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Sylwia Jarosz-Żukowska[1]

Reprivatization in Warsaw – Another Prosthesis Instead of a Systemic Solution

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Słowa kluczowe: mienie, własność, reprywatyzacja, grunty warszawskie, ochrona lokatorów

Abstract

The study discusses another statutory attempt to partially and *ad hoc* solution of the problem of claims of the former owners of the so-called Warsaw land. The main objective of the Act of 17 September 2020 amending the Act on the special rules for removing the legal effects of reprivatization decisions regarding real-estate in Warsaw, issued in violation of the law, and the Real-estate Management Act is to significantly reduce the scale of restitution of Warsaw real-estate by extending the list of grounds for refusing to grant the right of perpetual usufruct to the entitled entity and protection of tenants living in premises in reprivatized buildings. The act does not, in any way, end the process of settling accounts with the former owners.

Streszczenie

Reprywatyzacja w Warszawie – kolejna proteza zamiast rozwiązania systemowego

Opracowanie omawia kolejną ustawową próbę fragmentarycznego i doraźnego rozwiązania problemu roszczeń byłych właściciela tzw. gruntów warszawskich. Zasadniczym celem

[1] ORCID ID: 0000-0003-3270-710X, Assoc. Prof., Department of Constitutional Law, Faculty of Law, Administration and Economics, University of Wrocław. E-mail: sylwia.jarosz-zukowska@uwr.edu.pl.

ustawy z 17 września 2020 r. o zmianie ustawy o szczególnych zasadach usuwania skutków prawnych decyzji reprywatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem prawa oraz ustawy o gospodarce nieruchomościami jest istotne ograniczenie skali restytucji nieruchomości warszawskich poprzez rozszerzenie katalogu przesłanek odmowy ustanowienia prawa użytkowania wieczystego na rzecz uprawnionego podmiotu oraz ochrona lokatorów zajmujących lokale w reprywatyzowanych budynkach. Ustawa w żadnym razie nie kończy procesu rozliczania się państwa z byłymi właścicielami.

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I.

The case law of the European Court of Human Rights[2], as well as the constitutional courts of other Central and Eastern European countries and of the Polish Constitutional Court undoubtedly confirms the thesis that "the problem of the return of property nationalized by totalitarian regimes in the 20th century in post-communist countries became one of the most important issues regarding facing the past"[3]. Regardless of the importance and consequences (also financial) of the problems faced by other countries in our region of Europe when dealing with post-war historical events, including the ownership sphere, these countries have either completed or are approaching (at a different pace) the final completion of the restitution processes. However, this does not apply – as we know – to the Polish reprivatization practice, which was caused by the "sin" of the legislator's omission, who for many years had avoided a systemic solution to the problem of "reprivatization" in the form of a decision to grant former owners some form of compensation or to terminate reprivatization claims. As a consequence, the *nolens volens* judicial decisions had to settle complex and socially controversial matters (the so-called judicial re-privatization). This resulted in – more or less justified – criticism of judicial activism,

[2] On the very extensive jurisprudence of the ECHR on the effects of post-war nationalization see more S. Jarosz-Żukowska, *Własność w okresie przeobrażeń ustrojowych w Polsce z perspektywy orzecznictwa Europejskiego Trybunału Praw Człowieka*, Wrocław 2016, p. 175 et seq.

[3] A. Młynarska-Sobaczewska, *Autorytet państwa. Legitymizacyjne znaczenie prawa w państwie transformacji ustrojowej*, Toruń 2010, p. 408.

as well as allegations of an axiological disorder of the jurisprudence in reprivatization cases[4]. Many negative consequences of this state of affairs cannot be undone, but the legislator still has to take important decisions.

II.

For over 30 years, debates and more or less intense legislative work have been underway in Poland on the adoption of a comprehensive reprivatization act or an act regulating, at least partially, the legal situation of former owners of "Warsaw land"[5]. In the case of these owners, the enactment of the law was (and still is) particularly desirable due to the specific legal situation of this group of former owners. Moreover, the uncertainty as to the legal status of land in Warsaw, lasting for three decades, is very unfavorable. In the light of the decree of 1945[6], which is still in force, the ownership of the land located in the capital city was transferred to the commune of the Capital City of Warsaw by operation of law, upon the entry into force of the decree. Art. 7 sec. 1 of the decree granted former owners and their legal successors (who own real-estate) the right to submit an application within 6 months of taking the land into possession by the commune for another right to the real-estate (now perpetual usufruct right). In practice, the violation of this provision by the then authorities took two forms. Firstly, in practice, these were often cases of failure to process an application submitted within the deadline. Secondly – which was almost a rule – decisions were issued that groundlessly refused to establish right in rem for the plot[7]. In the latter case, finding that the original decision was issued with a flagrant violation of the law or without grounds, results in its elimination from the market by declaring it invalid with *ex tunc* effect[8], opening the way to reconsideration of the application for the establishment

