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Gradability of Public Law Interference with Property Rights: Valdity of Stanisław Kasznica's Considerations on the Subject

dr hab. Sławomir Pawłowski, Assoc. Prof.
Adam Mickiewicz University in Poznań, Poland
ORCID: 0000-0002-2060-6638
email: slawomir.pawlowski@amu.edu.pl

Abstract
The study demonstrates the actuality of the theses put forward by Stanisław Kasznica in the interwar period as regards the types of public law interference with the right to property. It is possible to make such an assessment, since immediately after Poland regained its independence the rule of law and the protection of private property were inscribed in its political foundations. Because Kasznica was aware of the fact that private property would be increasingly used in the public service, he made a graded classification of this interference on the basis of the regulations in force at the time. It turns out that his classification is also applicable in the Polish legal order.

Keywords
restrictions on the right to property; principle of proportionality; expropriation; gradation of interference with the right to property; progressive expropriation

1. Introduction

Stanisław Kasznica did not write many publications, but those he left behind are of great cognitive value and are highly useful not only for didactic purposes, but also for scientific research. These include the general lecture on administrative law, *Polish Administrative Law: Concepts and Basic Institutions*, which, as the author indicates in his introductory remarks, was of a strictly practical nature and aimed at future administrative employees.[1] For this reason, Kasznica treated the work as a foundational text in the fields of constitutional, substantive and procedural (formal) administrative law. Consequently, he refrained from citing numerous doctrinal views, instead choosing to write about complex matters in a clear and straightforward manner, definitively addressing challenging issues without leaving the reader uncertain about the correct interpretations

1 S Kasznica, *Polskie prawo administracyjne: pojęcie i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Księgarnia Akademicka 1946), also referred to as "the handbook".

or understandings of specific legal institutions. By presenting only one solution to a problem, Kasznica transformed his handbook into an authoritative lecture on administrative law, thereby enhancing its value.

The content of the handbook frequently complements contemporary perspectives on the subject, and in some instances addresses issues that remain inadequately understood today. For example, the concept of the informal administrative act as a form of administrative action and the issue of remonstration (representation) have only recently been acknowledged in the Polish doctrine.[2]

In the chapter entitled *Measures of Administrative Action*, Kasznica presents the conception of lawful interference in the right to property, which, due to its differentiation, can be ascribed the value of gradation depending on its depth. The study will present this concept and verify it against current positive law and the views of legal scholarship and the judicature. This is possible due to the fact that both in the period analysed by Kasznica and today the state system is based on the rule of law, which recognises private property as one of its foundations.

2. Gradability of public law interference with the right to property and the essence of the exercise of the right to property

Within deliberations on the encroachment of public administration into the subjective rights of real property owners (and not only), it is easiest to notice and distinguish those regulations which involve the most far-reaching encroachment into property rights, manifested in its deprivation. This takes the form of expropriation in the case of seizure for public purposes, although other forms of expropriation can also be found, such as confiscation (forfeiture of property) or nationalisation. However, it is much more difficult to distinguish those situations in which there is no formal expropriation, i.e. by means of an individual administrative act, but at the same time restrictions are established which worsen the scope of the original ownership rights, the so-called progressive expropriation,[3] also creeping (hidden)[4] or indirect.[5] In French doctrine, it is argued that the accumulation of restrictions cannot ultimately result in preventing the use of the property in the previous manner.[6] Whilst the separation of the first institution at the beginning of the 20th century did not give rise to much doubt, the perception of

2 See E Szewczyk, *Remonstracja w prawie administracyjnym procesowym* [Remonstration in Administrative Procedural Law] (CH Beck 2018); E Szewczyk, M Szewczyk, 'Status organizacji społecznej w postępowaniu prowadzącym do wydania decyzji na podstawie art. 7 ust. 3 in fine ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt. Glosa do uchwały NSA z dnia 24 lutego 2020, II OPS 2/19' [The Status of a Social Organization in the Proceedings Leading to the Issuance of a Decision Pursuant to Art. 7 section 3 in fine of the Act of 21 August 1997 on Animal Protection. Comment on the Resolution of the Supreme Administrative Court of February 24, 2020, II OPS 2/19] (2020) Orzecznictwo Sądów Polskich vol. 9, 127–147.

3 See M Bors, 'Wywłaszczenie pośrednie i postępujące a ochrona inwestora w świetle międzynarodowego prawa inwestycyjnego' [Indirect and Progressive Expropriation and Investor Protection in the Light of International Investment Law] (2014) Studia Iuridica Lublinensia vol. 21, 181–203.

4 S Litvinoff, 'Creeping expropriation' (1964) Revista Juridica de la Universidad de Puerto Rico 33(2), 222. See also BA Wortley, *Expropriation in Public International Law* (Cambridge University Press 1959) 107.

5 L Spataru-Negura, 'Special Considerations Regarding Indirect Expropriation in International Economic Law' (2017) Juridical Tribune 7(2), 125–126.

6 J-F Giacuzzo, 'Nouvelles précisions sur le régime constitutionnel des servitudes administratives' (2016) Constitutions vol. 1, 66–74.

the second situation is no longer so obvious. Kasznica was aware of the complexity of these issues, writing that "in contemporary legislation there is a tendency to limit property more and more – to put it more and more intensively into the public service".[7]

Nowadays, there is no longer much doubt that public law interference with the right to property is gradable, i.e. it can be more or less intense. Indeed, its depth determines the type of legal institution with which we are dealing. Legal systems based on the rule of law and a democratic state distinguish two types of such interference at the constitutional level: the first one is expropriation, whereas the second one is the restriction of individuals' rights and freedoms, including the right to property.

