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## LEGAL INSTITUTIONS SECURING SOCIALLY RECOGNISED RIGHTS OF THE SUBJECTS PARTICIPATING IN LEGAL TRANSACTIONS, BASED ON THE EXAMPLE OF LEGITIMATE EXPECTATIVE

### ABSTRACT

The article “Legal Institutions Securing Socially Recognised Rights of the Subjects Participating in Legal Transactions, Based on the Example of Legitimate Expectative” sheds light on the concept of legitimate expectative as a separate right. It gives arguments in favor of qualifying this type of right as legitimate since it protects legally important issues connected with the transactions undertaken by the participants of the market.

The article also draws attention to the decisions of the international tribunals and the European legislatures that grant the position of the legitimate expectative in the general system of law. Coined by the German doctrine of law under the names: *Anwartschaft*, *Wartenrecht* and *Zwischenrecht*, the notion of expectative becomes widely recognised in other European countries, also in Poland, which is highlighted in the text. The protection of the said right in the Polish law system is mainly guaranteed by the Polish Constitutional Tribunal, in the described in the article decisions of 1989, 1993 and 1996.

The topic of the article is not only the analysis of the said right of expectative but it also aims at a more general issue which is the creation of the new rights in

very traditional civil law systems, especially in the Polish one. The summary of the analysis shown in the article leads to the conclusion that new rights and regulations are necessary, and the source of them should stem from the needs of the society, not the needs of the state.

**KEYWORDS:** *expectative, Anwartschaft, Wartenrecht, Zwischenrecht, temporary legal rights, target rights*

Last century in some European countries we could observe an appearance of a legal institution, which has a fairly stable position now, called legitimate expectative. The institution in question found a particularly breeding ground in German law. However, other European Union countries, including Poland, have also accepted it, which can be seen in constitutional protection of this law. In the doctrine of Polish civil law it was firstly explained, developed and presented by Karol Gandor in the paper *Prawa Podmiotowe Tymczasowe (Ekspektatywy)* [Temporary Legal Rights (Expectatives)] in 1968<sup>1</sup>. He based his work on terms coined by the doctrine of German law *Anwartschaft*, *Wartenrecht* and *Zwischenrecht*, which have been used in German civil law since the 1960s.<sup>2</sup> The existence of expectative as a separate temporary law comes from the 2nd protocol of European Human Rights Convention<sup>3</sup>, which protects, above all, property rights (possessions), including the so-called legitimate expectations, translated into Polish by Michał Jackowski as “uprawnione oczekiwania”<sup>4</sup>.

Although it has been widely criticised in Poland<sup>5</sup>, the fact that expectative is protected by the constitution is a strong argument in favour of honouring this legal institution. The Polish Constitutional Tribunal acknowledged expectative as a law under protection which can be seen in verdicts of the Polish Constitutional Tribunal from 4th Oct. 1989<sup>6</sup>, 1st June 1993<sup>7</sup> and 3rd

<sup>1</sup> Zakład Narodowy Im. Ossolińskich – publishing house, Wrocław – Warszawa – Kraków.

<sup>2</sup> J. Kuropatwiński, *Ekspektatywa powstania wierzytelności w polskim prawie cywilnym*, Oficyna Wydawnicza Branta, Bydgoszcz, 2006, p. 15.

<sup>3</sup> Protocol no 1 and no 4 of Convention for the Protection of Human Rights and Fundamental Freedoms, formed in Paris on 20/03/1952 and in Strasbourg on 16/09/1963, Journal of Laws 36/1995, point 175 with amendments.

<sup>4</sup> M. Jackowski, *Ekspektatywa jako przedmiot ochrony konstytucyjnej*, p.93-101, 20/11/2018 11:34 (access 27/01/2019, 14:07) Available online: <https://sip.lex.pl/#/publication/151059148>.

<sup>5</sup> A. Brzozowski, W. J. Kocot, E. Skowrońska-Bocian, *Prawo Cywilne. Część Ogólna*, 4. Ed. Wolters Kluwer, Warszawa 2018, p. 242.

<sup>6</sup> K 3/88, LEX no 25153.

<sup>7</sup> P 2/92, LEX no 25448.

