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Are Current Owners and Usufructuaries of Polish Real Estate Nationalized after World War II Entitled to the Status of Parties to Reprivatization Proceedings?

PRZEMYSŁAW SZYMCZYK *

In a Polish proceeding seeking a finding of the invalidity of a nationalization decision issued under the Warsaw Decree,¹ the Agricultural Reform Decree,² the Nationalization of Industry Act,³ or other nationalization regulations, one of the basic determinations that must be made by the administrative body is the identities of the parties to the proceeding. In the administrative practice and the case law of the courts, there is a noticeable discrepancy between the positions on the treatment of current owners and perpetual usufructuaries of once-nationalized properties as parties to such reprivatization proceedings—particularly with respect to the owners of units within buildings located on the land in question.

Under the first position, the only parties to the reprivatization proceedings are the former owners of the real estate (or their legal successors) and possibly the State Treasury or local governmental unit (most often the commune—*gmina*). According to the second position, in addition to the former owner or legal successor, anyone who holds

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1. Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree on Ownership and Use of Land in the Territory of the City of Warsaw of October 26, 1945] (Dz. U. 1945 nr 50 poz. 279) (Pol.).

2. Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej [Decree of the Polish Committee of National Liberation on Conduct of Agricultural Reform of September 6, 1944] (Dz. U. 1945 nr 3 poz. 13 t.j.) (Pol.).

3. Ustawa z dnia 3 stycznia 1946 r. o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Act on Assumption of Ownership by the State of Fundamental Branches of the National Economy of January 3, 1946] (Dz. U. 1946 nr 3 poz. 17) (Pol.).

property rights to the real estate is a party to the proceeding, including the current owners or perpetual usufructuaries of the real estate.

This article seeks to demonstrate that the latter position is erroneous. The rights of current owners and perpetual usufructuaries are duly protected by law on the basis of the warranty of public reliance on the land and mortgage register. Thus, they have no legal interest in being a party to reprivatization proceedings and there is no need to summon them to participate in such proceedings. Moreover, that approach often results in conducting proceedings with dozens or even hundreds of parties, defeating any notion of efficient adjudication and unnecessarily prolonging the proceedings. In many instances, this approach precludes any real possibility of carrying the proceedings through to completion (due to inheritance matters, ownership changes and the like).

I. INTRODUCTION

A. Party to Administrative Proceedings and Legal Interest

The point of departure for considering the nature of a party to administrative proceedings is Article 28 of the Administrative Procedure Code.⁴ According to that provision, a party is anyone whose legal interest or obligation is affected by the proceeding or who demands activity by the administrative body in light of his legal interest or obligation.⁵ Article 28 does not constitute a freestanding legal norm because determination of a legal interest may occur in connection with a norm of substantive law. The nationalization regulations do not specify who may be a party to the proceeding, but this gap is filled by the practice of administrative bodies and the case law of the courts.

According to the position adopted in the legal commentaries,

A party within the meaning of art. 28 will be a natural or legal person or other organizational unit which under applicable law may or must obtain specific benefits, or may (or must) be charged with the obligation to take specific action indicated by the command or prohibition, but only when they are reduced to an administrative decision by the administrative body acting within the bounds of its jurisdiction and competence.⁶

4. Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego [Act of 14 June 1960 Code of Administrative Procedure] (Dz. U. 2017 poz. 1257 t.j.), art. 28 (Pol.).

5. *See id.*

6. BARBARA ADAMIAK & JANUSZ BORKOWSKI, KODEKS POSTĘPOWANIA ADMINISTRACYJNEGO. KOMENTARZ [ADMINISTRATIVE PROCEDURE CODE. COMMENTARY] 189 (2009) (Pol.).

No normative act of administrative law contains a legal definition of *interes prawny* (legal interest), and thus determination of its meaning is a task left to legal literature and case law.⁷

It is aptly pointed out in case law that there are no unequivocal rules or grounds for holding the status of a party or a legal interest under Article 28 which could automatically be applied in any case seeking a finding of the invalidity of an administrative decision (in particular a nationalization decision). This issue should be considered individually each time, responding to the question of what legal interest or obligation could be affected by the consequences of potentially finding the decision in question to be invalid.⁸ In its judgment of October 26, 1999, the Supreme Administrative Court stressed that “a legal interest should be understood as an objective and actually existing need for legal protection.”⁹ It is also asserted in the case law that the given entity obtains the status of a party in an administrative proceeding if the set of legal norms addressing the entity’s legal situation in the administrative proceeding directly affects the entity’s rights or obligations.¹⁰

The source of legal interest is generally a norm of substantive law, deriving from any and all fields of substantive law.¹¹ In civil law literature, the notion of a legal interest is understood to mean “an objective, that is truly existing, need for legal protection.”¹² In the judgment of April 11, 1991, the Supreme Court of Poland held that “a legal interest should be considered as an objective, that is truly existing, need for legal protection—this is an interest of a personal nature in that it is one’s own, individualized and concrete, as well as currently existing.”¹³ With respect to an administrative proceeding, “the interest must be personal, one’s own, individual . . . The interest must be concrete, capable

7. See ANDRZEJ SEBASTIAN DUDA, INTERES PRAWNY W POLSKIM PRAWIE ADMINISTRACYJNYM [LEGAL INTEREST IN POLISH ADMINISTRATIVE LAW] 184 (2008) (Pol.).

