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Restriction of public subjective rights to use the environment and freedom of economic activity – concessions and permits

Ograniczenia publicznych praw podmiotowych do korzystania ze środowiska i wolności działalności gospodarczej – koncesje i zezwolenia

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Abstract: Public subjective rights, as all rights and freedoms set out in the Polish legal order can, in principle, be restricted. Freedom of economic activity is a public subjective right regulated by the standards of the Constitution. In turn, the public subjective right to use the environment was regulated by the provisions of Article 4 of the Environmental Protection Law. In such a legal environment, concessions and permits treated as a restriction of public subjective right of constitutional rank can at the same time be limitations to the public subjective rights provided for in the relevant statutes. It should be noted that the less strategic the sphere of life of the state and citizens is, the gentler the form of restriction. It should be borne in mind, however, that the strategic importance of the state's or citizens' activity cannot be determined in isolation from the state's obligation to protect the environment. This may also be applied to other legal goods, including the environment. However, special care is required in application with reference to the latter. Concessions and permits affect the enjoyment of public subjective right to the environment, both by entities engaged in a business activity and those affected by the said activity. This impact may differ and depends on whether a given permit or concession is granted or refused. However, both granting or refusing to grant them will result in restrictions of public subjective rights to use the environment.

Keywords: public subjective rights to the environment, freedom of economic activity, environment, concessions, permits

Abstrakt: Publiczne prawa podmiotowe, tak jak, co do zasady, wszystkie prawa i wolności określone w przepisach polskiego porządku prawnego, doznają ograniczeń. Wolność działalności gospodarczej jest publicznym prawem podmiotowym uregulowanym normami Konstytucji. Z kolei publiczne prawo podmiotowe do korzystania ze środowiska zostało unormowane przepisami art. 4 ustawy Prawo ochrony środowiska. Taki stan prawny nie powoduje, że koncesje i zezwolenia traktowane jako ograniczenia publicznego prawa podmiotowego rangi konstytucyjnej nie mogą być jednocześnie ograniczeniami publicznego prawa podmiotowego uregulowanego w ustawie zwykłej. Zauważyć należy, że forma ograniczenia jest tym bardziej łagodna im mniej strategicznej sfery życia państwa i obywateli dotyczy. Należy mieć jednak na uwadze, że owa strategiczność dziedzin działalności państwa czy obywateli nie może być określana w oderwaniu od obowiązku ochrony środowiska, będącej zadaniem państwa. Wskazana prawidłowość może być stosowana także w odniesieniu do innych dóbr prawnych, w tym środowiska. W zakresie tego ostatniego dobra prawnego wymagana jest jednak szczególna ostrożność w jej stosowaniu. Koncesje i zezwolenia wpływają na realizacje publicznego prawa podmiotowego do środowiska, zarówno podmiotów prowadzących działalność gospodarczą, jak i podmiotów pozostających w obszarze odziaływania tej działalności. Wpływ ten może być przy tym różny i zależy od udzielenia danego zezwolenia czy koncesji, czy też od odmowy ich przyznania. Zarówno jednak ich przyznanie, jak i odmowa ich przyznania będą wywoływały ograniczenia publicznych praw podmiotowych do korzystania ze środowiska.

Słowa kluczowe: publiczne prawa podmiotowe do środowiska, wolność działalności gospodarczej, środowisko, koncesje, zezwolenia

Introduction

In principle, public subjective rights, as all rights and freedoms set out in the Polish legal order, can be restricted. It is well established in the legal science that the rights and freedoms subject to the regulation of constitutional norms (constitutional laws) are public subjective rights because of their structure as well as the content. It is further argued that constitutional rights are public subjective rights which have been defined by norms of positive law of constitutional rank. These norms justify the rights by defining their content, limits, and legal protection (Wróbel 2010: 332).