The limitation referred to above is expressed through the principle of proportionality, which, after the Second World War, became permanently embedded in universally ratified international agreements, both European and global,[8,9] in constitutions and in the global doctrine.[10] According to the principle of proportionality, it is permissible – in principle – to restrict individual rights and freedoms, including the right to property. However, this must be done in line with the principle of primacy of the law and in view of the values commonly accepted as fundamental to European legal orders. In the case of the Constitution of the Republic of Poland, these are public safety or order, protection of the environment, public health and morals and the freedoms and rights of other persons. Crucially, however, such limitations must not affect the essence of the right in question. This statement allows one to conclude that expropriation is an interference which violates the essence of the right to property, whereas the limitation of the right under Article 31(3) of the Constitution cannot exceed this limit.

Undoubtedly, an infringement of the essence of the right to property occurs in the case of expropriation *sensu stricto*, i.e. consisting in the deprivation of the right to property in favour of a public law entity, a local self-government unit or the State Treasury (Article 113, para. 1 of the A.G.N.[11]). On the other hand, it is much more difficult to indicate the difference between a restriction of the ownership right which complies with the principle of proportionality and one which violates its essence. The former case has been very well described by another prominent an outstanding scientist of the interwar period, M. Zimmermann, who concluded that:

> a restriction of the right to property, i.e. one which does not affect its essence, is effected by law and consists in the abrogation of a certain category of rights in general, in all those in whom it is found,

7 S Kasznica (1946) 156.

8 E.g. Article 10(2) or 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome [1950] OJ 61, 284.

9 See Article 22(2) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 [1977] OJ 38, 167.

10 In European jurisprudence, in line with the understanding developed by the German courts, there is a consensus that a proportionate regulation is one that fulfils three characteristics: usefulness, necessity and proportionality *sensu stricto* – *see e.g.* judgment of Federal Constitutional Court of 15 December 1965, BVerfGE 19 [1965], 342 (348-9), 55, 159 (165); see also G Stylianos-Loannis Koutnatzis, 'The Proportionality Principle in Greek Judicial Practice' (2016) Diritto & Questioni Pubbliche: Rivista di Filosofia del Diritto e Cultura Giuridica vol. 2, 205–224; B Schueler, 'Methods of Application of the Proportionality Principle in Environmental Law' (2008) Legal Issues of Economic Integration 35(3), 231–240; M Andreescu, 'Proportionality: A Constitutional Principle' (2010) Annales Universitatis Apulensis Series Jurisprudentia vol. 13, 8–19; D Derda, 'Principle of Proportionality in Administrative Adjudication' (2016) Zbornik Pravnog Fakulteta Sveucilista u Rijec vol. 1, 175–200; M Poto, 'The Principle of Proportionality in Comparative Perspective' (2007) German Law Journal 2007, no. 9(8), 835–870.

11 Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of 21 August 1997 on Real Estate Management] [2021] JoL 1899.

and is therefore of a general nature. Expropriation, on the other hand, consists in the taking away of an individual right, while preserving all other, equal rights.[12]

Thus, the violation of the essence of the right to property will no longer be its restriction, as referred to in Article 31(3) of the Constitution of the Republic of Poland or Article 64(3). From the point of view of the criterion of the obligation to compensate for damages caused to a property subject to public law interference, several types can be distinguished:

(1) expropriation – there is a compensation obligation;
(2) restriction that violates the essence of the property right – there is a duty to compensate;
(3) restriction of a general nature – there is no obligation to indemnify.

However, in order to determine the depth of the interference, it is sometimes necessary to analyse the sum of individual restrictions resulting from many normative acts.[13] It is therefore crucial when determining the scope of interference with the right to property to indicate what its essence is based on.[14] Although this task is not easy, sometimes it is even said that this criterion is too laconic and thus it significantly hinders the verifiability of legal acts establishing such restrictions,[15] it is possible to find certain directives in the legal system. Reference should be made here first of all to the Roman triad of proprietary powers (*ius possidendi*, *ius utendi* and *fruendi et abutendi and ius disponendi*). Here, the fundamental question becomes whether a violation of the essence of only one of these three attributes can have an expropriatory effect. This is because it happens many times that the owner can hold the property right and dispose of it, but cannot use it. Such situations are referred to as de facto expropriation,[16] and its most recognisable variety is planning expropriation.[17] The author advocates the position that restrictions preventing the use of the property have an expropriatory effect.

12 M Zimmermann, *Wywłaszczenie. Studium z dziedziny prawa publicznego* [Expropriation. Study in the Field of Public Law] (Towarzystwo Naukowe, Drukarnia Uniwersytetu Jagiellońskiego pod Zarządem J Filipowskiego 1933) 92.

13 Judgment of the Polish Constitutional Tribunal of 12 January 2000, P 11/98 (2000) OTK 3; see also resolution of the Polish Constitutional Tribunal of 2 March 1994, W. 3/93 (1994) OTK 17, part I, 159; judgment of the Polish Constitutional Tribunal of 12 January 1999, P 2/98, OTK 2, 21.

14 See L Garlicki, S Jarosz-Żukowska in L Garlicki, M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary] (Wydawnictwo Sejmowe 2016), commentary on art. 64 of the Constitution of the Republic of Poland, para 42–45.

15 F Zoll, 'Prawo własności w Europejskiej Konwencji Praw Człowieka z perspektywy polskiej' [Property Law in the European Convention on Human Rights from the Polish Perspective] (1988) Przegląd Sądowy vol. 5, 33.

16 See e.g. S. Pawłowski, *Modyfikacje klasycznej koncepcji wywłaszczenia, a gwarancje praw jednostki jednostki* [Modifications of the Classic Concept of Expropriation and Guarantees of Individual Rights] (Wydawnictwo Naukowe UAM 2018) 380 et seq.; P Ispas, 'Exproprierea de fapt' (2020) Pandectele Romane vol. 1, 70–79; P Ion, 'De Facto Expropriation – General Confusion of Romanian and the Strasbourg Court Decisions' (2016) Revista Universul Juridic vol. 7, 5–14; B Mladen, 'Actual (de facto) Expropriation on the Area of the City of Novi Sad' (2018) Zbornik Radova vol. 3, 1393–1410; A-I Opritoiu, 'Protection of the Right of Property and de Facto Expropriation According to the Jurisprudence of the European Court of Human Rights' (2012) International Conference Education and Creativity for a Knowledge-Based Society, 187–193, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229435> accessed 1 Feb 2023.

