

HISTORIC IMMOVABLE PROPERTY – EXECUTION OF OWNERSHIP (REMARKS IN THE LIGHT OF THE CONSTITUTIONAL PRINCIPLE OF PROPORTIONALITY)

In Polish private law there is the usual differentiation between three types of immovable property: land, i.e. plots of land as separate objects of ownership; buildings, i.e. establishments permanently attached to a ground and which are subject to ownership separate from the ground; premises, i.e. parts of buildings subject to separate ownership¹. The legal position of each type of ownership is not uniform. A good example of such difference is provided by a case of the ownership of a building situated on a land which is an object of perpetual usufruct. The ownership of the building is related to the perpetual usufruct by the right to the land that is weaker than legal ownership. An even more distinct example of the varying legal status of immovable property is the separate ownership of living spaces², which is dependent on the purpose of this type of ownership.

Therefore, this varying legal status of immovable property has not only theoretical, but also practical values, which is demonstrated well in the execution of legal ownership of real property. It needs to be stressed that in the actual execution of ownership the functional aspect of ownership is of significant meaning, as pointed out by A. Stelmachowski³.

The overall content of the ownership law has been outlined in Article 140 of the Civil Code (KC) with the aim to indicate the limits of the execution of rights to property by the entitled. According to this rule, the limits of ownership are determined by three factors: the law, the principles of social coexistence and the socio-economic aspect of law. It is worth noticing that the last two restrictions appear rather archaic, not to say flagrant, considering the fact that ownership is a law which constitutes one of the main pillars of the economy, economic turnover and the entire private law.

1 E. Skowrońska in J. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*. Vol. I, Warsaw 1997, p. 110

2 See also: A. Doliwa, *Prawo mieszkaniowe. Komentarz*, Warsaw 2005, p. 532 and ff.

3 A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warsaw 1998, p. 187.

In this context it is worth analysing the execution of ownership of historic immovable property. The term ‘property of historical value’ is not found in the rules of the Law of 23 July 2003 on historic property preservation and maintenance⁴, yet in Article 3 of this law there appears an expression ‘**historic immovable property**’. Based on this law, it can be concluded that **the term ‘historic immovable property’ refers to a property, its part or a number of properties created by human, the preservation of which is in the interest of the society, because of their historical, artistic or educational value.** Thus there are grounds to assume that this legislation refers to the classic civil notion of immovable property and its types, **without coining a novel legal expression for historic immovable property.** Still, the legislation clearly indicates the specific **functional aspect of the legal ownership** of historic immovables. While executing the ownership rights, each owner of historic immovable property ought to pay heed to the **preservation of historic immovables**, which is in the interest of the society, because of the existing historical, artistic or educational value (Article 3 Point 1 of the Law). This raises the fundamental question of adequate balance between preservation of historic property realised by public administration authorities and the civil notion of ownership as well as the principles of its execution in this specific arrangement.

According to the private law regulations, the ownership law is marked by two attributes of principle importance:

- 1) This law expresses the widest range of relations between the subject and the property;
- 2) This law is characterised by a specific flexibility.

These are two universal attributes which may relate to all forms of ownership⁵. Therefore, their application in the execution of ownership of historic immovable property needs to be considered.

In view of Article 4 of the law on historic property preservation, the preservation of property is mainly based on activities by public administration bodies which aim at:

- 1) Ensuring legal, structural and financial conditions enabling permanent preservation of historic properties as well as their development and maintenance;
- 2) Preventing risks which could cause damage to the value of historic properties;
- 3) Preventing destruction and inadequate use of historic properties;

4 Journal of Laws No. 162, point 1568 as amended.

5 A. Stelmachowski, Zarys..., p. 174.

- 4) Counteracting theft, disappearance or illegal transport of historic property abroad;
- 5) Monitoring of the maintenance and function of historic properties;
- 6) Considering preservation objectives in development and environmental planning.

It is evident that the term ‘preservation’ will entail elements of interference by authorities; the power of authorities which enables the imperative and compulsory measures.

There is no doubt that the law on historic property preservation, apart from fulfilling the public interest, **gives rise to restrictions in the execution of ownership rights with regards to historic immovable property** as well as any other historic property.

These restrictions are frequently crucial. One can take as an example the requirement of Article 25 of the Law to adhere to particular guidelines in the development of a historic property for practical purposes with a prior consent of historic property conservation authorities in a particular province. Moreover, the rule of Article 32 of the Law imposes the obligation to enable access to a historic property for research purposes. Another significant restriction is laid in Article 49 of the Law and provides that the conservation authority of a particular province may issue a decision demanding conservation or construction works. Implementation of this decision does not exempt the owner of a historic immovable property from the obligation to obtain the permission for any construction activity or to report in instances stipulated in the Construction Law.

If a legal owner fails to fulfil the obligation imposed by the decision and, consequently, substitute works are carried out, the province conservation authority issues a determination of the liability to the State Treasure on account of conducting the substitute conservation works, specifying the time limit and the requirements of the liability. Such liability is secured by obligatory collateral claimed by province conservation authorities according to the decision determining the amount of the liability.

Additional duties and restrictions regarding the execution of legal ownership of historic immovable property are introduced by the Law of 21 August 1997 on real property management⁶. In the rule of Article 39 of the Law, there is a statement that any construction activities which are to be carried out near a building listed as historic property or in the area listed as historic property, require permission issued by a relevant historic conservation authority. A permission for demolition of

6 Journal of Laws 2004, No. 261, point 2603 as amended.

a building listed as historic property may be issued only following the decision of General Property Conservation Authority which acts on behalf of a relevant minister for culture and national heritage preservation, to remove this object from the list of historic properties.