8. See Naczelny Sąd Administracyjny [Supreme Administrative Court], II OSK 347/06, Mar. 2, 2007 (Pol.).

9. Naczelny Sąd Administracyjny [Supreme Administrative Court], IV SA 1693/97, Oct. 26, 1999 (Pol.).

10. See Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 349/07, Jan. 9, 2008 (Pol.).

11. See WOJCIECH JAKIMOWICZ, PUBLICZNE PRAWA PODMIOTOWE [PUBLIC SUBJECTIVE RIGHTS] 132 (2002) (Pol.).

12. TADEUSZ ROWIŃSKI, INTERES PRAWNY W PROCESIE CYWILNYM I W POSTĘPOWANIU NIEPROCESOWYM [LEGAL INTEREST IN CIVIL TRIALS AND NON-ADVERSARIAL PROCEEDINGS] 22 (1971) (Pol.); see also WOJCIECH CHRÓŚCIELEWKI & JAN PAWEŁ TARNO, POSTĘPOWANIE ADMINISTRACYJNE [ADMINISTRATIVE PROCEDURE] 52-54 (1999) (Pol.).

13. Sąd Najwyższy [Supreme Court], III ARN 13/91, Apr. 11, 1991 (Pol.).

of being objectively determined, as well as current and not contingent”¹⁴

In administrative law literature, it is stressed that a legal interest is often accompanied by a third party's *prawo refleksowe* (reflexive right), and this constitutes one of the grounds for the occurrence of a legal interest.¹⁵

B. “Reflexive Right” Held by a Third Party

A “reflexive right” vested in a third party is tied to a situation where the primary holder's subjective right may lead to infringement of norms of objective law which are not indifferent to the interests of a third party; thus, a violation justified by the interests of the third party. In particular, this may involve a situation where the rightsholder demands that the administrative authority behave in an appropriate manner.¹⁶ Thus, a reflexive right is connected with the notion of a legal interest, constituting one of the configurations in which a legal interest may appear. A third party's reflexive right arises out of applicable law but is derived from the legal situation of another entity. Consequently, some commentators take the view that the lack of a specific legal norm directly concerning the rights or obligations of a third party excludes infringement of the legal sphere of the third party and renders any *reflex* legally indifferent.¹⁷

It is further stressed in case law from administrative courts that a reflexive right obtains protection only in an administrative proceeding in which a ruling may be issued that conflicts with the legally protected interests of a third party by limiting or preventing exercise of the third party's rights. As the Supreme Administrative Court held in the judgment of December 9, 2005:

The characteristics of a legal interest are that it is individual, concrete, current and objectively verifiable, and its existence is confirmed in the factual circumstances that are the grounds for application of a provision of substantive law. An administrative proceeding affects the legal interest of a specific person when a decision is to be issued in the proceeding that determines the rights and obligations of the person, or the determination of the rights and obligations of another entity affects the person's rights and obligations. In other words, the status of a party

14. WIT KLONOWIECKI, STRONA W POTĘPOWANIU ADMINISTRACYJNYM [THE PARTY IN ADMINISTRATIVE PROCEEDINGS] 41 (1938) (Pol.).

15. See JAKIMOWICZ, *supra* note 11, at 137.

16. See Magdalena Maciołek, *O Publicznym Prawie Podmiotowym* [On public subjective rights], 1-2 SAMORZĄD TERYTORIALNY [S.T.] 11 (1992) (Pol.).

17. See WŁADYSŁAW LEOPOLD JAWORSKI, NAUKA PRAWA ADMINISTRACYJNEGO [THE STUDY OF ADMINISTRATIVE LAW] 116 (1924) (Pol.).

in an administrative proceeding is held by a person when the person is directly affected by the proceeding or a ruling may be issued in the proceeding conflicting with the person's legally protected interests by limiting or preventing exercise of the person's rights.¹⁸

It is recognized in case law and legal literature that there is no barrier to a legal interest arising also out of civil law. However, as stressed by the Supreme Administrative Court in the same December 9, 2005 judgment, the body deciding an administrative matter must assess each time whether the legal interest asserted by the entity of a reflexive character founded in civil law "actually deserves legal protection."¹⁹ The notion of a legal interest should be understood as an objective (i.e. actually existing) need for legal protection.²⁰ Involvement in an administrative proceeding by an entity deriving its legal interest from a norm of civil law is justified by a threat to any personal or financial goods of the person. Only in that situation can it be said that the person has a legal interest.²¹ For example:

The owner of neighboring real estate has a legal interest arising out of Civil Code article 140 to participate as a party (Administrative Procedure Code article 28) in administrative proceedings as a result of which a decision may be issued so shaping the relations on the neighboring property (the manner of its use) that it will affect the exercise of the right of ownership by the owner of the neighboring property.²²

However, in the case of a proceeding concerning elimination of a nationalization decision from legal circulation, the property rights of third parties to the nationalized real estate (e.g. Warsaw Decree property) are not threatened in any way. The substantive ruling by the administrative body—whichever way it goes—will not affect the exercise of the right of ownership or perpetual usufruct of third parties. The reflexive rights of these persons are not threatened and thus cannot receive protection in such proceedings because the decision issued in the matter will not conflict in any way with the legally protected interests of the third parties. It will not limit or prevent exercise of their property rights to the

18. Naczelny Sąd Administracyjny [Supreme Administrative Court], II OSK 310/05, Dec. 9, 2005, (Pol.).

19. *Id.*

20. *See* Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], VI SA/Wa 24/06, May 5, 2006 (Pol.).

21. *See* Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], IV SA/Wa 916/06, Oct. 20, 2006 (Pol.).

22. Naczelny Sąd Administracyjny [Supreme Administrative Court], OSK 682/04, Mar. 8, 2005 (Pol.).

nationalized real estate. Consequently, “any reflex is legally indifferent.”²³

The rights of such third parties are indisputable and protected by the warranty of public reliance on the land and mortgage register. Regardless of the result of the administrative review proceeding, they will not lose their rights, as was unambiguously confirmed by a resolution of a seven-judge panel of the Supreme Court of February 15, 2011: “[t]he warranty of public reliance on the land and mortgage register protects the acquirer of perpetual usufruct also in the event of defective entry in the land and mortgage register of the State Treasury or local governmental unit as the owner of the property.”²⁴

In the judgment of September 8, 2011, the Supreme Court held that the principle of reliance on the land and mortgage register also covers the right of perpetual usufruct.²⁵ Real estate may change its legal status at a certain time, but defective action by the State Treasury leading to a change in that status (in the form of taking over the real estate by, among other things in the form of nationalization) cannot deprive the perpetual usufructuary of legal protection even against the owner of the land.