Dec. 1996<sup>8</sup>. It is worth to point out that none of the above Tribunal's decisions would have acknowledged the protection of expectative if it had not been based on legitimate person's interest.

However, having said that, it needs to be pointed out that the creation of new civil institutions on the grounds of statutory law systems is much more difficult than in the system of *common law*. Statutory law system does not, generally allow the participants of legal transactions to form new legal conventions even if they are necessary and desirable... Therefore, it seems advisable, that we should exceed the limits of somewhat rigid civil law, which rather reluctantly allows to create new legal institutions (as confirmed by the words of Małgorzata Pyziak-Szafnicka that "*civilists are restrained in creating new legal rights*"<sup>9</sup>), as it was the social needs that it stems from. Also today it is not a strange rule that "*(...) law is for people, and not people for law, it has to be adapted to the characteristics, habits and situation of the society.*", which was already obvious in the Napoleonic times<sup>10</sup>. Thus, the tendency in the rulings of Tribunals should be welcomed enthusiastically as it means putting person's needs over "national interest" expressed in too rigid legislative framework.

If we wish to define the expectative, we can refer to one of the definitions construed by one of the representatives of the doctrine – Krzysztof Ślebzak, who writes that "*It is a temporary legal right characterised most of all by the existence of the interest awaiting to protect the winning of a specific target right, due to an advanced stage of acquiring the said right*"<sup>11</sup>. A more general definition of the right is presented by Witold Borysiak, who states that: "*Expectative in the broad sense (German Anwartschaft) relates to a factual situation in which at least one of a few preconditions necessary to acquire a legal right has been satisfied, and at least one other has not. The other concept refers to only so-called temporary legal right, also known as "fully mature expectative", in German law Anwartschaftsrecht*

<sup>8</sup> K 25/95, LEX no 28652.

<sup>9</sup> M. Pyziak-Szafnicka, Chapter 7. Prawa i wolności konstytucyjne a prawa podmiotowe prawa cywilnego. Przydatność konstrukcji prawa podmiotowego [in:] *Aksjologia prawa cywilnego i cywilnoprawna ochroną dóbr*. J. Pisuliński (ed.), J. Zawadzka (ed.), C.H. Beck Publishing House, Warszawa, 2020, p. 119;

<sup>10</sup> P. A. Fenet, *Recueil complet des travaux préparatoires du Code Civil, Paris, 1861 vol. I*, p. 462 i n.

<sup>11</sup> K. Ślebzak, *Działanie prawa intertemporalnego na ekspektatywę prawa a nabycie prawa in abstracto* [online]. Zeszyty Naukowe Sądownictwa Administracyjnego, 2015, no 2. p. 58-76, 2019-08-15 16:48 [access: 2019-09-10 21:19]. Available online: <https://sip.lex.pl/#/publication/151248202>.

and in French law *le droit éventuel*”<sup>12</sup>. Another definition in Polish doctrine of law was formed by Stanisław Rudnicki: “*Expectative in the juridical sense means legal awaiting in the temporality of the person’s legal situation, which leads to the creation of legal right when the missing element stated in the legal principle occurs. Although differently understood it is an accepted by the judicature doctrinal construction, whose function is to protect the aforementioned legal situation in order to secure the law to be created.*”<sup>13</sup> And Zbigniew Radwański has noticed in his considerations of the matter that the awaiting of the person endowed with a right for the creation of the target right is under the statutory protection.<sup>14</sup> It is worth pointing out that in the construction of the expectative time factor is important. Especially when the creation of a target right takes much time, it is vital to protect the legal situation of the person waiting. It is particularly significant in the real estate market with regards to newly built premises. In Polish legal system the agreement regarding a newly built real estate is divided into two separate agreements – one that is entered by the parties at the early stage of investment and second one after the investment is finished and the collected documents allow the parties to transfer the ownership on the buyer. However, under Polish regulations, in case of apartments, in order to fully acquire ownership, it is necessary to settle for each real estate land and mortgage register. And this process takes quite some time, even up to two years, depending on the region. During this period, the buyer does not have full ownership of the premises, since for that the said register is needed. The Polish doctrine and the Polish Constitutional Tribunal as well as the Supreme Court, grant this state the status of the said legitimate expectative. The situation of the buyer is fully protected almost as the situation of the owner, but the ownership does not yet exist. It is however possible to transfer the right to the premises on the market – for example by means of purchase agreement, yet the subject of the transfer is not defined as real estate in its final form but the rights preceding the ownership, called expectative. One of the problematic matters with transferring the expectative is the forms of its taxation, which is different from the regular real estate.