The constitutional legislator determined the premises for limitation of the constitutional rights and freedoms primarily in the norms of Article 31 of the Polish Constitution. Whether such premises are present determines the limits of these rights. Following Para 3 of this article, restrictions on exercising constitutional freedoms and rights may be established only by way of a statute and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morality, or freedoms and rights of other persons. At the same time, in accordance with

the will of the constitutional legislator, these restrictions must not violate the essence of these freedoms and rights. It should also be emphasized that such a situation ought to be treated as a limitation of a given right if, by means of internal regulations functioning in a given unit, additional requirements are introduced, e.g. opinions of the unit's internal bodies, which are not provided for by the regulations contained in the acts, and which are established in these internal regulations as an additional premise for the realization of a given right. Cases where law of constitutional rank is limited in this way should be regarded as contrary to Article 31, Para 3 of the Polish Constitution, mentioned above. Introduction of the requirement for realization of a given right in a manner contrary to the binding legal order, by way of an act which has a lower rank than the statue, amounts to the limitation of that right. It should be assumed that each additional positive premise conditioning the functioning of a given right must be treated as its limitation because had it not existed, exercising of a given right would not have to be preceded by its occurrence. The adoption of the opposite interpretation could lead to situations where additional requirements introduced by an act inferior to a statute would make the enjoyment of the right depend on the occurrence of the premise or even preclude an entity from exercising it, for instance, when a public body refuses to issue a positive decision, justifying it with the opinions of, e.g., other authorities which, under applicable statutes, are not required. Therefore, it should be recognized that each restriction of constitutional rights and freedoms requires that two positive and one negative premises should occur jointly. The positive premises are the introduction of a restriction only by way of a statute and the presence of at least one of the following circumstances, i.e. when it is necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or freedoms and rights of others. The negative condition, the existence of which outlaws the limitations of constitutional rights and freedoms, is that these restrictions may not violate the essence of the freedoms and rights. Undoubtedly, the definition of premises for the restriction of public subjective rights must be considered within the framework of a given public subjective right. In the case of freedom of economic activity, the analysis must also include the wording of Article 22 of the Constitution. According to it, the restriction of this freedom can only take place by way of a statute and only because of an important public interest. In the academia, it is indicated that in the case of this freedom, Article 31, Para 3 of the Constitution should be treated as a particularization of Article 22 of the Polish Constitution (Garlicki and Zubik 2016: Art. 22 Lex electronic edition). The operation of thus defined premises has required the intervention of the court and the Constitutional Tribunal.

At the same time, it should be noted that while the freedom of economic activity is a public subjective right regulated by the constitutional norms, the

public subjective right to use the environment was regulated by the provisions of Article 4 of the Environmental Protection Law. The norms of the Basic Law refer to the environment as a legal good, e.g., in the provisions of its Article 74. However, the norms of the Constitution do not set out this public right *expressis verbis*. Nor can it be undisputedly construed as a reflection of the duties of public authorities specified therein (cf. Czech). In such a legal environment, concessions and permits treated as a restriction of public subjective right of the constitutional rank, can simultaneously be limitations to the public subjective rights provided for in the relevant statutes.

1. Permits and concessions as restrictions on public subjective rights to use the environment and freedom of economic activity

In the legal science, imposing requirements of obtaining various administrative permits is considered to be a limitation to the general individual right to freedom from non-statutory interference by the executive, which is understood as a public subjective right. This freedom may be restricted by the imposition of both preventive and repressive prohibitions, consistent with the principles of a democratic state and the rule of law (Kijowski 2000: 64). This view allows for the following reflection. It should be stressed that the form of limitation of such a freedom must result from the relevant provisions of the law in force at least of the statutory rank and can only be applied if the hypothesis of a specific legal norm, in which a specific limitation, e.g. taking the form of a permit, has been defined, is fulfilled. Only such a restriction can be deemed to have been made in accordance with the principles of a democratic state governed and the rule of law. A significant point is that imposing requirements for administrative permits is an expression of non-statutory interference by the executive. It is expressed in the fact that, as a result of a specific decision of a public administration body, there will be a restriction of a given constitutional freedom, which is a public subjective right. This will be the case, for example, if a decision refusing to grant a given permit is issued in violation of the law in which a given public subjective right is defined. The adoption of the non-statutory character of the above-mentioned executive interference does not exempt it from the need to take into account the provisions of the statutory rank, for example, as regards the premises for granting or refusing a given permit. Moreover, due to the existence of statutory delegations, on the basis of which regulations are issued, the provisions of executive acts will be taken into account in the process of issuing specific decisions.