17 See M Gdesz, 'Wywłaszczenie planistyczne' [Planning Expropriation] (2014) Samorząd Terytorialny vol. 4, 51–61; for the first time on this issue, see the judgment of the ECHR 7151/75 [1982] HUDOC; for Poland see the judgment of the ECHR 52589/99 [2006] HUDOC; judgment of the ECHR 17373/02 [2007] HUDOC; judgment of the ECHR 38672/02 [2007] HUDOC; judgment of the ECHR 10446/03 [2008] HUDOC; judgment of the ECHR 38185/02 [2008] HUDOC and judgment of the ECHR 27480/02 [2010] HUDOC.

Kasznica, who distinguished a number of types of interference with the right to property, had no doubts about the gradualness of interference. These will be discussed in the paragraphs below.

3. Expropriation

The most far-reaching public law interference with the right to property is its subtraction, which in a lawful state takes place by means of expropriation. Kasznica devotes the most space in his lecture on administrative law to this method of legal subtraction of the right, although he mentions other types of violation of private property:

(1) destruction of an item deemed to be dangerous;
(2) confiscation of the objects of the offence;
(3) infliction of a legal injury triggering a compensation obligation;
(4) cases of overriding necessity.[18]

The above list should be supplemented with nationalisation, whose effects are similar to expropriation, but which is a significantly different institution. Expropriation affects the future, its purpose being to create new facilities serving the public interest, the public purpose must be detailed in a constitutive administrative act. Meanwhile, nationalisation serves to regulate the existing legal relations, in this sense it affects the past, and the transfer of ownership to the state is confirmed by a general act. As it takes place directly by force of law (*ex lege*), only a declaratory administrative decision is required.

Contemporary views are expressed that nationalisation in a democratic state under the rule of law is inadmissible, as a rule,[19] since there are other, less intrusive means of interfering with a property right of constitutional rank. One of these is expropriation. Nevertheless, in an exceptional situation it should not be completely excluded, it may even be an appropriate means of realising the common good.[20] At the same time, it should be noted that during Kasznica's career, nationalisation was regarded as one of the categories of expropriation,[21] and sometimes even as its synonym.

Probably also for this reason – i.e. the pejorative perception of the institution of expropriation, sometimes identified precisely with nationalisation – after independence was regained, in Article 99 of the March Constitution the phrases "abolition of property" or "right of compulsory purchase of land" were used instead of the term "expropriation". Nevertheless, Kasznica had no doubt that in these cases the legislature had expropriation in mind, which,

18 S Kasznica (1946) 150

19 L Cibulka, 'Własność i koncepcje jej ochrony w Konstytucji Republiki Słowackiej' [Property and Concepts of its Protection in the Constitution of the Slovak Republic] in K Skotnicki (ed), *Własność – zagadnienia ustrojowoprawne. Porównanie rozwiązań w państwach Europy Środkowo-Wschodniej* [Ownership – Constitutional and Legal Issues. Comparison of Solutions in Central and Eastern European Countries] (Łódzkie Towarzystwo Naukowe 2006) 149; K Osajda, *Nacjonalizacja i reprywatyzacja* [Nationalization and Reprivatization] (CH Beck 2009) 6; S Pawłowski, 'Wywłaszczenie z mocy prawa (ex lege) a nacjonalizacja – refleksje w przedmiot publicznoprawnych ingerencji w prawo własności' [Expropriation by Operation of Law (Ex Lege) and Nationalization – Reflections on the Subject of Public Law Interference in Property Rights] (2019) Ruch Prawniczy, Ekonomiczny i Socjologiczny vol. 1, 87–100.

20 See 'Niemcy planują znacjonalizowanie Gazpromu Germania' [Germany Plans to Nationalize Gazprom Germania] (2022), <https://www.bankier.pl/wiadomosc/Niemcy-planuja-znacjonalizowanie-Gazpromu-Germania-8410436.html> accessed 26 Sept 2022.

21 WL Jaworski, *Nauka prawa administracyjnego. Zagadnienia ogólne* [Learning Administrative Law. General Issues] (Instytut Wydawniczy "Bibljoteka Polska" 1924) 166–167.

according to the first sentence of this provision, could be used for reasons of higher necessity and with compensation.

In doing so, he divided expropriation law into substantive and formal law, which is not commonly done in the doctrine today, although it does occur. Substantive expropriation law is the legislation which indicates the specific purposes for which expropriation may be carried out. The contemporary expression of this division is Article 6 of the Act on Land, in which the legislature decided to collect the majority of undertakings that justify expropriation. At the same time, Kasznica pointed out that the substantive provisions are contained in numerous legal acts.[22] Due to the reference in Art. 6(10) of the A.G.N., this principle also applies today, and public purposes are indicated in other acts in parallel to the said article.[23] Formal expropriation law, on the other hand, includes provisions regulating expropriation proceedings.

In the interwar period of the 20th century, the subject of expropriation was understood differently in the *lex generalis* than it is today. This is because nowadays, according to Article 112(2) of the A.G.N., it refers only to rights on real estate, whereas the Law on Expropriation Proceedings of 1934[24] took a much broader view of this issue. According to Article 2, expropriation was

(1) seizure of movable property – deduction of ownership of materials necessary for the construction of facilities for the defence of the State, land and waterways and railways
(2) temporary occupation of real estate.