The review body decides as a cassation authority only with respect to the invalidity of the challenged decision (which occurs due to the existence of the exhaustively defined grounds set forth in Administrative Procedure Code Article 156 Section 1),²⁶ and not as to the essence of the matter involving whether the nationalization of the given property was correct. The consequences of the review decision do not exert any direct legal effect limiting the currently held property right to the real estate. Such a decision does not give anyone rights to the real estate, and thus it does not result in any determination of a legal relationship in which third parties are participants.

As mentioned, in the practice of administrative bodies and in the case law of the courts, there is a discrepancy with respect to recognizing third parties holding property rights to nationalized real estate as parties to review proceedings regarding the nationalization decisions. This discrepancy is indicated in the passages from the opinions of the administrative courts cited below.

23. JAWORSKI, *supra* note 17, at 116.

24. Sąd Najwyższy [Supreme Court], III CZP 90/10, Feb. 15, 2011 (Pol.).

25. *See* Sąd Najwyższy [Supreme Court], III CSK 159/09, Sep. 8, 2011 (Pol.).

26. *See* Act of 14 June 1960 Code of Administrative Procedure, art. 156 § 1.

II. DISCREPANCIES IN ESTABLISHING THE PARTIES TO PROCEEDINGS IN REPRIVATIZATION CASES

A. Position Not Recognizing Third Parties Holding Property Rights to the Real Estate as Parties to Review Proceedings

In the judgment of September 18, 2014, the Warsaw Administrative Court held:

[A]dmitting entities who in reliance on the land and mortgage register obtained rights to the real estate from entities disclosed in the register to participate in the review proceeding in the matter of finding of the invalidity of nationalization acts is not justified by Administrative Procedure Code Article 28, which awards the status of a party exclusively to entities whose legal interest or obligation is affected by the proceeding . . . Such status is held in this case only by the company which owned the nationalized properties, the State Treasury acting via its *statio fisci*, and the local governmental unit which obtained rights to the real estate by way of communalization. Such status is not held by other entities even though they currently hold property rights to the real estate. Assuming purely hypothetically that the nationalization rulings under review were eliminated from legal circulation in the invalidation proceeding, such a ruling in the case, although exerting property law effects with respect to the State Treasury, would not automatically lead to restitution of the lost ownership to the enterprise (and in principle the appellant company). The subjective rights of the current owners and perpetual usufructuaries of the real estate, protected by the warranty of public reliance on the land and mortgage register, would not be disturbed or in any way limited as a result of a decision in favor of the former owners in this proceeding. In particular, issuance of such a decision will not lead to invalidation of the civil contracts concluded by them on transfer of ownership, establishment of the right of perpetual usufruct, or sale thereof . . . As regardless of the substance taken by the review ruling the rights currently held by entities to the real estate covered in the past by nationalization acts are not threatened, treatment of such entities as parties to the review proceeding is unwarranted.²⁷

Similar conclusions were reached by the Warsaw Administrative Court in its judgment of February 28, 2014:

The court did not find in the actions of the review authorities a violation of Administrative Procedure Code Article 28 through improperly ignoring in the proceeding all entities holding property

27. Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court] I SAB/Wa 374/14, Sept. 18, 2014 (Pol.).

rights to the real estate. First and foremost, the rights of these persons, protected by the warranty of public reliance on the land and mortgage register, will not be infringed in any way by the substance of the review ruling issued with respect to the ruling on taking over of the property for purposes of agricultural reform. Consequently, it should be accepted that there is no provision of substantive law which would give rise to a legal interest for such owners (or perpetual usufructuaries) entitling them to participate in the proceeding as a party.²⁸

In the court's view, admitting all current owners (or perpetual usufructuaries) of the real estate as participants in the review proceeding raises doubts under Article 2 of the Polish Constitution:

[C]onducting proceedings with all owners of plots unconnected to the matter, and requiring determination in each instance of the current legal status of such properties, in many situations will postpone for many years the possibility of redressing the injury done to the original owners of the real estate unlawfully taken over by the State. In extreme instances the possibility of concluding the review proceeding under such conditions would be purely illusory (due to changes in ownership relations during the course of the proceeding, approvals, the need to wait for inheritance proceedings to be carried out, and so on).²⁹

The Warsaw Administrative Court also pointed out in the judgment of October 7, 2013:

The simple question should be posed what legal effects a potential finding of the invalidity of the decree ruling would have for the owners of units, in what manner it could affect the substance of their rights to their separate unit and the connected share in the real estate. The administrative proceeding in which the challenged order was issued concerns a finding of the invalidity of the decision of the Presidium of the National Council in . . . dated . . . 1950 refusing to award to the former owners the right of perpetual usufruct to the land . . . covered by the operation of the [Warsaw Decree] . . . That the decree proceeding may finally lead to establishment of the right of perpetual usufruct to a share unconnected to the sold units will only cause a new person to join the residential cooperative in place of the commune. However, owners of units, as joint perpetual usufructuaries, have no

28. Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], I SA/Wa 1588/13, Feb. 28, 2014 (Pol.).

29. Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], I SA/Wa 414/14, Mar. 8, 2005 (Pol.); *appeal denied* Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 1330/15, Mar. 17, 2017 (Pol.); *accord* Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], I SA/Wa 1821/13, Mar. 12, 2014 (Pol.).

influence over disposal of that share by the commune. The court finds no regulation in the Civil Code governing exercise of the right to joint ownership, or in the Ownership of Units Act, which would create a legal interest in the owners of the units. A legal interest cannot be derived from the right of ownership of individual units held by such persons, joint ownership of common areas of the building, and a share in the right to the land under the building.³⁰

B. Position Recognizing Third Parties Holding Property Rights to the Real Estate as Parties to Review Proceedings

In the judgment of September 23, 2015, the Warsaw Administrative Court held:

[T]he parties to a proceeding in Warsaw Decree matters are not only the pre-decree owners or their heirs, but also anyone who holds property law title to the real estate, and thus the current owners and perpetual usufructuaries of the real estate . . . The review authority made an error in interpretation of Administrative Procedure Code Article 28, as the applicant seeking reconsideration of the case is entitled to the status of a party. This follows from Civil Code Article 140 §1, which protects to an equal degree the interests of both the former owners of Warsaw real estate pursuing decree claims, and persons who later acquired ownership of real estate from the State Treasury. The legal interest of these persons arising under art. 3(1)–(2) of the Ownership of Units Act of June 24, 1994 (2000 Dz. U. no. 80 item 903, as amended), as the owners of residential units in the building on the Warsaw land, became co-owners of a portion of the building and fixtures and, in a defined fractional share, perpetual usufructuaries of the Warsaw land involved in this proceeding.³¹

A similar position was taken by the Warsaw Administrative Court in the judgment of May 23, 2012:

It is unquestioned that perpetual usufruct cannot be established on real estate that is the property of other entities, or on real estate that is held in undivided joint ownership of the commune and natural persons . . . It cannot be stated that the perpetual usufructuary does not have a direct legal interest in a proceeding aimed at a finding of the invalidity of nationalization decisions, i.e. *de facto* seeking to defeat the right of ownership of the real estate held by the State Treasury. The ruling on this matter has a direct effect on the legal interest of an entity holding

30. Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 508/14, May 27, 2015 (Pol.).

31. Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], I SA/Wa 3037/14, Sept. 23, 2015 (Pol.).

the right of perpetual usufruct of the real estate that is the subject of the proceeding. This is because removing the right of ownership of the real estate from the State Treasury (or local governmental unit) upsets the legal construction built on Civil Code Article 232 and in consequence may lead to removal of the right of perpetual usufruct.³²

In its judgment of July 9, 2015, the Supreme Administrative Court also adopted this view:

[A]s the subject of this proceeding was oversight, under the review procedure, of a decision denying the former owner a property right to land in relation to which (an abstract fraction [*idealna część*] thereof) the petitioner holds the very same property right, the position that the petitioner is not entitled to appear in this proceeding as a party seems incomprehensible. This right arises under Articles 140 and 233 of the Civil Code. Under those provisions, within the bounds established by law and principles of social coexistence, the owner may, to the exclusion of other persons, use a thing in accordance with the socioeconomic purpose of his right, and in particular may dispose of the thing, while within the bounds established by law and principles of social coexistence and by the agreement delivering land of the State Treasury or land belonging to local governmental units or unions thereof in perpetual usufruct, the usufructuary may use the land to the exclusion of other persons.³³

III. WHY CURRENT OWNERS AND PERPETUAL USUFRUCTUARIES OF NATIONALIZED REAL ESTATE SHOULD NOT BE TREATED AS PARTIES TO REPRIVATIZATION PROCEEDINGS

Treating the current owners and perpetual usufructuaries of nationalized real estate as parties to reprivatization proceedings is one of the main reasons for the unusual length of these proceedings (often lasting a decade or more, or even several decades). This practice is erroneous and also contributes to a negative image of reprivatization because it generates among such persons a groundless fear of losing their property.

A legal interest entitling one to be a party to a proceeding (in particular a reprivatization proceeding) does not depend on an individual belief that there is a connection between the proceeding and the situation of the interested person, but instead is of an objective nature and must

32. Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], IV SA/Wa 409/12, May 23, 2012 (Pol.).

33. Naczelny Sąd Administracyjny [Supreme Administrative Court], I OSK 2527/14, July 9, 2015, (Pol.).

derive from a statutory source.³⁴ A legal interest derives from a specific provision of law, directly referring to the entity's situation. It arises when there is a connection between the applicable norm of substantive law and the legal situation of the subject of the law, wherein the act of applying such a norm may have an influence on the situation of the entity in terms of substantive law.³⁵

Because old nationalization decisions issued following World War II did not rule on acquisition of ownership rights to the real estate by the current owners (or the right of perpetual usufruct by the current perpetual usufructuaries), setting aside such decisions (i.e. finding them to be invalid) does not affect the legal situation of such entities because their rights to the real estate derive from later acts of civil law (notarial deeds).

Entities cannot be treated as parties to proceedings under extraordinary procedures, such as invalidating decisions or reopening proceedings. Reprivatization proceedings are an example of such extraordinary proceedings since it is obvious that the potential setting aside of the final decision cannot affect the interests of entities in any measure.³⁶ This makes it necessary to reject the requirement of notifying these entities of such a proceeding. A finding of the invalidity of the nationalization decision will not cause the original status to be restored, but will only serve to remove a number of consequences of the decision's being in force. Consequently, the result of the reprivatization proceeding does not directly impact the rights and obligations of the current owners and perpetual usufructuaries of the real estate, which includes the owners of separate units in the building located on the former property.

