

**LEGAL ASPECTS OF THE ACTIVITY OF SOCIAL BUILDING
SOCIETIES IN THE IMPLEMENTATION
OF HOUSING POLICY**

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ABSTRACT

Participation in the creation of a social housing association in its proper functioning is a very important part in the implementation of housing policy. In spite of this, the institution of the society is still insufficiently clarified, since determining a flat which in 30% is financed by a citizen as a social one seems to be a vague term. The aim of the publication is to analyze the issue of social housing associations, but first of all to show the advantages and disadvantages of this system and the indeterminate scope of the state's responsibilities in the area of supporting housing construction.

Key words: housing policy, housing construction, right to housing, social building societies.

1. INTRODUCTION

The purpose of this article is to analyse and explain the major aims of the activity of Social Building Societies (hereinafter: SBS). According to the historical background of SBS and housing need in Poland, it is not necessary to influence how crucial is to take social policy into account while making housing policy. Social policy is a deliberate activity of the state, self-government entities and other organizations. This activity aims

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to improve the overall working and living conditions of the population as well as socio-cultural relations. Apart from housing policy, the aspects of social policy include employment policy, health policy as well as social security and social assistance system. The Constitution of The Republic of Poland of 2nd April 1997¹ has been in operation for over twenty years, does not allow to name that issue other than “housing policy”, although at the basis of today’s wording of art. 75 of the Constitution were plans to create the “right to housing”². We may see, the housing problem in Poland is a phenomenon, that appeared long time ago. What is more, the problem demonstrates that in Poland we may face up with a shortage of houses. In view of this, Polish authorities in 1919 took the first step to solve the problem. As a result, they have enforced The Decree of 16 January 1919 in order to establish tenants’ protection and to start the prevention of housing shortages³. For the sake of the democracies and the economic system, the measures taken by the authorities focused mainly on the protection of tenants, however, they did not concentrate on how to provide a house for them. According to this, people who were not in possession of a house, were not in fact protected by the State. The Security Institution has been restored in The Constitution of 1997, in order to protect the tenants. Article 75 of The Constitution, concerning the issue of “the right of housing”, states that this security should be compulsorily regulated as a separate procedure. That is why, it cannot be treated as a source of an individual right or a claim. That kind of an attitude is approved by the science of law⁴. As it was mentioned above, this provision/legislation determines the direction of the policy, pursued by the public authority, as a directional norm. Therefore, we may consider it as the basis of constitutional revision of legislation but only in some ways. The form of words that describe the aim of the policy, according to Polish Constitutional Tribunal, is not the guarantee

¹ Journal of Laws No. 78, item 483 with amendments.

² Michał Bernaczyk, *Konstytucyjne obowiązki państwa do podejmowania działań w zakresie zaspokajania potrzeb mieszkaniowych jednostki*, Wrocław: Uniwersytet Wrocławski, 2014, 775. November 30, 2018 <http://www.bibliotekacyfrowa.pl>.

³ Dekret o ochronie lokatorów i zapobieganiu brakowi mieszkań z dnia 16 stycznia 1919 r., *Journal of Laws* item 116.

⁴ See: Paweł Sarnecki, *Commentary to Art. 50*, In: *The Constitution of The Republic of Poland*, ed. Leszek Garlicki, Warsaw: C.H. Beck, 2003, s. 2 i nast.

norm. It means that it does not establish the autonomous right to demand housing from a public authority, nor does it prejudge that your own home means ownership of it. The Constitution defines, that the tenants have the right to satisfy the housing need but, on the other hand, it is not the right to be a landlord. Article 75 of The Constitution is not intended to satisfy the housing need, after becoming a landlord, but for homelessness prevention as well as for giving the stability as a landlord. According to Article 75 (2) of The Constitution, we may claim that the protection of the rights of tenants shall be established by the statute. The public authorities shall pursue the policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting the activities aimed at the acquisition of a home by each citizen⁵. The protection mentioned above is also dedicated to a protection of charging them in inappropriate way, the way that is not suitable to the economic situation. It protects them also against eviction, which is contrary to the principles⁶.

