the “condition of the property,” which influences the amount of compensation, refers to the definition contained in Article 4, point

¹⁸ R. Hauser, A. Wróbel, Z. Niewiadomski, *Odpowiedzialność odszkodowawcza w administracji. System prawa administracyjnego*, tom 12, Warszawa 2016, pp. 537 and 538 [Liability for Damages in the Administration. The Administrative Law System, vol. 12].

17 of the Act on Real Estate Management. According to this provision, it includes the state of development, legal status, technical and functional condition, the level of equipment with technical infrastructure facilities, and the condition of the property's surroundings, including the size, character, and degree of urbanization of the locality where the property is situated.

Within the framework of the concept of the property's condition, three main elements can be identified: the actual state of the property itself, its legal status, and the actual context of its surroundings.¹⁹ When assessing the condition of a property, it is also essential to consider the structure of the building as a key factor determining the possibility of expropriation. As stated by the Supreme Administrative Court (NSA) in its judgment of January 8, 2009, "The possibility of expropriating part of a building property is determined by the structure of the building. Specifically, if the building's structure allows for such expropriation, it will be permissible, as the expropriation decision will be enforceable. However, if the building's structure makes it impossible to expropriate a part of it, such expropriation will not be feasible due to the unenforceability of the expropriation decision.

In the case of building properties, this issue cannot be reduced to the matter of purchasing 'residual plots.' In situations where the expropriation of part of a building property would lead to its demolition, the building should be regarded as an indivisible whole if its structure does not allow for physical division. This consideration is also linked to determining compensation for the building property."²⁰

Regulations governing appropriate compensation for expropriation are crucial for upholding the human right to housing. Providing adequate compensation for lost property is a fundamental aspect of ensuring citizens' decent living conditions. Through fair compensation, individuals affected by the expropriation process can maintain housing stability and continue their lives without significant disruptions.

It is worth noting, however, that on June 15, 2022, a draft amendment to the Act on Real Estate Management,²¹ was submitted to the Polish Parliament, proposing the removal of the principle of adequacy between the amount of compensation and the value of the expropriated property. In the author's opinion, introducing regulations that reduce the value of just compensation in cases of expropriation would not only violate international standards related to the equivalence of the value of the expropriated property. Such measures could also infringe upon individual tax rights, including the right to housing.

¹⁹ J. Jaworski et al., *Ustawa... Komentarz*, *ibid*.

²⁰ Wyrok Naczelnego Sądu Administracyjnego z 8 stycznia 2009 r., sygn. akt I OSK 29/08, *Legalis* nr 219114 [Judgment of the Supreme Administrative Court of 8 Jan. 2009].

²¹ Government draft bill of 15 June 2022 on amending the Act on Real Estate Management and certain other acts, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2349> [accessed: 02.01.2025].

Compensation for property, which provides the expropriated party with the means to find another place to live, plays a crucial role in the expropriation process and should be carefully considered from the perspective of social justice and individual rights.

This is not merely an economic issue but also a moral one, touching upon the essence of ownership and human dignity. Ensuring that expropriated individuals have the resources to find a new home has practical implications but also places an obligation on the state to care for its citizens. This obligation is reflected in the inclusion of such a requirement in the Constitution in cases of expropriation.

In most legal systems, expropriation is one of the tools enabling intervention in an individual's property rights. Similar to the current Polish legislation, the objectives of this institution are comparable. For instance, in Scotland, initiatives undertaken by the government in the area of compulsory acquisition of property,²² are guided by the idea of supporting actions that contribute to the improvement of the social, economic, and environmental spheres for the benefit of society as a whole. Authorities are therefore encouraged to actively use their powers, when necessary and appropriate, to deliver immediate benefits to communities.

The Scottish Government's vision for compulsory purchases includes: "A clear, accessible, consistent, effective, and efficient system of legislation and policy that facilitates compulsory acquisition and the purchase of legal shares in land and property for the public good. Provisions for potential compensation should be fair, transparent, and enable timely redress."²³ In this legal system as well, the analysis of the justification for expropriation in the context of human rights has been the subject of numerous considerations. It was ultimately concluded that, when certain conditions are met cumulatively, compulsory acquisition does not violate human rights related to both the right to housing and the right to property. It is therefore essential to maintain proportionality between the actions of the expropriating authority, which should focus on achieving its stated goal supported by public interest, and the rights of the individual, which must be satisfied through appropriate compensation upon deprivation of property.

In the context of public interest, expropriation actions can be aimed at achieving objectives for both local communities and society as a whole. Public benefit may take various forms, including economic, environmental, or infrastructural—such as generating new jobs, creating zones for investments with medical or social purposes, or transforming public transport systems. It

²² The laws regulating compulsory land acquisition in Scotland: Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, The Compulsory Purchase of Land (Scotland) Regulations 2003.

²³ Guidance for Acquiring Authorities: *Can I Use Compulsory Purchase?* [in:] *Compulsory Purchase in Scotland*: Scottish Government (ed.): Planning and Architecture Division, CPOGNA/001, 2018, p. 1.

is also important to emphasize that compulsory purchase in Scotland should only be applied in cases where it is impossible or impractical to acquire the property through agreement with the current owner, and the public interest in such action outweighs the rights of the individual.

