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NATIONALISATION AND REPRIVATISATION IN WARSAW

Real estate has always been an inseparable component of the history of human kind, widely referenced in historical events from the ancient times, through the investiture dispute, and the Russian revolution. Never, however, has real estate been subject to such a structural, social and mental revolution as in the communist idea of nationalization. Never before has the ownership relations been ruined in such a scale, nor so many people and institutions deprived of their land, never has the state taken over so much property, as happened during the Revolution in Russia in 1917 (in some aspects the French Revolution only could be compared), and in Polish reality – in accordance with the nationalization acts, in particular the Warsaw Decree from 1945[1].

It happened of course before, that whole social or ethnic groups have been deprived of their property, however, it never happened in time of peace, in the majesty of the law implemented by the state against its own citizens. As a precursor of such actions we can possibly consider the Third Reich with its Nuremberg laws, proscribing Jews, and often seizing their property. How important the Warsaw Decree was, is shown by the fact that its consequences are visible even today, and the Polish state did not manage to deal with this legislative problem.

Reprivatisation on the other hand is a process that leads to restitution of property that has been overtaken by the state in the way of nationalization or expropriation, to its former owners or their legal successors.

A common way of identifying the reprivatisation procedure is to describe it as satisfaction received by individual entities in exchange for deprivation of an owner of the ownership right, which in most cases means compensation. Reprivatisation, in other words, is a procedure of retrieving ownership title, lost by the rightful owners, upon the basis of the legal acts implemented after the World War II, within years 1944–1962.

As a result of World War II, Poland found itself within the Soviet zone. The government formed under Soviet supervision, moved in early 1945 from the city

[1] Decree of 26 October 1945 r. regarding the ownership and usufruct of the real estate in Warsaw [hereinafter Decree of 26 October 1945 r.].

of Lublin to the destroyed capital of Poland. After the uprising against Germans in August – October 1944, the city laid in ruins, destroyed during the fighting, but mostly after its finish, blown and burned by special squads of German army. With particular passion they destroyed objects of high cultural and historical value – palaces, churches, monuments, libraries, etc. 11,000 buildings were completely ruined, and another 14,000[2] required reconstruction. In such circumstances the reconstruction of Warsaw as the capital of Poland was not certain. Relocation of the capital to other agglomeration (Łódź) was seriously considered.

Extraordinary steps needed to be undertaken. Thus, the Warsaw Decree was introduced, and entered into force on 21November 1945 and referred to the whole area of Warsaw (14.146 ha at that time). Article 1 of the Warsaw Decree stipulated that all real estate located within Warsaw was transferred to the Warsaw Municipality[3].

Irrespective of how we judge the acts of Polish authorities at that time, it seems, if Warsaw was to be reconstructed, special legal solutions were necessary. It should be noted however, that the provisions of the Warsaw Decree were violated by the same authorities which implemented this law, as far as the right of establishing the perpetual usufruct, or compensation for the nationalised property. Such behaviour of the authorities is in complete contradiction to the rules of a state of law, but the idea itself of regulating the reconstruction of the city should be considered positively. It was clearly understood that keeping private ownership of real estate in districts completely destroyed, and at the same time undertaking the reconstruction works only available by public means, required extraordinary solutions.

It should be noted, that as a result of entering into the Decree by force, we faced not only communalization of private equity, but also expropriation. Looking at these actions now after many decades, we can consider that it was a progressive expropriation. Comparing indeed the legal status of the expropriated equity at the beginning of this process to its status after 60 years, it appears that slightly harmless partial expropriation evolved to a total expropriation without any compensation.

As mentioned above, Article 1 of the Decree provided that "in order to allow the rationalized reconstruction of the capital and its further development, in accordance with the needs of the nation, in particular in order to allow quick disposal of the real estate and its proper use, all property within the area of Warsaw are transferred to the municipality at the date of entrance into force of the present Decree"[4]. As we can see, the main idea was to reconstruct and develop the city. Furthermore, all persons and legal entities, whose property has been subject to

[2] *Raport o stratach wojennych Warszawy, Urząd miasta stołecznego Warszawy*, Archiwum Państwowe m.st. Warszawy, BOS I, signature 2480.

[3] Decree of 26 October 1945 r.

[4] Decree of 26 October 1945 r.

the above mentioned communalisation, were entitled to submit within six months from the date when the land was taken over by the city, a motion establishing on their behalf the right of perpetual lease (from 1961 transferred into perpetual usufruct) on the subject real estate. Unfortunately, the communist authorities violated these rules from the very beginning. Almost all such motions were rejected, despite the fact that the Decree provided only one premise when refusal was possible – namely, when the description of use of the particular real estate, described in the local master plan was in contradiction to its current purpose. Such attitude of the authorities resulted from the aspiration to not only take away the ownership right from the previous owners, but also the possession of their properties.