2. THE LIVING CONDITIONS IN POLAND

Let us discuss the multiple factors within the housing problem in Poland. The data, analysed by the Chamber of Building Design, showed that in Poland about 50 % of adult children live with their parents as a result of unsatisfied incomes. A low income is the major obstacle to buy or to rent a house. Whereas the indicator in UE is only 15%. The housing need is most wanted in a group of council flats, social rental flats, municipality, and welfare housing, which is designate for use in about 5%. According to the council flats, in 2013 there are about 16 % less of them than in 2012. As far as a council housing is concerned, we may claim that the housing need, during this rate of building, will be satisfied within next 50 years⁷.

⁵ Judgment of the Constitutional Tribunal of 30 October 2010, ref. no. K 33/00.

⁶ See: Bogusław Banaszak, Commentary to Art. 75, In: The Constitution of The Republic of Poland, Commentary, ed. Bogusław Banaszak, Warsaw: C.H. Beck, 2012, s. 307 i nast.

⁷ <http://www.ipb.org.pl/problemy-mieszkaniowe-polakow/>, November 11, 2018.

Taking into account the data of Statistical Office, we may claim that, in 2017 the housing condition improved in comparison to the previous years. As at 31 December 2017 the average number of the housing units shall be 3,82 per 1 house including cities 3,57 and rural areas 4,35. The average size of the dwelling shall be 74,0 m² and it has increased by 0,2m² compared with last year. The houses were on average 28,9m² higher in the rural areas than in the cities (appropriate ratios for the rural areas can be about 93,5m², but for the cities it is 64,6m²). In 2017 for the lease of the municipal resources (excluding the replacement places and temporary rooms), there were expecting about 154 182 households. It appears that a demand for the lease of a dwelling, within the housing municipal resources, is still decreasing and in comparison to 2016 shall be 97,0%. Out of the total of the pending for the rental of the municipal resources, on the waiting list for municipal flats there are about 63 864 households (which is 41,4 % of the total), for the social rental flats – 90 318, included 53 579 households as a part of the implementation of eviction⁸. The latest report of The Supreme Audit Office⁹ is a warning signal, as a result in Poland there is a lack of about 1,5 mln flats. In the SAO's assessment, there are simple reasons for this, namely, not only a lack of investment and a lack of the urban development plans, but also a lack of a coherent housing policy¹⁰. As a result, not only the way of conducting the housing policy is failing miserably. The reason for this is the fact of ignoring the problem as well as a lack of an active role of the authorities. One of the housing policy consideration was to create social building societies with an amount of a lease intended for a mid-level person. For the closer inspection of the housing situation in Poland, let us present what the situation is in France. The creation of SBS in Poland was modelled closely on a French system HLM (fr. *Habitation à Loyer Modéré* – rent controlled housing) that constitutes 50% of all housing in France. It is worth mentioning, that the standard of living the HML housing projects is often the lowest in Europe. This is a result of the authorities' involvement in housing policy.

⁸ Data downloaded from the Central Statistical Office, Housing in 2017, <http://stat.gov.pl/>, December 2, 2018.

⁹ Polish: Najwyższa Izba Kontroli; hereinafter: SAO.

¹⁰ www.nik.gov.pl, December 2, 2018.

The social housing programmes in France have an obvious positive effect because of a local authority of the State, that has a duty to ensure a house for everyone. In other words, a lack of its implementation results in bringing a responsible person to justice¹¹.

As we move into a new phase, social building societies shall be indicated as a component of the implementation of Article 75 of The Constitution. Social building societies were created in order to play a role in satisfying the housing needs by the State. The role of social building societies, despite the certain legal situation, still creates a great deal of consternation among the tenants¹². The Tenants' ignorance of the law and the legal basis has resulted in their sense of injustice or withholding the rules.