In the judgment of February 11, 2011, the Supreme Court held that invalidating a decision refusing to award the former owners of Warsaw land the right of perpetual tenancy or the right to construction on the basis of Article 7(1) of the Warsaw Decree exerts the legal effect of restoring to the entitled persons the right to seek the establishment of perpetual usufruct as a "surrogate" for the no longer existing property rights provided for in Article 7(1) of the decree.³⁷ However, it does not exert the property law effect in the form of restitution of the ownership right to

34. See Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], I SA/Wa 58/06, June 13, 2006 (Pol.).

35. See Naczelny Sąd Administracyjny [Supreme Administrative Court], IV SA/Wa 2164/97, June 2, 1998 (Pol.).

36. See Naczelny Sąd Administracyjny [Supreme Administrative Court], IV SA/Wa 1644/97, Oct. 5, 1999 (Pol.).

37. See Naczelny Sąd Administracyjny [Supreme Administrative Court], I CSK 288/10, Feb. 11, 2011 (Pol.).

the buildings located on the land pursuant to Article 5 of the decree.³⁸ This is because it is not possible for a building that has lost its separateness, and become an integral part of the real estate, to then currently be both partly an integral element of the real estate (i.e., with respect to the shares connected with the sold units)³⁹ and partly constitute separate real estate within the meaning of Article 5 of the Warsaw Decree.

The rights of persons who acquired real estate arising out of the former nationalized property (e.g. residential units in the building located on the land) are irrefutable and protected by Article 21(1) of the Constitution and the warranty of public reliance on the land and mortgage register (Article 5 of the Act on Land and Mortgage Registers and Mortgages),⁴⁰ and thus the involvement of such persons in reprivatization proceedings serves no purpose. Regardless of the result of the review proceeding, these persons will not lose their rights, as unequivocally confirmed by the resolution of a seven-judge panel of the Supreme Court in the resolution cited above of February 15, 2011.⁴¹

The notarial deeds under which the current owners and perpetual usufructuaries acquired rights to the real estate are unassailable. The establishment of perpetual usufruct or ownership was not the subject of the challenged nationalization decisions or a result of their issuance or execution. These rights arose independently of the scope and effects of the nationalization decisions,⁴² which did not contain any determinations concerning the need to establish the right of perpetual usufruct or the right of ownership of the real estate.

Issuance of a decision withdrawing from legal circulation the earlier decision (refusing to award temporary ownership of the land covered by the operation of the Warsaw Decree) will not lead to an authoritative determination of the rights and obligations of third parties. The review body rules as a cassation authority only with respect to the invalidity of the challenged decision, and not as to the merits of the case involving the correctness of the nationalization of the property. The review decision (which concludes the reprivatization proceeding) does not exert any direct legal effect limiting the property rights currently held to the real

38. *See id.*

39. Ustawa z dnia 24 czerwca 1994 r. o własności lokali [Ownership of Units Act of June 24, 1994] (Dz. U. 2018 poz. 716 t.j.), art. 3(4) (Pol.).

40. *See* Ustawa o księgach wieczystych i hipotece [Act on Land and Mortgage Registers and Mortgages] (Dz. U. 2017 poz. 1007 t.j.) (Pol.).

41. *See* III CZP 90/10, Feb. 15, 2011.

42. *See* Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court], IV SA 4470/10, Oct. 5, 1999 (Pol.).

estate. Such a decision does not give anyone rights to the real estate and thus its result will not be a concrete determination of a legal relationship in which the third parties are participants. Such persons (i.e. the current owners and perpetual usufructuaries of the real estate) therefore have no legal interest in this proceeding because there is no regulation justifying such interest.

Entities who acquired rights to the given real estate many years after issuance of the nationalization decisions have no influence on whether such decisions, issued over half a century ago, were issued in gross violation of law. Redress of the old injury cannot at the same time create either disproportionately greater new injuries to entities who have no connection to issuance of the unlawful ruling, or a sense of threat to such persons that they will lose the property they have acquired. Including such persons (i.e. current owners and perpetual usufructuaries of the real estate) in the proceeding for a finding of the invalidity of nationalization decisions would unnecessarily generate a concern among such persons over potential loss of the properties they have acquired because they are still protected by the warranty of public reliance on the land and mortgage register.

Conducting a proceeding often involving dozens or hundreds of persons whose legal situation cannot change in any way regardless of the result in the case creates absurd waste and unnecessary confusion for those persons as well as an obstruction for the applicant. For the administrative body to involve in the case persons who have no legal interest in the matter and suspend the proceeding until inheritance matters involving them are settled, results in practice in the long-term foreclosure of the path to review of the defective decision under the rules set forth in the Administrative Procedure Code. Continual prolongation of the proceeding for this reason and refusal to issue a decision on the merits should be regarded as a violation of the regulations which established the principle of expeditious proceedings as well as the rule of law. In particular, conditioning the resolution of the case on the clarification of inheritance matters of persons having no connection to the review proceeding is unacceptable from the point of view of the rule of law.

In light of the foregoing, the party's right to have the case heard within a reasonable time under Article 6(1) of the European Convention on Human Rights (ECHR)⁴³ should also be considered. Conducting a proceeding with the unnecessary involvement of a large number of owners and perpetual usufructuaries of real estate significantly prolongs

43. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 6(1) [hereinafter ECHR].

the administrative review process, often resulting in exceeding the maximum statutory periods for resolution of matters by administrative bodies. This also violates the principle of the rule of law (Administrative Procedure Code Article 6),⁴⁴ the principle of deepening of the citizens' trust in the State,⁴⁵ and the principle of expeditious proceedings.⁴⁶ As is often stressed, the grossly long period of consideration of a matter by the administrative authorities, even when the result of complex administrative procedures, demonstrates the ineffectiveness of the State, which violates the citizens' right to obtain a decision on the matter within a reasonable time under ECHR Article 6(1).⁴⁷ Such lengthy proceedings conflict with the foundations of the rule of law and undermine citizens' trust in the legal system and state institutions.