The Compulsory Purchase of Land (Scotland) Act, enacted on November 1, 2003, provides a comprehensive set of implementing regulations aimed at effectively enforcing the provisions concerning compulsory land acquisition. These regulations detail the procedures and requirements associated with this institution.²⁴

In a comparative legal perspective, it is worth discussing the institution of land socialization, which is not known in Polish law, based on German legislation. Under German law, there exists both the institution consistent with Polish expropriation, “Enteignung” (expropriation), and “Vergesellschaftung” (socialization). Pursuant to Article 14(3) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany):²⁵ “Expropriation is permitted only for the benefit of the general public. It may only be carried out based on a law or statute regulating the type and amount of compensation. Compensation is paid after a fair consideration of the public interest and applicable regulations. In the event of a dispute regarding the amount of compensation, there is a possibility of appealing to the ordinary courts.”

As in Polish and Scottish law, the essential condition for the application of expropriation is the fulfillment of public tasks. This means that the acquisition of ownership of someone else’s property is carried out to implement a specific project aimed at improving the living conditions of the community. Expropriation, of course, is not limited solely to the acquisition of property, but for the purposes of this analysis, it will be restricted to such cases.

The German institution of expropriation requires compliance with the principle of proportionality. This means that its execution by a state authority is considered a last resort when there are no other mechanisms available that do not interfere with individual rights and can achieve the intended goal. It is also crucial to demonstrate that the state’s interest in acquiring the property must outweigh the owner’s interest in retaining their property.

According to Article 14(3), sentence 3 of the Basic Law, the owner is also entitled to compensation, which is determined while taking into account the interests of the general public and the affected parties. “Vergesellschaftung” is addressed in Article 15 of the Basic Law. The concept of this institution is based on the premise that “Vergesellschaftung” may lead to the transfer of ownership of real estate, natural resources, and means of production to the

²⁴ Ustawa z 1 listopada 2003 [Act of 1 Nov. 2003] The Compulsory Purchase of Land (Scotland), 2003 No. 446, https://www.legislation.gov.uk/ssi/2003/446/pdfs/ssi_20030446_en.pdf [accessed: 21.02.2024].

²⁵ Grundgesetz für die Bundesrepublik Deutschland, Ausfertigungsdatum [accessed: 23.05.1949], GG.

state. Although some sporadic arguments in German legal literature suggest that socialization is merely a specific case of expropriation, the prevailing opinion is that socialization is an independent legal institution. Evidence for this is the regulation of these institutions in separate articles of the Basic Law.²⁶

Exploring the differences between “Enteignung” and “Vergesellschaftung” provides a better understanding of the common features of the expropriation institution in Germany and Poland, while also highlighting how the German legal system approaches the concept of protecting the right to housing as a human right. The terms “Enteignung” and “Vergesellschaftung” are often used interchangeably in debates about the government’s ability to intervene in living spaces. A defining feature that distinguishes the socialization of property from expropriation is the necessity of adhering to the principle of proportionality in their execution.²⁷ According to one perspective, socialization is a specific case of expropriation, and for this reason, the principle of proportionality should apply to it. Following this view, socialization must serve a legitimate purpose and, as already indicated in the analysis of *Enteignung*, must be necessary and appropriate to achieve this social objective.²⁸ The opposing view holds that, since these institutions are regulated in separate articles of the Basic Law, an expansive interpretation should not be applied. While the compensation referred to in Article 15(2) of the Basic Law does, in essence, refer to Article 14(3), paragraphs 3 and 4, this does not directly imply that the same standards apply to socialization as to compensation for expropriation, particularly given the differing objectives of the two institutions.²⁹

²⁶ M.-S. Biatel, *Aktueller Begriff, Die Enteignung nach Art. 14 Abs. 3 GG und die Vergesellschaftung nach Art. 15 GG*, Nr. 05/19 (06.05.2019), Deutscher Bundestag (ed.).

²⁷ A similar position on compensation for expropriation is expressed by Austrian law and case law. According to Article 26 of the Constitution (*Bundesverfassung*), property is guaranteed, and expropriations and limitations of property rights will be fully compensated. The Constitutional Court (*Der Verfassungsgerichtshof*) developed the theory of special sacrifice (*Sonderopfertheorie*), which assumes that different individuals should receive differentiated compensation, in accordance with the principle that no one should suffer the same loss of property due to expropriation without compensation. Importantly, Austrian case law diverges from the position expressed by the European Court of Human Rights. The ECtHR grants compensation based on the right to property, and according to its rulings, expropriation without compensation is permissible only in exceptional circumstances, although there is no clear explanation of when such circumstances occur. Compensation for expropriation is not the only form of compensation; all inconveniences associated with expropriation, including both market value and any losses in value, should be compensated. To estimate the value of compensation, various aspects must be taken into account, including the fact that the compensation amount should be either in kind or financial, and its determination is for the court based on expert opinions. More on compensation for expropriation, with particular regard to the “special sacrifice theory” [on:] N. Seywerth, *Enteignungs – Entschädigung unter besonderer Berücksichtigung der „Sonderopfertheorie“*, Johannes Kepler University Linz, Sept. 2022.