Let us start the explanation of the ground on which SBS is based on. The History of SBS has started by The Act of 26 October 1995 on certain forms of promoting housing construction¹³. Since that, we may see an uptake in the number of companies and the activity of TBS. Chapter 4 of the legal act mentioned before, defines the rules how The National Housing Fund and Housing associations should function. What is more, the main purpose of the Act was to make the building flats possible for so called middle-class people who are not in possession of other flats. The apartments of SBS are new, intended for renting to those who have a low or an average income. To put it in another way, these are the flats of an average rent¹⁴.

According to Art. 23 u.p.b.m, we may claim that the companies can be formed as limited liability companies, joint stock companies as well as cooperative. Moreover, the activities of the exact of SBS are governed: by the law of 15 September 2000 – Code of Commercial Companies¹⁵ (SBS

¹¹ <https://tbs24.pl/tbs-kopia-francuskiego-hlm/>, November 10, 2018.

¹² Work at the Lublin Social Building Society allowed to conclude that the vast majority of tenants inhabiting resources have no knowledge about their legal situation in relation to the Association.

¹³ Consolidated text Journal of Laws from 2018 item 1020 with amendments; hereinafter: u.p.b.m.

¹⁴ See: Elżbieta Twardowska, "Rola Towarzystw Budownictwa Społecznego w zaspokajaniu potrzeb mieszkaniowych ludności w Polsce", *Studia ekonomiczne regionu łódzkiego*, 5(2011): 43-64.

¹⁵ Consolidated text Journal of Laws from 2017 item 1577 with amendments.

as a limited liability company and a joint stock company), by the law of 16 September 1982 – cooperative law¹⁶ (SBS as cooperative), as well as by the Act of 21 June 2001 on the protection of the rights of tenants, the housing resource of municipalities and amending the civil code¹⁷. In addition to those Acts, there are other different regulations that determine the principles of SBS activity.

On the territory of Poland there are about 330 social building societies, principally municipal. It means that the municipality co-finances the programmes of building houses and flats for SBS. As a result, people who are entitled can rent those houses or flats. A situation is different when we consider SBS as a private company. In that case, the loan for building is taking by the proper company. If a person wants to become a tenant, needs to sign the lease agreement or to make a payment called participation in the costs of construction (even if the building has been already built) as well as to sign the participation agreement. According to this, we may claim that a major difference between a public and a private SBS applies only to the financing issue.

Sbs residential buildings, with a rented dwelling, were built using the credit granted by the Bank Gospodarstwa Krajowego. According to this, we may claim that the subject of the activity of TBS is to build residential houses as well as to use them on the basis of the lease. What is more, the rental rates, per 1m² usable area of a dwelling in the housing society, are determined by the meeting of shareholders. It has to appear in such a way that, the sum of rents of all establishments operated by the society, has to cover the costs of usage and maintenance of buildings as well as a repayment of the loan as it contained in Art 28 (1) u.p.b.m.¹⁸.

Sbs can rent residential premises to a natural person only if that person is reported to the joint residence, on the cover, does not have a legal title to another dwelling in the same town as well as that satisfies the criteria relating to an income of the household. According to Art 30a u.p.b.m.

¹⁶ Consolidated text Journal of Laws from 2018 item 1285.

¹⁷ Consolidated text Journal of Laws from 2018 item 1234 with amendments; hereinafter: u.o.p.l.

¹⁸ The tenant believes that if one of the rental components is the repayment of the loan contracted for construction, each of the tenants repays the loan. This is not true, since the party to the loan agreement is only sbs.

Sbs has a right to rent a dwelling to the district, to the municipality, or to an inter-municipal association in order to rent the properties to a natural person or to rent a dwelling for the security purpose as it shown in the regulation of a social assistance.

Another aspect of sbs activity is to purchase residential and non-residential, in order to expand or remodelling it for the purpose of a lease rental. Furthermore, social building societies can carry out repairs and modernization of objects to meet housing needs, on the basis of the lease, as well as to lead other activities related to housing and infrastructure such as building or buying buildings for sale in these residential buildings or premises.