The right to an efficient procedure aimed at quickly obtaining a resolution, free from delay or inaction of the competent authority of the State, constitutes an element of a subjective right under public law.⁴⁸ It is an element of procedural justice contained within the clause on the rule of law set forth in Article 2 of the Polish Constitution.⁴⁹ Moreover, this right is expressly stated in Article 45(1) of the Constitution (supplemented by Articles 77(2), 78, 173, 177 and 178(1)): "[e]veryone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial, and independent court."⁵⁰ Because the Constitution applies directly unless otherwise provided,⁵¹ Article 45(1) applies also to administrative proceedings.⁵²

The right to a fair hearing under administrative procedure regulations is expressed in Administrative Procedure Code Article 12 Section 1, which provides: "[b]odies of the public administration shall act in a matter thoroughly and expeditiously, using the simplest possible

44. See Act of 14 June 1960 Code of Administrative Procedure, art. 6.

45. See *id.* art. 8.

46. See *id.* arts. 12 § 1, 35 § 1.

47. See ECHR, *supra* note 43, art. 6(1).

48. See Trybunał Konstytucyjny [Constitutional Tribunal], SK 39/09, Oct. 18, 2011 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], S 3/06, Oct. 30, 2006 (Pol.); Sąd Najwyższy [Supreme Court], III CZP 152/06, June 27, 2007 (Pol.).

49. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION] Apr. 2, 1997, art. 2 (Pol.); see also Trybunał Konstytucyjny [Constitutional Tribunal], SK 2/09, Jan. 12, 2010 (Pol.); see also Naczelny Sąd Administracyjny [Supreme Administrative Court], V SA 250/93, Oct. 10, 1993 (Pol.).

50. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ, art. 45(1).

51. See *id.* art. 8.

52. *Id.* art. 45(1); see also PAWEŁ KORNACKI, SKARGA NA PRZEWLEKŁOŚĆ POSTĘPOWANIA ADMINISTRACYJNEGO [COMPLAINT FOR OVERLENGTHY ADMINISTRATIVE PROCEEDINGS] (2014) (Pol.).

means leading to resolution of the matter,”⁵³ and Article 35 Section 1, which provides: “[b]odies of the public administration are required to resolve matters without undue delay.”⁵⁴ These provisions express one of the fundamental principles of administrative law, alongside the principle of subsidiarity and proportionality, that is, the principle of efficiency. This principle requires bodies of the public administration to act efficaciously, expeditiously, effectively and economically, within the canon of principles of “proper action” or “good administrative practice.”⁵⁵

The principle of efficiency is one of the foundations for realization of another basic principle of administrative procedure, i.e. the principle of deepening citizens’ trust in the state, expressed in Administrative Procedure Code Article 8: “[b]odies of public administration shall conduct proceedings in a manner generating trust in public authority on the part of their participants.”⁵⁶ Conducting administrative proceedings that often last from several years to several decades undoubtedly undermines this principle.

An essential role in interpreting the substance of the right to an effective and expeditious proceeding is played by the case law of the European Court of Human Rights in Strasbourg⁵⁷ under ECHR Article 6(1) cited above, which provides: “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁵⁸ As an international agreement concerning freedoms, rights or obligations of citizens as specified in the Constitution,⁵⁹ pursuant to Article 91(1)–(2) of the Constitution in connection with Article 241(1), the ECHR constitutes part of the domestic legal order with precedence over any statute if it is not reconcilable.⁶⁰ Although ECHR Article 6(1) refers expressly to civil and criminal proceedings, under Article 45(1) of the

53. Act of 14 June 1960 Code of Administrative Procedure, art. 12 § 1.

54. Act of 14 June 1960 Code of Administrative Procedure, art. 35 § 1.

55. See ROBERT SUWAJ, *SĄDOWA OCHRONA PRZED BEZCZYNNYMI ADMINISTRACJI PUBLICZNEJ* [JUDICIAL PROTECTION AGAINST INACTION BY THE PUBLIC ADMINISTRATION] (2014); see also JAN ZIMMERMANN, *PRAWO ADMINISTRACYJNE* [ADMINISTRATIVE LAW] 92 (2010).

56. Act of 14 June 1960 Code of Administrative Procedure, art. 8.

57. On this subject the Constitutional Tribunal directly relies on the standards developed by the ECHR. See, e.g., Trybunał Konstytucyjny [Constitutional Tribunal], SK 10/00, Apr. 2, 2001 (Pol.); Trybunał Konstytucyjny [Constitutional Tribunal], P 49/06, Feb. 19, 2008 (Pol.).

58. ECHR, *supra* note 43, art. 6(1).

59. See KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ, art. 89(1)(2).

60. See *id.* arts. 91, 241.

Polish Constitution it also applies in administrative proceedings and is fundamentally important in shaping them.⁶¹

In *Helwig v. Poland*, a reprivatization case involving return of an enterprise nationalized in 1958, the ECHR reiterated that the reasonableness of the length of proceedings must be assessed in light of the circumstances of the case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute.⁶² There, the ECHR found that although the case displayed some degree of complexity, this in itself did not justify the overall length of the proceedings—nearly fourteen years.⁶³ In the court's view, the circumstances of the case, along with the overall length of the proceedings, the applicant's advanced age, and the importance of the case for the applicant, sufficed for the court to find that the applicant's case was not heard within a reasonable time, thus violating Article 6(1) of the ECHR.⁶⁴ In another judgment, *Trzaskalska v. Poland*, the ECHR found that one of the reasons for violation of Article 6(1) of the ECHR was that the deadline for resolution of the case was extended several times because the authorities were not in a position to complete the examination of the case within the established times.⁶⁵

Under the facts forming the foundation for the ECHR judgment in *Czajkowska v. Poland*, which concerned claims for compensation for nationalized real estate which passed to the ownership of the State Treasury pursuant to the Warsaw Decree, it took the authorities seventeen years to calculate and pay compensation to the former owners or their heirs.⁶⁶ The circumstances of the case, and in particular, the grossly long time it took state bodies to calculate and pay compensation, led the court to find that "the applicants have already had to bear an excessive burden which has upset the fair balance that has to be struck between the demands of the public interest and the protection of the right to peaceful enjoyment of possessions."⁶⁷ Thus the court held that there was a violation of Article 1 of Protocol No. 1 to the ECHR.⁶⁸

61. See KORNACKI, *supra* note 52.

62. See *Helwig v. Poland*, App. No. 33550/02 (2008).

63. See *id.* ¶¶ 14, 46-47.

64. See *id.*; see also *Puchalska v. Polska*, App. No. 10392/04 (2009); *Wilczyński v. Polska*, App. No. 35760/060 (2008); *Derda v. Polska*, App. No. 58154/08 (2010).