From the practical point of view, the communalisation was executed in the following way. A real estate was subject to inspection by relevant authorities, and it was considered as overtaken by the city of Warsaw on the date of publishing of the protocol from such inspection in the official journal of City Management. After 1948, the remaining property was overtaken without any inspections, street by street, by the way of publishing in the official journal of the City Management. In order to avoid any doubts, the authorities finally published an announcement in which they declared, that all real estate that have not yet been overtaken are from this date considered property of the city of Warsaw. It should be noted, that in case of refusal of establishing the perpetual lease, the Warsaw Decree provided compensation; however, it was almost never granted to the expropriated owners.

Between 1948 and 1949, 17.000 decree claims were submitted and almost all were rejected[5]. Through the decades, previous owners and later their legal successors were denied the right to claim the return of their property as well as any compensation.

First in 1989, after the communist system collapsed in Poland, and democratic reforms were introduced, the change of law allowed legal steps to be taken to regain the lost ownership of property in Warsaw. Many efforts were undertaken to develop a comprehensive legal solution for the reprivatisation issue, but none of them succeeded. Between 1989 and 2015, 19 reprivatisation bills were introduced in the parliament and only one reached the desk of the President, however it was vetoed by him. Even today, there is no reprivatisation law in force and after 25 years we are facing a legislative gap. The administration courts have taken over the competences of the state, and enabled a path through court that might lead to recovery of the former ownership title, or compensation.

First of all, it should be noted, that the Supreme Court decided that the reprivatisation cases shall be reviewed by administration courts – Province Admin-

[5] H. Ciepła, R. Sarbiński, A. Sobczyk-Sarbińska, *Roszczenia przysługujące byłym właścicielom tzw. gruntów warszawskich. Sposób ich dochodzenia w postępowaniu administracyjnym i sądowym*, Warsaw 2013, p. 97.

istration Court as the first instance, and the Main Administration Court as the second and final instance[6].

What are the possible actions of a former owner, or its successors in 2015? The main and most important issue is whether the decree motion has been filed in due time, which was 6 months after the real estate was communalized. If that condition is met, there is a possibility to launch the court procedure in order to obtain the perpetual usufruct title to the land.

As mentioned above, almost all the decree motions were rejected at the time they were submitted. In such case, or in case if such motion has not been examined at all, the entitled person or entity can today demand:

– to have the unfavourable decision declared invalid, which results in reviewing the decree motion by the relevant authorities as if it was submitted today;

– filing a motion regarding inactivity of the authority if the decree motion was not examined at all.

The main rule is that the real estate should be returned in nature, therefore, the above described actions may result in establishing in favour of the former owner the right of perpetual usufruct on the subject real estate.

However, there might be some obstacles with this approach. One of them is a situation when irreversible legal consequences have occurred. The term of an irreversible legal consequence is important for the previous owners because only in the event of declaring a decree decision invalid may they request the establishment of perpetual usufruct. As the Main Administration Court declares, an irreversible legal consequence occurred if perpetual usufruct right on the real estate was established on behalf of a third party, or the property was sold and buyers are protected by principle of public credibility of land and mortgage registers.

As far as the relevant authorities are concerned, in case the national council of the city of Warsaw issued the decree decision, and the current owner of the land is the City of Warsaw, Local-government Appeal Boards should examine the case. And if the current owner is the State Treasure, the case should be examined by the Minister of Infrastructure and Development.

The President of the capital city of Warsaw is obliged to re-examine the decree motion filed at the end of the 40s of the last century, for establishment of the perpetual usufruct in favor of the former owners of the land. In case the decree motion was submitted but the decision was not issued, the competent authority to consider the case, both for the land owned by the City of Warsaw and the State Treasury, is the President of the Capital City of Warsaw. The inactivity of the authority may be appealed to – appropriately – local-government Appeal Boards or the Voivode of Mazovia.

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[6] Supreme Court judgement of February 7, 1995, signature III ARN83/94, OSNAPiUS 1995, No. 12, item 142.

In case of positive decision, in accordance to Article 7 par. 3 of the Decree – it is necessary to conclude an agreement regarding the perpetual usufruct[7]. If the President of the Capital City Warsaw evades execution of the agreement, the former owner is entitled to a civil claim stating that a given person is obliged to conclude an agreement under Article 64 of the Civil Code in connection with Article 1047 of the Code of Civil Procedure[8]. Obligation to the conclusion arises from that decision.

In accordance with the current line of jurisdiction after the declaration of the invalidity of a decree decision, the proceedings will be carried on the basis of Article 7 of the Decree[9], and in case that negative decree decision was issued with the infringement on law the previous legal owners may claim compensation on the basis of provisions of the administration proceeding law, but only within the scope of its negative interest – *damnum emergens*, i.e. the actual damage, not *lucrum cessans*, i.e. lost profits. The burden of proving damage is with the person who claims compensation.