So far the most theoretically and practically controversial was Article 31 Paragraph 1 of the Law on historic property preservation, which requires a legal owner to cover the expenses of archaeological research and documentation, if these activities are indispensable for preservation of a particular historic property. In relation to this rule, there appears a statement in the literature to declare that this rule **protects historic property, above all, from its legal owner** and this function is principal⁷. It needs to be stressed here that **preservation of historic property lies in the duties of public authorities, and Article 31 Paragraph 1 of this Law represents the outcome and the way this duty is fulfilled**. However, we have to differentiate between the preservation of historical property and its maintenance. The preservation belongs to public administration, while the maintenance is strictly individualised⁸. The fundamental question is whether the restrictions in legal ownership and in other property rights resulting from this type of rules are justified in the constitutional norms.

This issue was subject to the decision by the Constitutional Tribunal. The verdict of 8 October 2007 (Case No. K20/07)⁹ by the Constitutional Tribunal ruled that Article 31 Paragraph 1 of the Law of 23 July 2003 on historic property preservation and maintenance is not in accordance with Article 64 Paragraph 1 and 3 in relation to Article 31 Paragraph 3 and Article 73 of the Constitution of the Republic of Poland.

Every legal owner of historic immovable property is obliged to take the burden and provide for public services related to historic property preservation as outlined in the Law, because the subject of this ownership plays a specific role and its maintenance is in the public interest (Article 3 of the Law on historic property preservation). **This particular burden is to aid the realisation of public interest and not to transfer the public authorities' duties onto the legal owner of a historic immovable property.**

In the grounds for the above verdict, the Constitutional Tribunal accurately emphasizes that the current state in the scope of this matter, as regulated by Article 31 Paragraph 1 of the Law on historic property preservation, is an indication of the lack of adequate balance between the private and the public interests, which has led

7 M. Dreła, *Własność zabytków*, Warsaw 2006, p. 129.

8 K. Stanik, *Ewolucja pojęcia „zabytek” w prawie polskim (zagadnienia podstawowe)*, „*Studia Iuridica Lublinensia*”, 2007, No 9, p. 179.

9 *Journal of Laws* 2007, No. 192, point 1394.

to the violation of the nature of legal ownership. In this respect the above regulation has been ruled as conflicting with Article 64 Paragraph 1 and 3 in relation to Article 31 Paragraph 3 of the Constitution.

A number of legal solutions which aim to alleviate the burden are not sufficient to compensate for the expenses of archaeological research and documentation; such as Article 73 of the Law on preservation of historic property and Article 68 Point 3 of the Law on real property management.

Article 73 provides that the legal owner or possessor of a listed property, or a holder of permanent management of such property, has a right to apply for a special subsidy from the government to fund conservation, restoration and construction works related to this property. However, this applies only to properties registered on the list of historic properties, and the regulation of Article 31 Paragraph 1 of the Law on historic property preservation includes historic immovable property covered by conservation protection based on the local environmental planning and forest administration. The subsidy may only provide for the essential costs and does not include the research documentation expenses. In the end, this can lead to a state when a legal owner is not able to execute their legal ownership of the historic immovable property.

According to Article 68 Point 3 of the Law on real property management, when a property listed as historic is on sale, the price is dropped by 50%. A relevant authority with consent of a province governor or district council may elevate or reduce this discount.

In the assessment of any particular norms which interfere with the ownership law all already existing restrictions must be taken into account. In order to establish whether the essence of the ownership law has been preserved/maintained, it is necessary to analyse all legally valid restrictions¹⁰. The Constitution does not exclude the possibility to impose legal public charges on the ownership that would exceed benefits brought by the subject of the ownership. It is important though that the admissibility of this type of burden is limited, namely, it may not violate the essence of the ownership law, nor represent a hidden (indirect) form of expropriation. Additionally, burdens must not result in transferring the duties of public authorities on the owner¹¹. The state of affairs caused by the current regulation on historic property preservation has particularly affected owners of historic immobile property. The legal validity of the rule of Article 31 Paragraph 1 of the Law questioned by the Constitutional Tribunal ceases 18 months from the publication of the verdict in the

10 See the judgment of Constitutional Tribunal of 17.05.2006, Case No. K 33/05, OTK ZU 2006, No. 5A, point 57, as well as the judgment of 7.11.2006, Case No. SK 42/05, OTK ZU, 2006, No. 10/A, point 148.

11 Grounds for the judgment of Constitutional Tribunal of 8.10.2007, Case No. K 20/07, Journal of Laws 2007, No. 192, point 1394.

Journal of Laws of the Republic of Poland. This verdict is of immense importance, as it once again indicates the significance of the criteria of the constitutional principle of proportionality.

Streszczenie

Przepisy ustawy z 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, nie posługują się pojęciem “nieruchomość zabytkowa”, za to w art. 3 tejże ustawy pojawia się określenie “zabytek nieruchomy”. Na podstawie tego przepisu można wnioskować, że za zabytek nieruchomy należy uznać nieruchomość, jej część lub zespół nieruchomości, będących dziełem człowieka, których zachowanie leży w interesie społecznym ze względu na posiadaną wartość historyczną, artystyczną lub naukową. Są więc podstawy aby przyjąć, że ustawodawca odwołuje się tu do klasycznego cywilistycznego pojęcia nieruchomości i ich rodzajów, nie tworząc nowej konstrukcji prawnej nieruchomości zabytkowej. Wyraźnie jednak wskazuje się tu na specyficzny aspekt funkcjonalny prawa własności zabytku nieruchomego. Każdy właściciel zabytku nieruchomego przy wykonywaniu prawa własności powinien mieć na względzie zachowanie zabytku nieruchomego, co “leży w interesie społecznym ze względu na posiadaną wartość historyczną, artystyczną lub naukową” (art. 3 pkt 1) ustawy).