<sup>12</sup> W. Borysiak, 2.2. Pojęcie ekspektatywy w znaczeniu szerokim i wąskim, [in:] *Dziedziczenie. Konstrukcja prawna i ochrona* [online]. Wydawnictwo Prawnicze LexisNexis, 2018-11-20 12:04 [access: 2019-02-03 00:36]. Available online: <https://sip.lex.pl/#/monograph/369302399/102>.

<sup>13</sup> S. Rudnicki, *Ekspektatywa nabycia własności nieruchomości w świetle orzecznictwa sądowego*; Rejent, rok 13, nr 10 (150) Oct. 2003, p. 185.

<sup>14</sup> Z. Radwański, *Prawo cywilne. Część ogólna*, Warszawa, p. 99,100.

On the one hand the tax rate is lower for the buyer, as it is 1% of the value instead of 2% when the subject of transaction is real estate. However, the seller cannot apply certain object exemptions as it is possible with real estates. An example of this object exemptions is the so-called housing relief, which enables the seller, in case the purchase takes place before the end of five years period, to use the income gained from such a transaction to buy next real estate. This allows the seller to release him or herself from the obligation to pay income tax. And yet this is not the case with the expectative. Interpretations of tax authorities clearly state that the expectative, however connected with real estate, is not a real estate itself, therefore, the application of the said release is impossible<sup>15</sup>.

It also needs to be said that from the moment of closing the final agreement, the parties generally cannot influence anymore the situation of the premises, as from this moment it is entrusted in notary and court. This is an example of the so-called *sensu stricte* expectative, described in the following part of this article.

At the basis of the expectative's construction lies undoubtedly one of the key values, i.e. protection of legal rights. And the aim of securing the intermediate situation of the person waiting, is to make sure they acquire the target right of significant value in the safest possible way – in the subjective and objective sense. However, it must be stressed that legal regulations must address society's needs, not the other way round. Thus, we should look for the sources of expectative in basic rights regulated by the Constitution, and by far they can be found there.

As it stems from the opinions presented in the case laws and by the representatives of the doctrine, constitutional protection of the expectative is derived from the protection of fairly accrued rights<sup>16</sup>. Based on the effective basic law the ruling of the Constitutional Tribunal confirms that this protection includes securing rights which were accrued fairly and in an equitable

<sup>15</sup> Compare the interpretation of the Tax Chamber in Warsaw of the 26th July 2008 signature IPPB2/436-108/08-2/MZ, which states that expectative is a similar right to claim or debt and is under the same taxation regime as them.

<sup>16</sup> M. Zubik i W. Sokolewicz, Art. 2. W: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, wyd. II, L. Garlicki (red.), M. Zubik (red.) [online]. Wydawnictwo Sejmowe, 2019-09-30 02:05 [access: 2019-11-01 09:30]. Available online: <https://sip.lex.pl/#/commentary/587734530/531970> oraz M. Jackowski, *Ekspektatywa jako przedmiot ochrony...*, p. 93-101, 2018-11-20 11:34 [access: 2019-01-27 14:17]. Available online: <https://sip.lex.pl/#/publication/151059148>.

manner. The rights are “*anchored in constitutional order applied at the time of ruling within the expectations*”<sup>17</sup> In the addendum to this ruling it was pointed out that the expectations have to be rational and legitimate.