The party that suffered damage as a result of the Decree decision issued with a breach of Article 156 par. 1 of the Code of Administrative Procedure[10] or the declaration of invalidity of a decision, had a right to apply in administrative proceedings for a compensation from the public authority that issued the subject decision. If the person was dissatisfied with the compensation awarded, or if it is not granted (which was the rule), it had the right to bring an action for damages before the common court of law.

The basis for bringing an action to the common court of law is the declaration of invalidity of decision under Article 156 par 1 of the Code of Administrative Procedure[11]. It should be noted that the declaration of invalidity of the decision or issuance of the decision with infringement of law is only the fulfilment of the basic condition of liability provided for in Article 160 par. 1 of the Code of Administrative Procedure[12], but it does not determine the existence of the damage, its amount and the existence of causal link between the defective decision and the damage. The burden of proof lies with the party claiming compensation, as a general rule expressed in Article 6 of the Civil Code[13].

Persons who did not submit decree motions in due time or at all are in the worst situation. They have currently no claims to the property, nor for compensation if they:

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[7] Decree of 26 October 1945 r.

[8] Act of November 17 1964 – Code of Civil Procedure, as amended.

[9] Decree of 26 October 1945 r.

[10] Act of 14 June 1960 – Code of Administrative Procedure, as amended.

[11] *Ibidem*.

[12] *Ibidem*.

[13] Act of 23 April 1964 – Civil Code, as amended.

– did not submit in due time the application for a perpetual lease or development rights (temporary ownership and perpetual usufruct right);

– did not apply for an allocation of rights under the applicable rules.

As we can see, although 70 years have passed since ownership of all land property located within Warsaw was transferred to the municipality of the Capital City of Warsaw, a part of former property owners or their legal successors can still claim to return property in nature or compensation.

Lack of reprivatisation law results in uncertainty of the legal status of the real estate in Warsaw, confusion, incomprehension and mistrust of the citizens towards the authorities and the legal system. It also limits the possibility of the development of the city, and makes development of some of its areas completely impossible.

Complexities connected with recovery of land in Warsaw remain incomprehensible to the majority of the population, and raises legitimate fears and concerns. This situation also negatively affects the confidence of citizens of the state.

NATIONALISATION AND REPRIVATISATION IN WARSAW

Summary

Real estate has always been an inseparable component of the history of human kind, reflecting historical events in a very wide spectrum on may occasions referenced in historical events from the ancient times, through the investiture dispute, till the Russian revolution.

Nationalisation, is the process of transforming private assets into public assets by bringing them under the public ownership of a national government or state. Reprivatisation, on the other hand, is a process that leads to restitution of property that has been overtaken by the state in the way of nationalization or expropriation, to its former owners or their legal successors. The article describes the nationalization performed in Warsaw by communist authorities, and the later the reprivatisation procedure.

NACJONALIZACJA I REPRYWATYZACJA W WARSZAWIE

Streszczenie

Nieruchomości były i są nieodłącznym elementem historii ludzkości, stanowiąc punkt odniesienia w historycznych wydarzeniach w bardzo szerokim spectrum, od czasów antycznych, poprzez okres sporu o inwestyturę, po rewolucję bolszewicką.

Nacjonalizacją jest przejęcie przez państwo, w drodze aktu prawnego, prywatnego mienia na własność państwa lub samorządu. Reprywatyzacją natomiast nazywa się proces polegający na zwrocie poprzednim właścicielom lub ich następcom prawnym mienia zabranego właścicielom przez państwo w drodze wywłaszczenia bądź nacjonalizacji. Niniejszy artykuł opisuje proces nacjonalizacji dokonany w Warszawie przez władze komunistyczne i późniejszy proces reprywatyzacji.

BIBLIOGRAPHY

Bernatowicz Ł., *Reprywatyzacja na przykładzie gruntów warszawskich*, Warsaw 2015

Ciepła H., Sarbiński R., Sobczyk-Sarbińska A., *Roszczenia przysługujące byłym właścicielom tzw. gruntów warszawskich. Sposób ich dochodzenia w postępowaniu administracyjnym i sądowym*, Warsaw 2013

Friszke A., *Polska. Losy państwa i narodu 1939–1989*, Warsaw 2003

Hetko A., *Dekret warszawski – postępujące wywłaszczenie na przykładzie gruntów warszawskich*, Warsaw 2008

Strus Z., *Grunty warszawskie*, PS 2007, No. 10

Raport o stratach wojennych Warszawy, Urząd miasta stołecznego Warszawy, Archiwum Państwowe m.st. Warszawy, BOS I, signature 2480

Decree of 26 October 1945 regarding the ownership and usufruct of the real estate in Warsaw

Supreme Court judgement of February 7, 1995 , signature III ARN83/94, OSNAPiUS 1995, No. 12, item 142

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