65. See *Trzaskalska v. Poland*, App. No. 34469/05 (2009) (finding that the case was not resolved in a reasonable time, lasting over eight years).

66. See *Czajkowska v. Poland*, App. No. 16651/05 (2010).

67. *Id.* ¶ 62.

68. See *id.*

The case law of the Strasbourg court should also be consulted for interpretation of Article 47 of the Charter of Fundamental Rights of the European Union,⁶⁹ which provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.⁷⁰

Judicial review of administrative acts is also covered by Recommendation Rec(2004)20 adopted by the Committee of Ministers of the Council of Europe on December 15, 2004.⁷¹ In creating standards for all constitutive aspects of the right to a fair trial, it formulates five general rules, within which the right to “a fair hearing” includes the requirement (assessed in light of ECHR case law) that the case should be decided at the administrative stage (prior to judicial proceedings) within a reasonable time.⁷²

IV. LEGAL SOLUTIONS IN OTHER JURISDICTIONS

Reprivatization proceedings for current owners, usufructuaries, and others who hold property rights to once-nationalized real estate also arise in other legal systems, particularly in other Central and Eastern European countries which shared similar historical experiences with Poland.

The solutions adopted in these countries, whether expressly provided for in regulations or established through administrative and judicial practice, may be categorized into three groups as follows:

69. See Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 02. The charter is regarded as a source of primary EU law. See Monika Lejczyk, *System źródeł prawa unijnego po Traktacie Lizbońskim* [System of sources of EU law following the Treaty of Lisbon], 2 REV. OF PUB. L. 78 (2011) (Pol.). See Nina Pótorak, *Rozsądny termin postępowania*, in KARTA PRAW PODSTAWOWYCH UNII EUROPEJSKIEJ: KOMENTARZ [EU CHARTER OF FUNDAMENTAL RIGHTS: COMMENTARY] 1250-1251 (Andrzej Wróbel ed., 2013), and Andrzej Wróbel, *Karta Praw Podstawowych jako część krajowych porządków prawnych* [Charter of Fundamental Rights as a part of national legal orders], 6 EUROPEJSKI PRZEGLĄD SĄDOWY [E.C.R.], 1 (2012), for a more extensive discussion on the right to effective legal measures, including in the context of consideration of the case in a reasonable time, guaranteed in this provision.

70. Charter of Fundamental Rights of the European Union, *supra* note 69, art. 47.

71. See COUNCIL OF EUROPE, RECOMMENDATION REC (2004) 20 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON JUDICIAL REVIEW OF ADMINISTRATIVE ACTS (2004). https://eos.cartercenter.org/uploads/document_file/path/61/CoE_Committee_of_Ministers_Rec_2004__20__EN.pdf.

72. See KORNACKI, *supra* note 52.

1) Property currently held by a third party cannot be the subject of restitution in kind and therefore such an entity cannot participate in the proceeding as a party;

2) The current owner of the property may appear as a party to reprivatization proceedings only if the owner acquired rights to the real estate in bad faith; and

3) The current owner of the property may join the proceeding as a party only after demonstrating a legal interest and obtaining the consent of the body conducting the proceeding, but such person's rights in the proceeding are fairly limited.

For example, in Slovakia, under Section 6 of the Act on Restitution of Ownership of Land of December 2, 2003, ownership of real estate cannot be restored if the real estate is currently owned by another natural or legal person.⁷³ Thus, reprivatization proceedings are not possible if the former owner of the real estate could be a party. The Act on Change in Ownership of Land of June 24, 1991 provides an exception to this rule.⁷⁴ Under Section 6, it was possible to return real estate to an entity or person who could participate in the reprivatization proceedings as a party, but only if the title to the property had been obtained unlawfully (particularly as a result of unlawful expropriation). However, the filing period to apply for the return of property under that provision expired at the end of 1992.⁷⁵

In Estonia as well, the current owners or usufructuaries of real estate are not parties to proceedings concerning previously nationalized real estate. Under Section 12(3) of the Principles of Ownership Reform Act of June 13, 1991, unlawfully expropriated property is not subject to return if the property is owned by a natural person in good faith.⁷⁶ Similarly, under Section 6(2) of the Land Reform Act of October 17, 1991,⁷⁷ land is not subject to return if it has been granted in usufruct to another natural person. Former owners of real estate or their legal successors can only seek compensation for nationalization of their property, and only they can

73. See Zákon o navrátení vlastníctva k pozemkom ao zmene a doplnení zákona Národnej rady Slovenskej republiky [Act on Restitution of Ownership of Land of December 2, 2003] (No. 503/2003) (Slovk.).

74. See Zákon o úprave vlastníckych vzťahov k pôde a inému poľnohospodárskemu majetku [Act on Change in Ownership of Land of June 24, 1991] (No. 229/1991) (Slovk.).

75. See *id.* § 6.

76. See Eesti Vabariigi omandireformi aluste seadus [Principles of Ownership Reform Act of June 13, 1991] § 12(3) (RT 1991, 21, 257) (Est.).

77. See Eesti Vabariigi maareformi seadus [Land Reform Act of October 17, 1991] § 6(2) (RT 1991, 34, 426) (Est.).

be parties to such proceedings. Current owners or usufructuaries do not qualify as parties.