²⁸ W. Opfermann, *Die Enteignungsentschädigung nach dem Grundgesetz. Grundprobleme der Entschädigungsflexibilität des Grundgesetzes bei Eingriffen in das Eigentum mit besonderer Berücksichtigung der Baulandbeschaffungsfrage*, vol. 254, Berlin 1974.

²⁹ Wissenschaftliche Dienste, *Ausarbeitung, Zur Zulässigkeit der Vergesellschaftung von Wohneigentum eines privaten Wohnungsunternehmens*, WD 3-3000-108/19, 12 Apr. 2019.

Conclusion – Housing: A Right or a Commodity?

Undoubtedly, domestic (national) laws, international treaties, and EU law require treating the right to housing equally with the right to life and dignity. It is clear that satisfying housing needs affects the well-being of individuals and society as a whole. Therefore, it is necessary to agree that housing should be subject to special protection. However, the debate about whether housing should be considered a right or a commodity remains, in the author's opinion, unresolved.

Recognizing that housing should be treated as a right, not a commodity, has implications for entities engaged in professional real estate transactions. Since the heated debate in Germany about the possibility of limiting the bulk purchase of properties for investment purposes, the Polish government has made an attempt to limit this phenomenon in Poland. Proponents of the idea of treating housing as a right, rather than a commodity, believe that adopting a clear stance focusing on "housing as a right, not a commodity" would increase the availability of housing offered by the state to those unable to purchase or rent property independently. The author finds it hard to deny that these actions contribute to the realization of the state's role in implementing the right to housing. However, first of all, they not only interfere with economic freedom but can also have real economic consequences. Regulating the real estate market will not translate into increased supply or reduced property prices. Moreover, it may reduce the interest of entities in investing in the real estate market. A situation may even arise where the supply of housing decreases, demand remains the same, and prices increase. In the long term, recognizing housing as a right rather than a commodity will not lead to greater housing availability.

Certainly, the right to housing is one of the fundamental human rights; however, housing should be regarded merely as the idea of freedom and personal space. Therefore, it should be considered a tool that enables the realization of values and freedoms established by national and international law. Housing is not an end in itself. For this reason, they should be treated as a tool that enforces values and freedoms through national and international law. Housing is not an end in itself.

Recognition of housing as a right in the Universal Declaration of Human Rights, EU law, and the Council of Europe system has influenced the shaping of national law signatories of the discussed regulations, including provisions related to land expropriation. This primarily concerns limiting state discretion in the expropriation decision-making process, thereby increasing individual protection. It has also become crucial for the European Court of Human Rights (ECtHR) to emphasize the principles that should guide such decisions, namely: the necessity of a legal basis (of statutory rank) allowing

for expropriation; appropriate compensation; as well as the proportionality and necessity of such actions.

Abstrakt

Celem artykułu jest analiza wpływu prawa do mieszkania, uznawanego za prawo człowieka, na kształtowanie krajowych przepisów w zakresie wyłączenia. Autorka daje pozytywną odpowiedź – podkreślając, że zarówno prawo międzynarodowe, prawo UE, jak i akty prawne Rady Europy poświęcone ochronie mieszkania znacząco wpłynęły na kształtowanie prawa.

Analiza została oparta na uregulowaniach Powszechnej Deklaracji Praw Człowieka (która pierwsza ustanowiła prawną ochronę mieszkania jako prawa przyznanego każdej jednostce), Karty praw podstawowych, a także systemu Rady Europy. Autorka wykorzystuje ponadto metodę porównawczą, badając wpływ norm gwarantujących prawo do mieszkania na przepisy wyłączeniowe w państwach będących sygnatariuszami każdego z tych aktów. Podkreśla to znaczenie wspólnych standardów ochrony praw człowieka w kształtowaniu krajowych przepisów.

Ostatnie rozważania skupiają się na kwestii, która wzbudziła ostatnio duże zainteresowanie: mieszkanie jako prawo czy towar? Autorka uważa, że próba odpowiedzi na to pytanie – oparta na badaniu prawa i ekonomii – pozwoli lepiej zrozumieć, dlaczego mieszkalnictwo powinno być postrzegane jako narzędzie umożliwiające realizację wartości i wolności ustanowionych zarówno przez prawo krajowe, jak i międzynarodowe. Gdy ujmuje się mieszkalnictwo w ten sposób, staje się jasne, że dostęp do odpowiedniego mieszkania nie jest jedynie transakcją ekonomiczną, ale podstawowym elementem godności człowieka, sprawiedliwości społecznej i wypełniania praw zapisanych w systemach prawnych na całym świecie.

Słowa kluczowe: prawo do mieszkania, wyłączenie, mieszkanie, system ochrony praw człowieka.

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