[4] S. Jarosz-Żukowska, op.cit., p. 265 et seq.

[5] Detailed discussion of the assumptions of subsequent bills ibidem, pp. 621–655.

[6] Decree of October 26, 1945 on the ownership and use of land in the area of the capital city of Warsaw (Dz.U. No. 50, item 279 as amended).

[7] This is highlighted by the judgment of the Constitutional Tribunal of 19 July 2016, Kp 3/15.

[8] See Art. 156 § 1 pt. 2 the Act of June 14, 1960, Code of Administrative Procedure (Dz.U. 2020, item 256, 695, 1298).

of the right of perpetual usufruct of land[9]. Granting the former owner or his legal successor the perpetual usufruct of land (natural restitution) is excluded, however, if any of the negative conditions indicated in the Art. 156 § 2 of the Code of Administrative Procedure, including especially the so-called irreversible legal consequences[10].

However, in case of failure to consider an application submitted within the time limit pursuant to the decree of 1945, the former owner or his legal successor has the right to wait for the application to be examined according with the Art. 7 sec. 1 of this decree regardless of the passage of time. The right to apply for a perpetual usufruct by persons who have already applied for it in the past is currently based on the Art. 214 of the Act of August 21, 1997 on real-estate management[11] (hereinafter: r.e.m.). The situation of entities entitled to the right under the Art. 7 sec. 1 of the decree – apart from the previous regulations – was modified by Art. 214a r.e.m. introduced by the 2015 novel[12]. It introduced additional conditions justifying the refusal to establish the right of perpetual usufruct, to which I will return in further comments. The amendment of r.e.m. was called unjustifiably the "small reprivatization act", although its purpose was not to solve the problem of former owners' claims, but to limit natural restitution in the case of real-estate used for public purposes.

The adoption of the mentioned *ad hoc* and fragmentary regulation was justified by the ongoing work on the draft comprehensive reprivatization act covering not only Warsaw land, but also other types of nationalized property and various groups of former owners. The last draft of the compensation law was announced by the Ministry of Justice in 2017[13], but it did not become the sub-

[9] R. Trzaskowski, *Reprywatyzacja w orzecznictwie Izby Cywilnej Sądu Najwyższego*, [in:] *Reprywatyzacja w orzecznictwie sądów*, "Studia i Analizy Sądu Najwyższego. Materiały Naukowe", vol. III, ed. M. Plilich, Warsaw 2016, p. 137.

[10] In such a situation, the administrative authority acting under the supervision procedure merely confirms that it has been issued in violation of the law (Art. 156 § 2 and Art. 158 § 2 of the Code of Administrative Procedure), and the entitled only has a claim for damages (Art. 160 § 6 of the Code of Administrative Procedure).

[11] Dz.U. 2020, item 65, 284, 471 i 782.

[12] Act of 25 June 2015 amending the act on real-estate management and the act – Family and Guardianship Code (Dz.U. item 782).

[13] The draft act on compensation for certain harm caused to natural persons as a result of the seizure of real-estate or movable monuments by the communist authorities after 1944 of October 20, 2017.