Such a broad understanding of expropriation is also presented by Kasznica. It should be added that the above enumeration still provokes discussion on the essence of expropriation, because the Constitution of the Republic of Poland of 1997 does not provide for expropriation of the ownership right, or any other limited right on real estate, as the Act on Real Estate Management does, but for expropriation of of law in general. Thus, the contemporary constitutional concept of expropriation also goes beyond public law interference relating exclusively to real estate.[25] An important question is whether expropriation can be applied to all material rights, including e.g. the right to CO^2, and whether it can violate personal rights,[26] including *pretium affectionis*.[27]

However, what was very important for Kasznica was that expropriation was undoubtedly not only

22 S Kasznica (1946) 151.

23 See Article 4 of the ustawa z dnia 2 grudnia 2021 r. o wsparciu przygotowania III Igrzysk Europejskich w 2023 r. [Act of 2 December 2021 on Support for the Preparation of the 3rd European Games in 2023] [2022] JoL 1550 as amended; Article 3 of the ustawa z dnia 29 czerwca 2011 r. o przygotowaniu i realizacji inwestycji w zakresie obiektów energetyki jądrowej oraz inwestycji towarzyszących [Act of 29 June 2011 on the Preparation and Implementation of Investments in Nuclear Energy Facilities and Accompanying Investments] [2021] JoL 1484 as amended, or Article 3(2) of the ustawa z dnia 29 października 2021 r. o budowie zabezpieczenia granicy państwowej [Act of 29 October 2021 on the Construction of State Border Security] [2021] JoL 1992 as amended.

24 Rozporządzenie Prezydenta Rzeczypospolitej z dnia 24 września 1934 r. – Prawo o postępowaniu wywłaszczeniowym [Regulation of the President of the Republic of Poland of 24 September 1934 – Law on Expropriation Proceedings] [1934] JoL 86, 776 as amended.

25 L Garlicki, M Zubik in L Garlicki, M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary] (Wydawnictwo Sejmowe 2016) commentary on art. 21 of the Constitution of the Republic of Poland para 15; M Szalewska, *Wywłaszczenie nieruchomości* [Expropriation of Real Estate] (TNOiK "Dom Organizatora" 2005) 125.

26 See judgment of the ECHR 46044/99 [2003] HUDOC.

27 Article 47 of the Spanish law on compulsory expropriation (Ley de 16 de diciembre de 1954 sobre expropiación forzosa [The Spanish Expropriation Law of 16 December 1954] [1954] BOE 351) provides for a bonus of 5% for emotional damages (*como premio de afección*), quoted by M Gdesz, 'Zasada korzyści w prawie wywłaszczeniowym' [The principle of Benefit in Expropriation Law] (2022) Zeszyty Naukowe Sądownictwa Administracyjnego 1(100), 47.

a subtraction of a right (*sensu stricto* understanding), but also its restriction (*sensu largo* understanding), which had to manifest particular features. Due to the wording of Art. 2(1) of the Law on Expropriation Proceedings of 1934, it was further specified as a temporary or permanent restriction of rights *in rem* on real estate. This position is particularly important today for the reason that, despite the literal wording of Article 112(2) of the A.G.N., the existence of the so-called "expropriation by restriction" is often overlooked,[28] also by the judicature.[29] Of course, the correct positions also appear, and Articles 124–126 of the A.G.N. are sometimes referred to as "small expropriation" or a special type of expropriation.[30] In the legal scholarship, in addition to views that do not perceive this dualism, there is also a strong current that *accentuates* this complexity, with the clarification that this is an expropriation that violates the essence of the property right (expropriation *sensu largo*),[31] and therefore is not the kind of restriction referred to in Article 31(3) of the Constitution of the Republic of Poland. The complexity of such limitations and their perception through the lens of expropriation are present in other legal systems. Here, it is worth pointing to the solution adopted in the Swiss Constitution, where Article 26(2) explicitly states that "[e]xpropriations and restrictions on property that amount to expropriation shall be fully compensated".[32]

Kasznica also advocates the view that whilst in certain circumstances an individual (private law subject) cannot protect themselves from expropriation, the overall value of their property should not be reduced. This position corresponds to the considerations of Zimmermann that whilst the ownership of a thing can be taken away, its value cannot be taken away.[33] In his view, the rules of equity and equality require that the material damages caused should be "as fully compensated as possible".[34] In doing so, he refers to the concept of a special sacrifice in favour of the public interest, a concept strongly present today in French legal culture.[35] A reflection of these views can be seen in the initial jurisprudence of the Constitutional Court after the political transformation, in which it was strongly emphasised that the constitutional "just" compensation of Article 21(2), was compensation that allows for the restoration of the thing taken,[36] full,[37] and equivalent.[38] Unfortunately, this line of jurisprudence became relativised in subsequent years.[39]

28 E.g. K Tomaszewski states that "[t]he restriction of the ownership right to real estate under Article 124 of the Act on Real Estate Management is an independent administrative law institution which does not have legal consequences either with regard to the expropriation of real estate or with regard to the creation of rights in rem to the land (K Tomaszewski, 'Charakter prawny ograniczenia prawa własności nieruchomości, określonego w art. 124 ustawy o gospodarce nieruchomościami' [The Legal Nature of the Restriction of Ownership of Real Estate, Specified in Art. 124 of the Real Estate Management Act] Rejent vol. 4, 108.

29 E.g. the judgment of the Regional Administrative Court in Olsztyn II SA/Ol 408/22 [2022] Lex 3406394 or the judgment of the Supreme Administrative Court I OSK 2980/19 [2022] Lex 3349608.

30 Judgment of the Court of Appeal in Warsaw VI ACa 1218/13 [2014] Lex 1483875.

31 See S Pawłowski (2018) 117, 138, 680; Z Leoński, M Szewczyk, M Kruś, *Prawo zagospodarowania przestrzeni* [Space Development Law] (Wolters Kluwers 2019) 661.

32 Z Czeszejko-Sochacki (ed), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r.* [Federal Constitution of the Swiss Confederation of 1999] (Temida 2000).