It is also pointed out that the mere introduction of the institution of administrative permission into the Polish legal order takes place in a variety of ways and using various nomenclature, including names. The following phrases

are used for this purpose: 'permit' (641 cases recorded in internal legal acts published in the *Journal of Laws*), 'permission'. (82 cases), 'consent' (315 cases), 'concession' (44), 'license' (29), and occasionally 'entitlement' (95), 'authorization', 'approval', 'acceptance', 'grading', 'reconciliation', and even 'registration' or 'registering'. It is also legitimately argued that none of these names can be attributed a single characteristic that distinguishes it from all the other ones. At the same time, it is stressed that, to a limited extent, this observation applies to acts called 'concessions', because they are usually issued under a single statute. Still, this is only a formal feature and does not apply to all acts bearing this name in positive law. The justification for the separation of a 'concession' is, on the other hand, more closely related to the statutory requirements that justify a decision to refuse it. However, since these are very different reasons, it is difficult to consider this characteristic as material rather than formal and procedural. (Kijowski 2000: 64). Seeing the accuracy of the outlined position, one should certainly bear in mind the dispute of the existing material and legal distinctions between permits and concessions. It can be observed in cases where we are dealing with the affiliation of a business activity to the state and a transfer by means of a concession of the right to exercise it to private entities (cf. Kosikowski 2002: 224; Waligórski 1988: 98). Nevertheless, permits do not involve such an activity. They indeed are a limitation of public subjective rights, such as the public subjective right to use the environment. Their role varies, depending on the type that is subject to analysis. The use and exercise of public subjective rights in practice depends at least on a number of implied concepts used to determine the premises for granting permits.

In order to illustrate this, it is necessary to refer to concessions and permits seen as limitations to public subjective rights to use the environment and freedom of economic activity. Their analysis is justified by the fact that these restrictions have a simultaneous impact on all the above-mentioned public subjective rights. These restrictions concern numerous rights, i.e. not only the freedom of economic activity, but also public subjective rights to use the environment.

In the legal science, it is reasonable to distinguish between business activities requiring the consent of the state or a local government unit. It is understood as an activity prohibited by a statute. The consent is granted on the basis of the provisions of the Business Activity Law (currently the Law of Entrepreneurs), by granting a permit or concession. The author further indicates that it is permissible to regulate areas of human activity of a complex nature, which are particularly important for the public interest, by means of a concession, which must be clearly defined in the Business Activity Law (currently the Law of Entrepreneurs). In turn, the permit is reserved by the Legislator for small-scale undertakings (Jakimowicz 2002: 306-307).

1.1. Concessions as restrictions on public subjective rights to use the environment and freedom of economic activity

In turn, the norms of the Act of 6 March 2018 on The Law of Entrepreneurs (hereinafter referred to as the LE), indicate that performance of a business activity in areas of particular importance for the security of the state or citizens, or other important public interest, requires obtaining a concession only if the activity cannot be performed as a free activity or after obtaining an entry in the register of regulated activity or a permit (Article 37, Para 1 of the LE). The legislation still lacks in the legal definition of a concession, which determines the need to use the academic commentary in this respect. It is emphasized that a concession is a legal form (legal measure) of restricting the freedom to start, carry out, and end a business activity. In public economic law, concession is a type of decision which entitles an entity to do something (Kiczka 2013: 464). It is also indicated that the concession should be regarded as one of the manifestations of legal rationing of economic activity, consisting of competent public body consenting to undertake and perform an economic activity in a specific field within the scope of and in accordance with the conditions specified in the concession and in separate legal provisions (Strzyczkowski 2011: 216).