ject of legislative activities. On the other hand, in the response of the Minister of Justice to a parliamentary question on the issue discussed here[14], it was stated that the ministry is carrying out – interestingly still – "intense analytical work on determining the size and characteristics of private property nationalized during the Polish People's Republic", necessary to develop detailed assumptions of the comprehensive act and the schedule of legislative works. Importantly, the existence in the Constitution of the Republic of Poland of April 2, 1997, of the obligation of public authorities to compensate for the harm suffered by citizens from the communist authorities was emphasized. However, a wide margin of appreciation for the legislator was indicated as regards the choice of detailed solutions to a possible restitution act, or rather a compensation act. The latter view should be accepted, the more so as it is also confirmed in the jurisprudence of the Polish Constitutional Tribunal[15], as well as in the Strasbourg jurisprudence[16]. It is also difficult to disagree with the statement that the method of compensation for nationalized property, adopted in the possible future, should not lead to pathologies caused by the mechanism of annulling former nationalization decisions[17]. In this context, it should be remembered that the need to apply during process the so-called judicial reprivatization Art. 156 of the Code of Administrative Procedure (which for over 30 years had been a kind of substitute for "reprivatization") resulted precisely from the reluctance of the Polish legislator to solve the problem of compensating the claims of former owners of property nationalized in the 1940s. Importantly, a fundamental change could have been brought about by the judgment of 12 May 2015, P 46/13, in which the Constitutional Tribunal found that this provision, in so far as it does not exclude the admissibility of annulment of a decision issued in gross violation of the law, a long time passed (even several

[14] *Odpowiedź sekretarza stanu w Ministerstwie Sprawiedliwości z 7 stycznia 2020 r. na interpelację nr 308 (nr K9INT308) z dnia 10 grudnia 2019 r., dotyczącą prac rządu nad przygotowaniem projektu ustawy regulującej kompleksowo kwestię restytucji mienia prywatnego znacjonalizowanego przez władze komunistyczne po 1944 r.,* http://sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=BKMJQA (20.09.2020).

[15] For example: the judgment of April 24, 2014, SK 56/12 or the judgment of October 25, 2015, P 6/13.

[16] S. Jarosz-Żukowska, op.cit., p. 418 et seq.

[17] Ibidem.

dozen years)[18] before the decision was issued is inconsistent with the Art. 2 of the Constitution. Due to its nature, the judgment P 46/13 does not change the normative content of the Art. 156 § 2 of the CAP, nor does it lead to its repeal. It requires implementation by the legislator through an appropriate amendment of the challenged provision. However, so far – despite some attempts – the judgment of the Constitutional Tribunal has not been executed, and its understanding has raised doubts in the jurisprudence of administrative courts[19]. Certainly, the courts will not replace the legislator in determining the final date for the annulment of nationalization decisions issued in gross violation of the law. It is also true that without the act definitively closing the problem of "reprivatization", the temporary limitation of the possibility of annulment of administrative decisions, pursuant to the Art. 156 § 1 point 2 of the Code of Administrative Procedure, by courts, failing to bring about the desired, from the point of view of the public interest, effect, because – as it is stressed – it can only shift the emphasis to compensation[20].

III.

Recently, the Association of Polish Cities called on the government to abandon any *ad hoc* measures to complete the reprivatization process in Poland[21]. This type of action was considered to be the enactment of the act amending the act on special rules for removing the legal effects of reprivatization decisions concerning real-estate in Warsaw, issued in violation of the law, and the

[18] Temporary limitation of the competence to annul a decision the provision of the Art. 156 § 2 of the CAP it does not apply, inter alia, to an administrative decision issued without a legal basis or with a gross violation of the law.

[19] As for the positions expressed in this matter by administrative courts, see S. Jarosz-Żukowska, op.cit., p. 364 et seq.

[20] E. Łętowska, *Orzecznictwo sądowe jako instrument reprywatyzacji zdekoncentrowanej*, [in:] *Reprywatyzacja w orzecznictwie sądów…*, p. 95; B. Zdziennicki, *Reprywatyzacja w świetle zasad prawa*, "Studia Prawnicze" 2015, No. 3, pp. 21, 26.

[21] *Stanowisko Związku Miast Polskich w sprawie reprywatyzacji mienia obywateli polskich, zawłaszczonego przez władze PRL w kontekście poselskiego projektu ustawy (druk 420) z 8 lipca 2020 r.*, https://www.miasta.pl/aktualnosci/stanowisko-zmp-w-sprawie-reprywatyzacji (20.09.2020).

act on real-estate management of September 17, 2020[22]. A part of the problem of reprivatization of Warsaw land – although undoubtedly significant – is touched upon by the Act to the extent to which it amended the mentioned Art. 214a r.e.m. The act expands the list of the existing grounds for refusal to grant the right of perpetual usufruct to an authorized entity by seven more[23]. Moreover, the premise specified in Art. 214a point 4 (as amended), has been significantly changed. Namely, at present it will not be possible to return real-estate due to the reconstruction or renovation, carried out with public funds, of buildings destroyed in 1939–1945 by more than 50% (instead of the previous 66%).