33 M Zimmermann (1933) 82–98.

34 S Kasznica (1946) 152.

35 See also F Fleiner, *Institutionen des deutschen Verwaltungsrechtes* (Mohr Siebeck 1928) 308 et seq.; O Mayer, *Deutsches Verwaltung* (Duncker & Humblot 1986) 3, <http://www.deutschestextarchiv.de/book/view/mayer_verwaltungsrecht02_1896?p=15> accessed 26 Sept 2022.

36 Judgment of the Polish Constitutional Tribunal of 8 May 1990, K 1/90 (1990) OTK 2.

37 Judgment of the Polish Constitutional Tribunal of 19 June 1990, K 2/90 (1990) OTK 3.

38 Judgment of the Polish Constitutional Tribunal of 14 March 2000, P 5/99 (2000) OTK 60.

39 See judgments of the Polish Constitutional Tribunal of 20 July 2004, SK 11/02 (2004) OTK-A 66; of 15 September 2009, P 33/07 (2009) OTK-A 123; of 16 October 2012, K 4/10 (2012) OTK-A 106 and others.

4. Restrictions on the right to property not requiring compensation

Kasznica, like Zimmermann, was aware that the right to property is not an absolute right (*ius infinitum*),[40] on the contrary, as mentioned above, it was obvious to him that it would be increasingly harnessed to the public service. If restrictions on this right were to follow by law, they would be of a general nature, shaping the content of the right to property. In such a case, the obligation to compensate would not materialise, as the principle of equality before the law – or as stated in Article 32(1) of the Polish Constitution, equal treatment by public authorities – would not be violated. As Kasznica directly pointed out, referring to Article 99 of the March Constitution,[41] the free use of land, mineral waters and other "treasures" of nature may be subject to limitations – this is a reference to statutory limitations[42] – and not through acts of law application. He also gave a number of examples of such restrictions: in particular, those under agrarian laws, water laws or mining laws. Consequently, he argued that "whoever acquires and holds such property possesses and acquires it already encumbered by these restrictions, with the *reduction* of its content in advance".[43]

The relevance of the above theses is not in doubt today. Firstly, a similar understanding is contained in the current Constitution of the Republic of Poland, and it is generally expressed in Article 64(3), which is a kind of development of its Article 31(3). It deals exclusively with restrictions on the use of real estate and not on its possession or disposal. However, just after the political transformation, in its ruling of 28 May 1991 the Constitutional Tribunal – on the basis of the new system of values – stated that due to their essence, purpose and social sense, certain limitations of the right to property do not always require compensation and, in fact, the owners of the affected property are not always compensated.[44] Indeed, the above-mentioned restrictions include such obligations of the owner that could be qualified as arising from the social function of property,[45] in particular the Law on the Protection of Monuments.[46] This knowledge has been developed subsequently. It is worth pointing out the position of the Constitutional Tribunal of 30 January 2001, which states that "not every influence of the legislature on the property situation of an individual is tantamount to interference in the sphere of property rights. It is not interference in the sphere of the right to property (it is not a restriction of property within the meaning of Article 64, paragraph 3) to oblige relevant entities to bear certain public burdens (tributes) for public purposes".[47] Furthermore, restrictions on the right to property must comply with the principle of proportionality.[48]

40 It is also appropriate to mention that such a right has never been in place.

41 Ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej [Act of 17 March 1921 – Constitution of the Republic of Poland] [1921] JoL 44, 267.

42 S Kasznica (1946) 155.

43 Ibid.

44 Judgment of the Polish Constitutional Tribunal of 28 May 1991, K 1/91 (1991) OTK 4; this theme is strongly present in the German doctrine, which holds that the greater power the legislature has to shape and interfere with property rights, including the imposition of restrictions, the more the right in question fulfils social functions – D Hesselberger, *Das Grundgesetz. Kommentar für politische Bildung* (Hermann Luchterhand Verlag 2001) 153.

45 L Garlicki, S Jarosz-Żukowska (2016) commentary on art. 32 of the Constitution of the Republic of Poland para 37.

46 See the judgment of the Polish Constitutional Tribunal of 8 October 2007, K 20/07 (2007) OTK-A 102.

47 Judgment of the Polish Constitutional Tribunal of 30 January 2001, K 17/00 (2001) OTK 4.

48 In its judgment of 8 October 2015, SK 11/13 (2015) OTK-A 144, paragraph III.4.6), the Constitutional Tribunal held that "the finding of an infringement of the principle of proportionality, resulting from Article 31(3) of the

The validity of Stanisław Kasznica's position is confirmed today not only by judicial opinions, as cited above, but also by legislative measures. The Act of 23 July 2003 on the Protection and Care of Historical Monuments, specifically its chapter III, outlines numerous obligations for owners of buildings recognised as historical monuments, which influence how ownership rights are exercised. Article 25 meticulously regulates issues related to the use of such properties, including the requirement to coordinate conservation works with the voivodeship conservator of monuments. It also mandates the agreement on the development programme for the monument and its surroundings and its future use, whilst considering its significant value. Additionally, such buildings may be subject to conservation recommendations.

Alongside these substantial obligations, there are less burdensome ones. Specifically, the owner or possessor of an immovable monument or a property possessing the characteristics of a monument must allow access for research purposes, thereby tolerating the presence of third parties on the monument's site. In cases of refusal, the law permits the issuance of a binding order for such conduct through an administrative decision. Furthermore, Article 36 of the Act on the Protection of Monuments exemplifies administrative regulation by listing activities that require the voivodeship conservator's permission, with a mandate that research and works be carried out by qualified individuals. If these obligations are violated, an order can be issued to restore the monument or its surroundings to their previous state.