In turn, the Supreme Administrative Court, in its judgment of 19 January 1998, took the position that a concession is a form of business rationing. It is a public body's consent for a given entity to undertake and carry out an activity on conditions unilaterally set by the authority issuing the concession. In turn, in its judgment of 8 May 1998, the Supreme Court noted that a concession is a public-legal (personal) entitlement and for this reason, as a rule, it is subject to exclusion from civil law trading (Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019: electronic edition Legalis). Such a position of the judicature, especially considering the above-mentioned views, makes it necessary to indicate at least a varying perception of a concession as a legal institution. It is indicated that it has the character of a public entity right and therefore it is deprived of the element of certainty in obtaining the required reaction from the state (Boć, Błaś 2010: 506). In the concession, according to the above views, one should also see an act of consent of the public authority to certain behavior of the entities. At the same time, it is a legal form of limiting the freedom to take up, pursue and stop carrying on a business activity. It should be pointed out that the varying perception of a concession may lead to the formulation of interpretations that may theoretically indicate their mutual exclusion, e.g. in terms of seeing a concession as a restriction of freedom of business activity. It should be assumed that in the light of the view expressed on the basis of the provisions of the law on freedom of economic activity, which is no longer in force, a concession was a transfer of certain powers of the state authority in the

sphere covered by the monopoly, which was also connected with the transfer of the concessionaire's power to use such instruments as those used by the administration (Szydło 2005: 212 ff.; Kosikowski 2012: 47 ff.).

Assuming that this position is correct, it should be considered that obtaining a concession is a restriction of the state's public subjective right, i.e. freedom of economic activity, since the freedom to conduct this activity belongs to the state. The dispute about the position constructed in this way should not be explicitly rejected because of the mere doubt about treating the state as an entity of public subjective rights. It is also worth emphasizing that as a form of administrative activity, a concession is an administrative decision, issued on the basis of law, in accordance with the provisions of the Code of Administrative Procedure (Zdyb 2013: 363). At the same time, it should be noted that obtaining it can and usually does limit the public right to use the environment of other entities.

2.2. Permits as restrictions on public subjective rights to use the environment and freedom of economic activity

Another area of rationed activity is the activity requiring a permit. In compliance with Article 41, Para 1 of the LE, obtaining a permit is required to carry out a business activity within the scope specified in separate regulations. It should be noted that the authorities competent in the sphere of granting permits and the conditions for performing the activity covered by the permit, in particular the rules and procedure for granting, refusing, amending, suspending, withdrawing or limiting the scope of the permit, are determined by separate provisions, unless the aforementioned Act provides otherwise. As in the case of concessions, the legislator has not introduced a legal definition of a permit into the applicable legal order. It is indicated in the legal science that a permit is an act of discretion of a competent public administration authority, confirming that an interested entrepreneur can undertake a business activity within the scope defined by the subject matter, because the authority found that all legal requirements have been satisfied. While granting the permit, the public administration body states, among others, that the entity which applied for it meets the prerequisites to conduct the business activity in accordance with the binding regulations (Strzyczkowski 2011: 227 from Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019). There are three fundamental differences between a permit and a concession, as defined in the legal science. The first of these is the type of business activity requiring a concession or a permit. Concession is reserved for the most strategic areas of activity, those that are particularly important for the security of the state and citizens. In turn, obtaining a permit is necessary to undertake an activity which is important but of less strategic importance for the state. Undoubtedly, there are some areas of economic activ-

ity, whose free exercising could prejudice an important public interest. For this reason, the legislator provides for the obligation to fulfil the specific conditions set out in the law for their commencement and execution as well as obliges the competent authorities to verify whether the conditions have been met; at the same time, however, it recognizes that a milder form of rationing will be sufficient. Due to the fact that the concession is considered to be the most onerous form of rationing for the entrepreneur, reserved for the business activity in areas crucial for the state in the current legal status, it is provided for only in 7 statutes. In turn, permits are a much more frequent form of rationing, as the obligation to obtain them was introduced in almost 30 acts. The second difference indicated is the nature of the administrative decision of the relevant concession and permit. It is assumed that a concession is, in principle, a discretionary decision and a permit is obligatory. This means that the authority must issue a permit if the entrepreneur meets the relevant conditions. Thirdly, the difference concerning which public bodies are authorized to issue a concession and a permit should be indicated. In principle, concessions are granted by the central body (competent minister, or other central body, or the voivodeship marshal). As far as permits are concerned, the competent authority is both the central government administration bodies, central offices and local government, as well as its bodies (Zdyb and Lubeńczuk and Wołoszyn-Cichocka 2019).