The main goal of the Act of September 17, 2020 – as is clear from its justification – is undoubtedly to limit the scale of restitution of real-estate in Warsaw in the manner of applying the decree of 1945. The second goal of the legislator is to protect tenants occupying premises in reprivatized buildings and often in a difficult life or property situation, against whom the beneficiaries of reprivatization decisions have often taken illegal actions in the past. Subsequently, the introduced regulations are to protect real-estates with special historic and scientific values, important for the national culture, as well as located in areas important for broadly understood leisure. Finally, the legislator's goal was to protect third parties who obtained rights in rem or the right to use for a fee on the real-estate in Warsaw, including in particular a rental agreement for a flat[24].

It should be recalled that the constitutionality of the statutory solutions used for the gradual closing of the cases pending under the 1945 decree was confirmed by the Constitutional Tribunal in the aforementioned judgment Kp 3/15, in which it found the provision of Art. 214a r.e.m. introduced by the

[22] Dz.U. 2020 item 1709.

[23] These are: occupancy of the premises by one tenant: use of real-estate for the purposes of science, education and culture; location of the land within a public holiday or recreation complex or green areas; establishing or transferring rights in rem to third parties on the land, building or part thereof, or giving real-estate or its part for use against payment, in particular on the basis of a rental agreement for a flat – regardless of the duration of the civil law relationship with a third party; obstacles causing that the establishment of perpetual usufruct and ownership of a building or other device would be contrary to the socio-economic purpose of these rights; the inability to reconcile with the proper neighborly relations; designation or use of real-estate for public utility purposes.

[24] Justification of the bill, pp. 26–28.

mentioned Act of 2015. One should agree with the view that the position of the Constitutional Tribunal expressed in this judgment can also be applied – in principle – to the legislator's decision to expand the list of these premises by the recent amendment of the r.e.m. of 17 September 2020[25]. However, due to the fact that this act constitutes an interference with the property rights vested in former owners under Art. 7 of the 1945 decree, requires assessment from the point of view of compliance with Art. 64 sec. 1 and 2, in connection with the Art. 31 sec. 3 of the Constitution, in particular the justification in other constitutional values.

Undoubtedly, the premise excluding the possibility of natural restitution for the benefit of the former owner due to "occupancy of the premises by a tenant" has a strong constitutional justification in the Art. 75 of the Constitution, imposing an obligation on public authorities to satisfy citizens' housing needs. In the judgment Kp 3/15, the Constitutional Tribunal also pointed to the fact that the right to a flat is a value that justifies the possibility of refusing to establish perpetual usufruct[26]. Similarly, the other indicated premises, which are also included in the concept of "public purpose" within the meaning of Art. 6 r.e.m.[27], they are also justified in a number of constitutional provisions, including Art. 6, 70 and 73 (with regard to real-estate with special historic, scientific and national culture values) and in Art. 68 sec. 1 and 5 and Art. 74 sec. 3 and 4 (with regard to real-estate located within a recreational or recreational complex or green areas)[28].

On the other hand, the least precise premise for the refusal of natural restitution in favor of the entitled person is the fact that it cannot be reconciled "with the proper formation of neighborly relations". As it was pointed out

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[25] M. Wiącek, *Opinia prawna do projektu ustawy o zmianie ustawy o szczególnych zasadach usuwania skutków prawnych decyzji reprywatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem prawa oraz ustawy o gospodarce nieruchomościami z 7 stycznia 2019 r.*, https://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=3070 (20.09.2020), p. 17.

[26] M. Szydło, *Opinia prawna z 10 grudnia 2018 r. o zgodności z art. 2 i art. 64 w zw. Z art. 31 ust. 3 Konstytucji RP niektórych przepisów projektu ustawy o zmianie ustawy o szczególnych zasadach usuwania skutków prawnych decyzji reprywatyzacyjnych dotyczących nieruchomości warszawskich, wydanych z naruszeniem prawa oraz o zmianie ustawy o gospodarce nieruchomościami*, https://www.sejm.gov.pl/Sejm8.nsf/opinieBAS.xsp?nr=3070 (20.09.2020), pp. 34–35.

[27] Ibidem, p. 36.