Another instance of regulating the exercise of ownership rights that does not warrant compensation is the restrictions on constructing large commercial facilities, as established by the Act of 27 March 2003 on Spatial Planning and Development (u.p.z.p).[49] Such a restriction is all the more justified because, as the TK stated, it may be justified by the need to protect other constitutional values, particularly public order, state security, the environment and cultural heritage.[50] The way that the right to property in the u.p.z.p. is exercised is also shaped in many other areas, starting with the possibility to determine the purpose of the land by indicating the admissibility of its development, including the maximum and minimum level of development as the ratio of the total developed area in relation to the total area of the building plot,[51] the minimum percentage of minimum biologically active surface, the maximum height of structure, the lines of the development and the size of the objects,[52] down to the minimum number of parking spaces[53] (Article 15(2)(6) of the u.p.z.p.).[54] One should consider whether the ban on

Constitution, means at the same time that there has been an infringement of the general guarantee of protection of property rights, i.e. Article 64(1) of the Constitution". See also the judgment of the Polish Constitutional Tribunal of 1 July 2014, SK 6/12 (2014) OTK-A 68); the judgment of the Polish Constitutional Tribunal of 29 July 2013, SK 12/12 (2013) OTK-A 87.

49 Articles 10(3a) and 15(2a) of the ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym [Act of 27 March 2003 on Spatial Planning and Development] [2003] JoL 80, 717. See also R Krupa-Dąbrowska, 'Nie wszędzie będzie budowany supermarket' [Not Everywhere a Supermarket Will be Built] (2015) Rzeczpospolita vol. 11, 10.

50 Judgment of the Polish Constitutional Tribunal of 7 February 2001, K 27/00 (2001) OTK 29, para III.7.

51 See judgment of the Regional Administrative Court in Poznań II SA/Po 954/05 [2006] Lex 448123.

52 See judgment of the Regional Administrative Court in Szczecin SA/Sz 447/18 [2018] Lex 2563773.

53 Judgment of the Regional Administrative Court in Rzeszów II SA/Rz 523/17 [2017] Lex 2359631.

54 See P Burski, 'Doprecyzowanie pojęcia powierzchni całkowitej zabudowy przez organ planistyczny w świetle orzecznictwa sądów administracyjnych i rozstrzygnięć nadzorczych' [Clarification of the Concept of Total Development Area by the Planning Authority in the Light of the Jurisprudence of Administrative Courts and Supervisory Decisions] (2017) Public Law Review vol. 6, 73–81.

erecting fences introduced by so-called advertising (landscape) resolutions falls within this set.[55] However, the above-mentioned restrictions are established by local laws in the formal sense, i.e. not "by means of a statute" as provided for in Article 64(3) of the Constitution of the Republic of Poland, but on the basis thereof.

Many restrictions of a differential nature various the way in which property rights are exercised relate to land that borders public waters and the use of the water itself, which are regulated by the Act of 20 July 2017 – Water Law (u.P.w.)[56]. These restrictions or orders do not always derive directly from the Act, but often require its concretisation by means of an administrative decision is an example of the concretization of a law. This is the case with the order to remove trees or bushes in order to ensure the flow of flood waters in areas of special flood hazard (Article 175), the prohibition against works or activities affecting the tightness or stability of flood embankments (e.g. driving over embankments, cultivating the land or constructing facilities) (Article 176) or the order to remove trees or bushes in order to ensure the flow of flood waters in areas of special flood hazard (Article 176). In all of these cases, the legislature explicitly prohibits works or activities that affect the integrity or stability of flood control features (e.g. driving over embankments, cultivating the land or building on it) (Article 176) or imposes a temporary ban on driving on an embankment if there are statutorily defined circumstances (Article 177). In all of these cases, the legislature explicitly stipulates that no compensation is payable for damages resulting from the relevant decisions. Nonetheless, these restrictions directly follow from the Act and establish obligations to act on an ongoing basis or to refrain from certain activities (334 point 6, Art. 410(2) u.P.w.).

Similarly, the administrative law regime of nature and environmental protection also generates many restrictions. For example, the Act of 27 April 2001 – Environmental Protection Law provides the basis for the enactment of the so-called anti-smog law, empowering the provincial assembly to introduce restrictions or bans on the operation of facilities at which fuels are burnt (Art. 96).[57] This is part of the broader issue of Air Protection Programmes, also regulated by this Act. In this respect, the possibility of establishing Clean Transport Zones has recently been introduced into Polish law,[58] which are also not connected with an obligation for compensation. On the other hand, many more restrictions that shape the way the ownership right is exercised have been introduced by the Act of 16 April 2004 on nature protection (u.o.p.),[59] i.e. establishing areas for natural protection, referred to in Article 6 of this Act. For example, Article 15 of the u.o.p. introduces a number of prohibitions applicable to national parks and nature reserves.[60] Particularly vivid examples, but with regard to landscape parks, are the prohibition of building new structures within 100 m of the shoreline of rivers, lakes and other natural water reservoirs

55 See T Bąkowski, 'Wywłaszczenie krajobrazowe' [Landscape Expropriation] (2019) Nieruchomości@ vol. 2, 48.

56 Ustawa z dnia 20 lipca 2017 r. Prawo wodne [Act of 20 July 2017 Water Law] [2021] JoL 2233.

57 See P Zacharczuk, 'Administracyjnoprawne aspekty ograniczania emisji zanieczyszczeń do powietrza pochodzących z eksploatacji instalacji spalania paliw stałych w budynkach mieszkalnych' [Administrative and Legal Aspects of Reducing Air Pollutant Emissions from the Operation of Solid Fuel Combustion Installations in Residential Buildings] (2017) Studia Prawnicze KUL vol. 1, 153–178.

58 Articles 39–40 of the ustawa z dnia 11 stycznia 2018 r. o elektromobilności i paliwach alternatywnych [Act of 11 January 2018 on Electromobility and Alternative Fuels] [2022] JoL 1083.

59 Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody [Act of 16 April 2004 on Nature Protection] [2022] JoL 916.