Another important aspect of sbs activity is non-profit oriented action. What is more, sbs activity is devoted to satisfy the housing need and has to do that with a view to a task of a State and its implementation of the housing needs. According to Art 24 (2) u.p.b.m, it is worth mentioning that the revenue of the society cannot be spent for distribution among shareholders or members. To Art 25, we may claim that sbs is not a company with decision-making power because of legal limitations. Firstly, in the company, the Supervisory Board shall be appointed. The municipality, in which the company operates, is entitled to put its representatives to the composition of the Supervisory Board of the society, in the number specified in the statute. We may clearly see that the company is under control. On account of a profit distribution ban, sbs shall be determined as *non-profit* institution, which is not exactly right. SBS shall be able to make a profit, on condition that, it is allocated to the activities of the Office¹⁹.

We should also mention that the resources are for those people who do not have a legal title to another dwelling. As a result, a tenant should not be wealthy because the public funding cannot be spent on people who are able to support themselves financially. In addition, the tenants cannot be as well impoverished because that would mean they will not be able to pay the rent.

¹⁹ More: Ewa Bończak-Kucharczyk, *Towarzystwa Budownictwa Społecznego w świetle obowiązujących przepisów, tworzenie, zasady działania, finansowe wsparcie*, Warszawa: MINIGO, 2013, s. 490 i nast.

3. SOCIAL HOUSING COMPANY-IMPLEMENTATION OF HOUSING POLICY

In this respect, let us discuss the liquidity of SBS. The period from 2007 to 2009 was very difficult for housing construction which led to difficulties associated with mortgage credits. Consequently, the demand on the real estate market has been lessened. The property values have been also decreased, while the construction service costs have been increased. The economic situation has remained substantially fragile, which caused difficulties associated with obtaining credits for a new investment by the companies, that specialized in housing construction. Not only the adverse change in the labour market but also the difficulties in financial situation of the household, have resulted in problems with regaining the amounts of the charges from the counterparties.

Therefore, the provision of the accounting as well keeping the accounts are applied to SBS as a commercial company. The rental of a functional building as well as a dwelling, in combination with the administration of them, appears as an economic activity of the nature of service. While the activity of the nature of production appears in selling housing construction and dwellings. As a result, we may encounter the products such as : dwellings, housing or garages. This may cause the isolation of the entity in the accountant, which is devoted to rental of the dwelling as well as to the housing construction for sale.

It should be mentioned again that, besides the legislator's explanation and existing legal limitations, when it comes to sbs activity, the large of majority of the tenants are not aware of what a type of a dwelling they live in. The participation payment or bail money, that protects the rental charges, does not give the tenants a legal title of the dwelling but gives only those rights that resulting from a tenancy agreement²⁰. "Participation is the act of taking part in construction payment but it is not the act of owning the dwelling. According to this as well as to Art. 10 (1) u.p.d.o.f.²¹, we may claim that it establishes the sources of revenue, that is,

²⁰ Judgment of Voivodeship Administrative Court in Wroclaw of 23 September 201, ref. no. I SA/Wr 1146/11.

²¹ Polish: Act on personal income tax.