[28] M. Wiącek, op.cit., p. 19.

during the consultations of the bill, its application may result in the judicature of "the danger of relativism in the perception of the values to which it refers"[29]. As a consequence, decisions refusing to return the property could be overruled by the administrative court, and until then there would be a state of uncertainty as to the legality of the negative decisions in the first years after the entry into force of the 2020 amendment[30]. Moreover, it is questionable, because it is characterized by a certain amount of arbitrariness, that the reduction of the damage threshold in case of reconstruction or renovation performed with public funds from 66% to 50% is also questionable. In the justification of the bill, it is only indicated that reducing the "percentage of damage of the building will allow the scope of the draft provision to cover a greater number of buildings destroyed in 1939–1945, rebuilt or renovated from public funds"[31]. Thus, the decision was not justified convincingly enough. On the other hand, there was a clear intention to limit the number of real-estates returned to former owners, which is difficult to reconcile with the constitutional guarantee of the protection of property rights[32].

IV.

Finally, it should be noted that the Act of September 17, 2020 – implementing the undisputed need to protect tenants living in reprivatized buildings – does not end the process of settling accounts with the former owners. Extending the list of negative premises for the establishment of perpetual usufruct will entail the necessity to pay compensation to former owners of Warsaw land under Art. 215 r.e.m., and consequently the financial consequences for the state budget[33]. Against the background of the subjective scope of para. 2

[29] *Pismo Prezesa Prokuratorii Rzeczypospolitej Polskiej z dnia 30 czerwca 2010 r.,* http://www.sejm.gov.pl/sejm9.nsf/druk.xsp?documentId=85F8393F59B6D28CC125859F002DFD74 (20.09.2020).

[30] *Nowa ustawa dotycząca reprywatyzacji: Pozorne rozwiązanie problemu,* https://prawo.gazetaprawna.pl/artykuly/1486586,reprywatyzacja-nowelizacja-ustawy-o-komisji-weryfikacyjnej.html (20.09.2020).

[31] Justification of the bill, p. 26.

[32] M. Wiącek, op.cit., p. 17.

[33] Pismo Prezesa Prokuratorii Rzeczypospolitej Polskiej…

of this provision, there is an unjustified differentiation between the former owners of Warsaw land. The judgment of the Constitutional Tribunal of 13 June 2011, SK 41/09 still requires implementation through legislative action[34]. The obligation of the legislator to regulate the issue of Warsaw land in a systemic way is also indicated in the judgment of the Constitutional Tribunal in the case Kp 3/15.

Therefore, an alternative to the lack of a law will be the so-called judicial reprivatization, although in a different form due to the content of Art. 214a r.e.m. Instead of claims for the return of real-estate, claims for damages will be raised predominantly[35]. An unquestionable disadvantage of the fragmentary solution adopted in the Act of 17 September 2020 is that it limits the possibility of natural restitution without adopting a model for determining the scale of damages. However, the jurisprudence of the Constitutional Tribunal indicates that "constitutionally significant values justify a separate legal regulation of compensation for mass expropriation from the post-war period"[36].

On the occasion of the enactment of the Act of 17 September 2020 discussed here, the aforementioned judgment of the Constitutional Tribunal P 46/13 was not implemented by introducing a temporary limitation of the possibility of annulment of decisions refusing to grant the right to land to former owners. In the justification of the bill, the need to implement the mentioned judgment was not generally addressed. However, one should agree with A. Bodnar that possible statutory solutions in this area "must be consistent with the reprivatization act and take into account the principles of protection of acquired rights and respect for interests in progress"[37].

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[34] Bodnar A., *RPO o reprywatyzacji: wystąpienie do Prezesa Rady Ministrów z siedmioma konkretnymi postulatami z 7 października 2016 r.*, http://www.rp.pl/Nieruchomosci/3100799-41-Reprywatyzacja-RPO-pisze-do-premier-Szydlo-i-przedstawia-7-postulatow.html#ap-1 (20.09.2020); M. Szydło, op.cit., pp. 36, 37.

[35] K. Łaski, *Co dalej z reprywatyzacją?*, http://www.krytykapolityczna.pl/artykuly/kraj/20160912/laski-co-dalej-z-reprywatyzacja (20.09.2020). See more E. Łętowska, op.cit., pp. 102–103.

[36] Judgments SK 56/12 and Kp 3/15.

[37] A. Bodnar, *RPO o reprywatyzacji…*

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