60 See also Article 17 u.o.p.; K Czajkowska-Matosiuk, 'Realizacja inwestycji budowlanych a utrudnienia wynikające z prawa ochrony przyrody i prawa wodnego' [Implementation of Construction Investments and Difficulties Resulting from Nature Protection Law and Water Law] (2014) Prawo i Środowisko vol. 3, 88–99.

or the extent of the water surface in artificial water reservoirs situated on flowing waters at the normal level of accumulation specified in the water permit – with the exception of structures serving water tourism, water management or fishing (Art. 17(1)(7) u.o.p.) – or the prohibition of locating buildings within 200 m of the edge of cliff shores and in the technical strip of the sea shore (Article 17(1)(8) u.o.p.). Such prohibitions are also indicated in the Act with regard to other forms of nature preservation.[61] It is also worth quoting Article 119 of the u.o.p., which prohibits in the vicinity of the sea, lakes and other water reservoirs, rivers and canals the erection of construction facilities preventing or hindering human and wild animal access to water, with the exception of facilities serving water tourism, water management or fishing and those related to general security and national defence.

Some of the above restrictions are classified by Kasznica as statutory or administrative easements, the essence of which is the encumbrance of various types of property. In this case, he is probably referring to those situations in which there is a prohibition of using it "in a certain direction"[62], i.e. refraining from certain actions.

Finally, limitations of the right to property are introduced by the Civil Code, which provides in its Article 140 that it may be used only in accordance with its social and economic purpose, but also within the limits specified by law and the principles of social co-existence. Also, the Neighbourhood Law constitutes an example of regulations limiting the right to property, though they do not entail the obligation to compensate for such limitations, as long as they do not exceed the so-called "average measure" (Article 144 of the Civil Code).

5. Restrictions on property rights requiring compensation

Contemporary commentators on Article 64 of the Constitution of the Republic of Poland express the view that in the case of "more severe limitations, the lack of compensation would be in contradiction with the principle of proportionality, thus preventing the proper balancing of public interest and individual interest". At the same time, the jurisprudence of the Constitutional Tribunal presents the view that "the legitimacy of the existence of mere limitations on property rights[63] cannot justify the owner bearing their burden to a predominant extent."[64] A similar position is also presented in French doctrine and jurisprudence, where it is stated that restrictions on the right to property cannot lead to the "degeneration of the right to property" (*dénaturer le droit de propriété*), the deprivation of this right of content (*vider de son contenu*) or the imposition of an "unbearable burden" (*une gene non supportable*) on the owner.[65] The national constitutional courts cite as an example of undue interference the situation of a so-called "land freeze", allocating private property for public purposes without proceeding to formal acquisition. In this case, moreover, as early as 1984, the ECtHR expressed its negative position on such a practice and

61 E.g. Articles 24, 33, 51, 52 u.o.p.; see also W Radecki, *Prawna ochrona przyrody w Polsce, Czechach i Słowacji* [Legal Protection of Nature in Poland, the Czech Republic and Slovakia] (Wolters Kluwer 2010).

62 S Kasznica (1946) 155.

63 L Garlicki, S Jarosz-Żukowska (2016) commentary on art. 64 of the Constitution of the Republic of Poland para 41.

64 See judgment of the Polish Constitutional Tribunal of 8 October 2007, K 20/07 (2007) OTK-A 102, para III.6; see also judgment of the Polish Constitutional Tribunal of 18 December 2014, K 50/13 (2014) OTK-A 121, para III.3.1.3 and 3.2.4.

65 See e.g. decision of the Constitutional Council rulings of 13 December 1985 [1985] 85-198 DC and decision of the Constitutional Council rulings of 9 April 1996 [1996] 96-373 DC, no. 22. See also L Favoreu, L Philip, *Les grandes decisions du Conseil constitutionnel* (Editions Dalloz 1997) 477–478.

described it as de facto expropriation.[66] The benchmark for the compensation mechanism in the case of particularly severe interference with the exercise of the right to property should be related to the expropriation of the right and not its restriction. This indicates that the line between the depth of interference, here between expropriation by restriction and proportional restriction, may be difficult to grasp. It should therefore be emphasised that in expropriation, the essence of the right to property is violated, which cannot occur in the case of a constitutionally permissible restriction, which must be proportionate. As rightly stated by Dybowski, "statutory provisions cannot nullify the basic rights constituting the content of the right to property",[67] i.e. the right to possess, use and dispose of it.

Examples of restrictions on the exercise of ownership rights that warrant compensation include orders, prohibitions and limitations on land and water use resulting from the protection of water intakes and inland water bodies through the establishment of protection zones and areas. Protection zones are established by a decision of the relevant authority of the Polish Water Authority, whilst protection areas are created by a local law issued by the provincial governor, as stipulated in Article 135 of the Act on the Protection of Inland Waters. Additionally, protection areas are designated by the voivode through a local law at the request of the Polish Waters. Article 142 u.P.w. explicitly provides that damages incurred due to these measures are subject to compensation, according to the principles outlined in Article 471 u.P.w. Compensation is also applicable when the owner is subjected to prohibitions under Article 192(1) u.P.w., particularly those that prevent impeding the flow of water due to the construction or maintenance of water facilities or activities affecting such facilities.

Furthermore, in cases involving the construction of water reclamation facilities under the procedure referred to in Article 199(2) u.P.w., the landowner is entitled to compensation for any damages caused during the works on these facilities. Compensation for actual damages is also due to the owner of real property adjacent to public inland surface waters, who is obliged to allow access to the waters for maintenance works and for setting navigational signs or hydrological and meteorological measuring devices (Article 233(4)).[68] They are also owed for damages incurred in connection with the construction of state measuring devices and the imposition of prohibitions, orders or restrictions on land use or water use in the protection zone of state measuring devices (Article 382(9) u.P.w.).