In Lithuania, the basis for reprivatization is the Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to Existing Real Property of June 18, 1991.⁷⁸ Under Article 2 of that Act, the party to reprivatization proceedings is the former owner of real estate or his legal successors. If it is impossible to return the actual property for practical or legal reasons, the former owner shall receive financial compensation.⁷⁹ The Act does not provide for the possibility of restitution of real estate that has been acquired by third parties in good faith. If, however, the property is occupied by residential tenants, the property may be restored, and then the party who has regained the property joins the lease as the landlord. This law was supplemented by the Law on Restoration of the Rights of Ownership of Citizens to Existing Real Property of July 1, 1997.⁸⁰

In Latvia, until 2004, reprivatization proceedings were conducted pursuant to Article 78 of the Civil Procedure Act of October 14, 1998,⁸¹ which governed participation in proceedings by third parties. Current owners of real estate could join proceedings as a party only if they demonstrated a legal interest and the body conducting the proceeding consented; even then, however, their rights in such proceedings were fairly limited. Since 2004, reprivatization proceedings have been conducted under Chapter 28 of the Administrative Procedure Act of October 25, 2001,⁸² which provides rules governing the participation of third parties in such proceedings similar to the previous rules. A current owner of real estate may join proceedings as a party only upon demonstration of a legal interest and with the prior consent of the body conducting the proceeding. In administrative practice, the authorities rarely recognize such owners as parties to reprivatization proceedings.

In Ukraine, it was originally impossible to return nationalized property to the former owners or their legal successors. This was provided for in the Act on Rehabilitation of Victims of Political Repression of

78. See Dėl piliečių nuosavybės teisių į išlikusių nekilnojamąjį turtą atstatymo tvarkos ir sąlygų [Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to Existing Real Property of June 18, 1991] (No. I-1454) (Lith.).

79. See *id.* art. 1.

80. See Lietuvos Respublikos piliečių nuosavybės teisių į išlikusių nekilnojamąjį turtą atkūrimo įstatymas [Law on Restoration of the Rights of Ownership of Citizens to Existing Real Property of July 1, 1997] (No. VIII-359) (Lith.).

81. See Civilprocesa likums [Civil Procedure Act] (1387/1391) (Lat.).

82. See Administratīvā procesa likums [Administrative Procedure Law] ch. 28 (Latvijas Vēstnesis, 164 (2551)) (Lat.).

April 17, 1991, which is no longer in force.⁸³ Currently, under new regulations, such a possibility does exist, subject to certain restrictions. For example, real estate cannot be returned if: (i) it has been acquired by third parties, (ii) it has been rebuilt at a cost exceeding its original value, or (iii) it is being used for public purposes (e.g. as a hospital). If real estate cannot be returned in kind, the former owners or their legal successors will receive appropriate compensation, and as a rule, the current owners or users of the real estate are not parties to compensation proceedings.

V. SUMMARY

The issue of the treatment of current owners and usufructuaries of nationalized real estate as parties to review proceedings is vitally important for reprivatization. It is one of the main reasons for the great lengthiness of these proceedings, often lasting a decade or more. This practice can deprive the former owners of the right to expeditious resolution of their case and redress of the injury they suffered in the past, sometimes preventing the case from ever being completed. Moreover, summoning the current owners and usufructuaries of property to participate in reprivatization proceedings builds an unfavorable image of reprivatization proceedings, generating among such persons a groundless fear of loss of their property. Such a proceeding will at most result in payment of compensation by the State Treasury or commune to the previous owners (or their legal successors) and not return of the property, because such property was effectively acquired by the current owners and perpetual usufructuaries.

Against this background, a split has developed in the practice of administrative bodies and the case law of the courts. But it must be stressed that the rulings recognizing third parties holding property rights to the real estate as parties to review proceedings are often limited to a finding that these persons are parties to the administrative proceedings in question. In these rulings it is typically not explained how the determination by the administrative body concerning the nationalization decision could disturb the property rights of third parties to the former real estate.

In extreme situations, treatment of all the current owners and perpetual usufructuaries of nationalized real estate as parties to the proceedings will lead to absurd consequences. An example is the notorious reprivatization case in the village of Michałowice, near

83. *See* Pro reabiliansiyu zhertv politichnikh repressiv na Ukraini [Act on Rehabilitation of Victims of Political Repression of April 17, 1991] (No. 962-XII) (Ukr.).

Warsaw, where petitions were filed by 211 people, and the total number of participants in the proceeding reached 1,467.⁸⁴ It is difficult to conduct proceedings under such conditions. This refers not only to the need to serve copies of pleadings on such a large number of people and to conduct hearings with such a large group, but also the risk of constant suspension of the proceeding due to ownership changes or waiting for inheritance cases to be conducted. Situations of this type are the very negation of procedural economy and also stir negative social emotions. Moreover, the grossly long period for resolving the matter demonstrates the state's ineffectiveness, which infringes the citizen's right to obtain a ruling within a reasonable time, as provided in the European Convention on Human Rights.

Entities who have acquired the right of ownership or perpetual usufruct of real estate many years after issuance of nationalization decisions have no influence over whether decisions from more than half a century ago were issued in gross violation of law. In redressing old losses, disproportionate harm cannot be done to the new owners, particularly if they had no connection with issuance of the unlawful decisions.

The problem analyzed here has been effectively resolved in other legal systems, particularly in neighboring countries with historical experiences in this area similar to Poland's. There appears to be no reason similar methods cannot be applied in Poland. It should be stressed that these solutions have been implemented in other countries not only via regulations, but also through administrative and judicial practices.

84. See Wojewódzki Sąd Administracyjny w Warszawie [Warsaw Administrative Court] I SA/Wa 493/14, Sept. 21, 2016 (Pol.).