It is important to indicate here that Polish publications on the subject differentiate between the expectative *sensu largo* and the expectative *sensu stricte*<sup>18</sup>. The former – *sensu largo* – refers to the situation when at least one precondition of acquiring the target legal right has been satisfied, while most of them remain yet to be satisfied<sup>19</sup>. The *sensu stricte* expectative is on the other hand a state in which only one precondition is left to be fulfilled and it is usually an objective one, i.e., not dependent on the parties’ will. As an example of such a precondition we may indicate, on the basis of the Polish law, the settlement of a mortgage register (księga wieczysta) for premises constituting a separate real property. After the agreement settling a separate real estate in the form of, for example, living premises, the only condition left is a decision of a registry court on establishing a land and mortgage register. Since this decision bases purely on the documents enclosed by the notary who drafts such an agreement, the parties will no longer be in power to influence court’s decision. Therefore, the *sensu stricte* expectative is much better protected by the Polish Constitution as the *sensu largo* one. The reason for that is a better probability of the fulfillment the expected right when only one, objective precondition is left to be fulfilled, than with many ambiguous and not so certain ones as it is the case with *sensu largo* expectative. It is worth to stress here that these – i.e., *sensu largo* – expectatives were given protection by the Polish Constitutional Tribunal before 1997 in one of the rulings, stating that: “*The protection of expectatives is as legitimate as the protection of fairly accrued rights. The difference is mostly constructional, not axiological. The duty of a democratic state is to avoid situations which surprise the citizen with legal regulations that worsen his/her situation – except for cases when such changes are necessary because of other constitutional values that need to be prioritised at the moment – refers not only to already acquired legal rights, but also to legal wait*

<sup>17</sup> M. Zubik, W. Sokolewicz, Art. 2 in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Tom I, wyd. II, [online]. Wydawnictwo Sejmowe [access: 2019-11-01 09:30]. Available online: <https://sip.lex.pl/#/commentary/587734530/531970>.

<sup>18</sup> W. Borysiak, 2.2. Pojęcie ekspektatywy in: *Dziedziczenie. Konstrukcja prawna i ochrona* [online]. Wydawnictwo Prawnicze LexisNexis [access: 2019-11-03 08:26]. Available online: <https://sip.lex.pl/#/monograph/369302399/102>.

<sup>19</sup> *Ibidem*.

for them to be acquired by satisfying conditions determined in the act.”<sup>20</sup> This line of ruling is in accordance with the previously analysed ruling of the European Human Rights Tribunal. However, nowadays, only the *sensu stricto* expectative is honored in terms of constitutional protection in Poland which seems to be a move backwards for the Polish judicature, as most of the European countries accepts both kinds of expectatives as equally deserving legal protection. The reason for that is, as it has been already said before, the fact that both of them derive from the legal interests of participants of the market, and therefore their role cannot be diminished solely due to their legal construction.

To sum up, it is worth pointing to one of the most interesting ideas concerning creating new legal rights by using the so-called legal institutions. According to the idea presented by Krzysztof Wojtyczak, who – with the theory of legal rights in the background – came up with the concept of giving the person endowed with the right the possibility to demand from the state regularising designated legal institutions<sup>21</sup>. Application of this legal institution could export the expectative into other areas, i.e., social security or property laws. At this moment only theoretically, but this institution prompts reflection on the possibility of using it to create the institution of expectative by addressing – from the level of a rightholder – the request to regularise the pivotal (from the perspective of conduct) construction.

Summing up the deliberations connected with the existence of institutions arising from social needs, despite lack of existing regulations, it is worth to point out that there are all-important institutions of this sort, e.g. trusteeship, which has been functioning in the conduct around the world for centuries now<sup>22</sup>. Thus, lack of regulations of the institution by no means excludes its legal existence. It also should be noted that the modern approach even in the statutory law countries brings it closer to case law, as a more flexible system of law which allows the emergence of new institutions stemming from, as it has been already said, social needs, not the right of state. This attitude is certainly much more desired than the stable, yet way too conservative regulations introduced by the state.

<sup>20</sup> Ruling of the Constitutional Tribunal from 3 Dec. 1996. K 25/95, LEX nr 28652.

<sup>21</sup> M. Pyziak-Szafnicka, Rozdział 7. Prawa i wolności konstytucyjne in: *Studia Prawa Prywatnego* 01/2006; p. 127.

<sup>22</sup> P. Stec, *Rozdział I Zagadnienia wstępne. W: Powiernictwo w prawie polskim na tle porównawczym* [online]. Kantor Wydawniczy Zakamycze, 2020-04-09 21:02 [access: 2020-05-20 08:47]. Available online: <https://sip.lex.pl/#/monograph/369148938/3>.

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