It should be noted that, as in the case of a concession, the provisions of the LE do not specify the activities that require issuance of a permit. This matter is regulated in separate regulations. One example is the obligation to obtain a permit for conducting collective water supply or collective sewage disposal activities (Act on collective water supply and collective sewage disposal of 7 June 2001).

Seeing such a perception of permits in the study of law, including their differences from concessions, it is necessary to relate them to the premises for the restriction of constitutional rights and freedoms (public subjective rights as defined in the Constitution). The obligation to obtain permits is defined in standards of the statutory rank. Certainly, the obligation to obtain these permits has its justification, e.g. in the need to protect the environment or freedoms and rights of others. At the same time, it should be remembered that the limitation of a given public subjective right, which is in accordance with the law in force, can only be spoken of if it does not lead to limitation of the essence of a given public subjective right. Therefore, the occurrence of the two positive premises indicated will take place in the case of permits. Only in practice will it be possible to establish unequivocally whether the issuance of permits indicated above, while at the same time obtaining other permits required by law, will not lead to a violation of the essence, e.g. freedom of economic activity or public subjective right to use the environment. In the area of freedom

of economic activity, the content of Article 22 of the Constitution must also be taken into account as regards the premises for restricting this freedom, as well as the positions of the legal sciences, with which it must be agreed that Article 31, Para 3 of the Basic Law is a more specific standard of Article 22 of the Constitution.

Such a perception of a permit leads to the following conclusion: permits constitute a restriction of the freedom of economic activity and public subjective rights concerning the environment, as defined in the norms of Article 74 of the Constitution. At the same time, the refusal to grant a permit, and thus the impossibility to conduct a business activity, usually has a negative impact on the use of public subjective rights to the environment of the entities that applied for these permits. In turn, granting a permit usually has a negative impact on the exercise of public subjective rights to use the environment of those entities which remain within the influence of economic activities carried out on the basis of the obtained permits.

Conclusions

The presented limitations to the public subjective rights of economic freedom and use of the environment, are an expression of the limitation of negative public subjective rights, expressed in the individual's claim to the state not to enter the sphere of previously granted freedom. In the case of the freedom of economic activity, these restrictions are treated in the legal science as rationing of an economic activity (Jakimowicz 2002: 303 ff.). In the case of a concession issued in the scope of activity reserved for the State, we can only speak of rationing with respect to entities other than the State, in the case of acknowledgment of the legitimacy of the view concerning the business activity belonging to the State, the conduct of which is granted through the concession to other entities.

The forms of restrictions on the freedom of economic activity that have been established, indicate their leading feature as discussed above. This is as follows: it is expressed in the existence of a stricter form of limitation on the possibility of exercising public subjective law, in those areas of state activity which are the most strategic areas of activity, especially important for the security of the state and citizens. The less strategic the sphere of life of the state and citizens there is, the more lenient the form of restriction. It should be borne in mind, however, that the strategic importance of the state's or citizens' activity cannot be determined in isolation from the state's obligation to protect the environment. This is indicated by Article 5 of the Constitution. Additionally, it should be pointed out that the binding character of a given individual administrative act is influenced by the fact that in the provisions under which the premises for granting or refusing an administrative privilege were defined, the legislator used implied and undefined concepts.

The above-mentioned pattern as to how strict the restriction of a given subjective right is, applies beyond the scope of business activity for it may also be applied to other legal goods, including the environment. However, special care is required in the application thereof, which is due to the fact that degradation, even of one element of the environment and this even to a small extent, may lead not only to unforeseen, but also serious consequences because of interconnection of the environmental elements.

Undoubtedly, concessions and permits affect the public subjective right to the environment, by both entities engaged in a business activity and ones affected by the said activity. This impact may vary and depends on whether a given permit or concession is granted or refused. However, both granting or refusing to grant them will result in restrictions of public subjective rights to use the environment. Each time, however, it will affect other legal entities. Such a specific situation is clearly influenced by this pattern, which means that limitation of public subjective rights should always be accompanied by appraisal of competitive public and private interests, in addition to a conflict of individual interests.

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