the capital and the property law. In relation to Art. 18, we may claim that incomes, arising from a termination of a rental agreement and a return of participation, that was required during construction costs of a dwelling, must be qualified as a source of an income from the property law. As it shown in Art. 18 u.p.d.o.f., a calculation of the property law, determined by the Art 10 paragraph 1 (1) u.p.d.o.f. as a separate source of an income, is open-ended, as evidenced by the wording “in particular” used by legislator. Hence, the adoption of those incomes by legislator, allowing to allocate all other revenue/incomes, taken from the property law, other than those referred to this category. Not knowing about housing in sbs system, undoubtedly, is still arousing much emotion related to rental and the whole mechanism of sbs activity. It may also lead to conflict with the tenants and the seekers/applicants. Most of the tenants require a response about the amount of the loan that they have already paid, even though none of the tenants have not signed the contract yet. The mortgage is held by sbs, in order to build the housing stock. A tenant takes part in the construction costs by the payment of the participation amount. That is why, we shall indicate the differences between a rental and a participation. Thanks to that, we may determine the powers of tenants and participants as well as to demarcate the extent of the protection. Termination of a contract may only happen if the legislator indicates the reason. To Art 30 paragraph 5 u.p.b.m these are the main reasons for it: submission by the tenant in the declaration statements inconsistent with the truth, the society says a lease agreement without notice. After the termination of the person dealing with it, without legal title, shall pay to the receiving monthly compensation for the use of the premises at the rate of 200 % of the monthly rent, which would have paid if the contract has not been terminated. In such a case, Art. 28 paragraph 2 should not be applied. The participation shall be 30% of the value of the dwelling, in exchange for the payment, the participant meets the standards regulated by the law on certain forms of promoting housing construction. In that case, SBS signs the lease with that kind of a tenant. The contract concluded with a tenant, is open-ended, that is why, it may be terminated only for an important reason as well as on conditions listed in Art 11 u.o.p.l. Due to this regulation, if a tenant is entitled to rent a dwelling, so termination of the lease in legal relationship may happen only for the reasons set out in

paragraph 2-5 as well as in Art 21 paragraph 4 and 5 u.o.p.l. Unless it is a written statement that gives a reason for such action. After examination of the tenants' rights and participation, we may claim that a dwelling in SBS system secures the citizen and gives a sense of protection against loss of a house by the day. It is an ideal solution for people, who are not able to buy a house or a flat of their own.

In conclusion, it should be mentioned that the participation as well as bail money, paid in order to become a tenant of sbs, should not be under debt enforcement proceedings, likewise, a dwelling of sbs. The claim of a tenant, as a part of participation in the construction, can be enforced only if there is a termination of a tenant agreement or a tenant lives a dwelling unattended. Before that happens, the amount of the participation belongs to SBS. However, at the same time sbs is not a debtor, that is why it cannot be enforced due to the debt enforcement proceedings. Hence, owning a dwelling is related to a lease. There no grounds to enforce the amount of participation by the request of a lease termination²².

The examination of the implementation of housing policy, by creation of sbs system, shows that in comparison to France, Poland appears in an unfavourable way. We may claim that, in a crisis situation there is not any fall-back if something goes terribly wrong. As it shown by the example of a French system, we may see that the state suffers the consequences of ineffective fulfilment of their tasks in timely manner. Whereas, in Poland the problem has stopped at this stage when the state does not discharge the duties of a dwelling provision for every citizen, that is regulated by Art 5 of The Constitution. The Constitution of The Republic of Poland states that The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of the citizens, as well as the security of them²³. To sum up, according to Art 75 of The Constitution, the policy conductive to satisfy the housing need depends on the protection of the citizens' activity that aims to own a house or a flat. This statement not only refers to the ownership of the housing but also it makes

²² Judgment of the Appeal Court in Szczecin II Civil Department of 20 October 2015, ref. no. II Ca 338/15.

²³ Agnieszka Bień-Kacała, "Bezpieczeństwo w Konstytucji RP z 1997 r. – wstępna diagnoza", *Przegląd Prawa Konstytucyjnego*, 2(2015), s. 13.

reference to be entitled to rent a dwelling single-handedly²⁴. The title of the end, making a decision about choosing a flat in the resources of a sbs is one of the forms of meeting the housing needs of citizens. Although it is not an apartment acquired for ownership, it gives a sense of security and protects you from losing your apartment from day to day. The payment of the share which is the participation in the construction costs is one of the elements, which gives a citizen's feeling of belonging to a flat in sbs.

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²⁴ See: Przemysław Mikłaszewicz, *Commentary to Art. 75*, In: *The Constitution of The Republic of Poland. Commentary to Art. 1-86, Vol. I*, ed. Marek Safjan, Leszek Bosek, Warszawa: C.H. Beck, 2016, s. 1725 i nast.