66 Judgment of the ECHR 7151/75 [1982] HUDOC; S Jarosz-Żukowska, 'Wywłaszczenie faktyczne w orzecznictwie europejskiego trybunału praw człowieka' [De Facto Expropriation in the Jurisprudence of the European Court of Human Rights] in A Bator, M Jabłoński, M Maciejewski, K Wójtowicz (eds), *Współczesne koncepcje ochrony wolności i praw podstawowych* [Contemporary Concepts of Protection of Freedom and Fundamental Rights] (Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2013) 83–99, <https://www.bibliotekacyfrowa.pl/dlibra/publication/42457/edition/43827?language=pl> accessed 26 Sept 2022.

67 T Dybowski, 'Własność w przepisach konstytucyjnych wedle stanu obowiązywania w 1996 r.' [Property in Constitutional Provisions as in force in 1996] in A Jankiewicz, J Trzciński (eds), *Konstytucja i gwarancje jej przestrzegania, Księga pamiątkowa ku czci Prof. Janiny Zakrzewskiej* [Constitution and Guarantees of its Observance, Commemorative Book in Honor of Prof. Janina Zakrzewska] (Wydawnictwa Trybunału Konstytucyjnego 1996) 321.

68 In the judgment of the Regional Administrative Court in Gdańsk III SA/Gd 857/19 [2020] Lex 2939056, it was argued, inter alia, that "[t]he entity notifying the lack of access to water is not a party within the meaning of Article 28 of the Code of Administrative Procedure and cannot determine in a binding manner the plots of land where this access will take place, i.e. in accordance with its factual interest. Indeed, it is only the administrative body acting ex officio guided by the principle of universal use of water and the public good that is competent to designate specific plots of land providing access to water".

The Act on the Protection and Care of Monuments also includes a provision based on which the compensation obligation is updated directly by virtue of the Act. This happens when damage is caused as a result of making an immovable monument or property with the features of a monument available for the purpose of *in situ* conservation research (Article 29(3) and Article 30(3)). It is worth noting that their compensation is full, as it takes place according to the principles specified in the Civil Code. In turn, Article 46(1) of the Act of 13 October 1995 – Hunting Law[69] provides for compensation for damage to crops caused by wild boar, elk, deer, fallow deer and roe deer, as well as during hunting. A similar regulation is contained in the u.o.p., whose Article 126 regulates the issues of liability for damage caused by wild animals, particularly bison, wolves, lynx, bears and beavers.

Notwithstanding the above, it should be noted that in the legal system it is possible to decode a certain general premise of compensatory liability, which is related to the conferment of a public law regime on specific land, which is most often associated with the enactment of the applicable local law. It is formulated so that the use of the real property or a part thereof in the previous manner or in compliance with the previous purpose becomes impossible or is significantly restricted (Articles 27a, 36(1), 472, 129 and 18(3) of the Act on the Public Use of Land). In the indicated cases, there may be a justified assumption that these restrictions infringe the essence of the right to property, taking the form of *de facto* expropriations. Thus, it would be advisable to examine *casu ad casum* the depth of this interference and the effects caused by it. As it is rightly pointed out in the case law of the planning authority, "a local plan, by introducing specific conditions for the development of land and restrictions on its use, including the prohibition of development, directly modifies the right to property in the areas where these specific rules, restrictions and prohibitions are to be applied".[70] The scope of these modifications is gradual and not rigidly indicated in the Act.

All this makes the correct use and understanding of the notion of "restriction" and its dual nature, as well as distinguishing whether it is referred to in the context of the principle of proportionality or expropriations *sensu largo*, a difficult task. In the judicature, there are also such positions that the notion of restricting property may also be "exceptionally referred to the provisions which allow, under certain conditions, the deprivation of property, wholly or in part". Such positions can hardly be regarded as appropriate.[71]

6. Conclusions

Stanisław Kasznica's analysis of interwar Poland's legislation concerning public law interference in property rights – legislation that was in force over a century ago – remains relevant for evaluating contemporary legal systems based on the rule of law and the principle of equality before the law. Although the considerations in this study primarily pertain to the Polish legal system, the concept of a democratic state governed by law is a common thread across European legal systems. Consequently, the thesis concerning the gradation of state interference in property rights remains applicable.

As Kasznica aptly noted, such interference may, in extreme cases, take the form of expropria-

69 Ustawa z dnia 13 października 1995 r. Prawo łowieckie [Act of 13 October 1995 Hunting Law] [2022] JoL 1173.

70 See the judgment of the Supreme Administrative Court II OSK 175/16 [2017] Lex 2328678.

71 See e.g. judgment of the Polish Constitutional Tribunal of 25 May 1999, SK 9/98 (1999) OTK 78, or the abovementioned judgment of the Polish Constitutional Tribunal of 8 October 2007K 20/07.

tion *sensu stricto* – and in rare cases, nationalisation. More subtle and often harder to identify are instances of interference that violate the essence of property rights by preventing or "freezing" the ability to use a property – this is referred to as expropriation *sensu largo*, or expropriation by restriction. The difficulty in legally characterising such interference, as well as the legislative tendency to avoid labelling these restrictions as expropriation, both complicate this issue. Nevertheless, the perspective that property rights are increasingly subordinated to public service remains valid. Depending on the degree of interference, this may necessitate compensation or be viewed as a regulation of property rights that is equal for all and, at least formally, non-damaging.

In conclusion, a notable trend in Polish legislation is the introduction of property right limitations not directly through statutes but through statutory authorisations, allowing for such limitations to be imposed via acts of local law: locally binding general regulations.[72] Although from a pragmatic point of view this seems reasonable, it is not necessarily in compliance with Article 64(3) of the Constitution of the Republic of Poland, which states that "property may be restricted only by way of a law". This issue has still not been clearly settled in the doctrine.

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72 See Articles 87(2) and 94 of the Polish Constitution.

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