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CONDITIONS FOR THE ADMISSIBILITY OF RESTRICTIONS
ON THE OWNERSHIP OF MONUMENTS
IN THE LIGHT OF THE CONSTITUTIONAL
AND CONVENTIONAL STANDARDS
OF OWNERSHIP PROTECTION

1. INTRODUCTION

The protection of ownership lies at the foundations of the legal culture of democratic states. The main characteristic of the evolution of ownership protection standards is a transition from seeing ownership as “inviolable and sacred”² to the conception of the social function of ownership (Germ. *Sozialbindung*), which finds its fullest expression in art. 14 para. 2 of the Basic Law for the Federal Republic of Germany, with its famous formulation: “Property entails obligations” (*Eigentum verpflichtet*). In the modern democratic state of law, the question about restrictions of ownership is not the question of “if” but rather “on what conditions.” As interpreted by the Polish Constitutional Tribunal: “The assessment of compliance with the Constitution does not boil down to the question of legal admissibility of restrictions as such but to the question of adherence to the constitutional framework within which a right under the protective cover of the Constitution can be restricted.”³

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² Article 17 of the French Declaration of Human and Citizen Rights of 1789.

³ Judgement of the Polish Constitutional Tribunal dated January 12, 1998, file ref. no. P 2/98, OTK 1999, no. 1, item 2.

The issue of restrictions imposed on the ownership of a monument is an excellent example illustrating the tension between the unrestricted use of the object of ownership and the public interest manifested by the necessity to protect one of the most fundamental elements of state cultural heritage – constituting actually an element of *raison d'état* – the obligation to safeguard the cultural identity of a nation.⁴

The article seeks to identify the basic problems associated with the perception of the constitutional and conventional legal standards of ownership protection in the context of restricted ownership of monuments. Considerations of the question of expropriation of a monument will be left out of the scope of this study as this goes beyond the “ordinary” restriction of ownership. Its extensive scope calls for a separate study.

2. RESTRICTIONS OF OWNERSHIP EXPLAINED

The notion of “restriction of ownership” is highly abstract and wide-ranging. In the interpretation of the Constitutional Tribunal, it entails restrictions which delimit the content (range) and scope of ownership without depriving the owner of the capability of using his own thing, deriving benefits therefrom and the opportunity to dispose of his own thing. Their meaning and purpose is merely to determine the content and scope of the protection of ownership lying in the general interest including the owner’s interest.⁵ The legal doctrine defines the notion at hand as: “conditions arising from the provisions of law (directly or from decisions made by public authorities) and restricting the content of or the way property is used, including those conditions which impose on the owner certain obligations with respect to the object of ownership or obligations to endure certain activities involving the object of ownership.”⁶

The scope of this notion will not embrace the most profound interference with ownership, i.e. expropriation, since its aim is not so much the determination of li-

⁴ Similarly in K. ZALASIŃSKA, “Głosa do wyroku TK z dnia 8 października 2007 r., K 20/07,” *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* 2 (2008): 60: “[cultural] heritage, manifested by historical objects, have always sculpted our national identity, our sense of distinctness and independence, which in turn constitutes an agent that consolidates the nation, enabling it to develop.”

⁵ Judgement of the Constitutional Tribunal dated May 28, 1991, file ref. no. K 1/91, OTK 1991, no. 1, item 4.

⁶ J. SOMMER, “Prawo własności a ochrona środowiska w warunkach gospodarki rynkowej,” in *Ochrona środowiska a prawo własności*, ed. J. Sommer (Wrocław: Wydawnictwo Prawo Ochrony Środowiska, 2000), 7–8.

mits to ownership as to undermine its essence, to strip the owner of the fundamental attributes of this right.⁷

When trying to precisely define “restrictions of ownership,” difficulties arise under the Additional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.⁸ This provision stipulates two types of permissible interference of the State in ownership: deprivation of ownership (expropriation) and restriction on the use of property (regulations setting out the content and scope of ownership). Difficulties are highlighted in the separation of these two forms of interference. The European Court of Human Rights (hereafter ECHR], however, endorses the view that when ownership is being transferred, the owner is deprived of its property, but in practice it is not always possible to draw a distinction between the two forms of interference.⁹

The presented attempts at making the notion of restricted ownership more precise still belong to a rather highly abstract sphere, but a narrower definition of this notion is neither feasible nor purposeful.

The notion of restricted ownership should refer to a broad spectrum of sovereign acts which interfere with the right of ownership. Considering the contemporary circumstances such as the complexity of socioeconomic relationships, the scope of tasks facing the State, and the dynamics of changes in these spheres, it is impossible to create a precise definition of the restriction of ownership. Precision should actually be discouraged since it can be counter-productive. The function of constitutional regulations governing restricted ownership is to establish minimum standards for the protection of individuals. It may turn out that an important element of the interference lies outside the scope of a notion which is conceived too narrowly and the Convention standards of ownership protection.

⁷ Cf. L. GARLICKI, *Polskie prawo konstytucyjne. Zarys wykładu* (Warsaw: Wolters Kluwer, 2015), 103; F. ZOLL, “Prawo własności w Europejskiej Konwencji Praw Człowieka z perspektywy polskiej,” *Przegląd Sądowy* 5 (1998): 30; judgement of the Constitutional Tribunal dated March 14, 2000 r., file ref. no. P 5/99, OTK 2000, no. 2, item 60.

⁸ Journal of Laws of 1993, No. 61, item 284 as amended. [hereafter cited as Convention].

⁹ Cf. C. MIK, “Ochrona prawa własności w prawie europejskim,” in *O prawach człowieka – w podwójną rocznicę paktów. Księga pamiątkowa w hołdzie profesor Annie Michalskiej*, ed. C. Mik and T. Jasudowicz (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa, 1996), 213ff; I. NAKIELSKA, *Prawo do własności w świetle Europejskiej Konwencji Praw Człowieka* (Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego, 2002), 119–20; A. WRÓBEL, “Protokół nr 1 do Konwencji. Art. 1. Ochrona własności,” in *Komentarz do artykułów 19–59*. Vol. 2 of *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, ed. L. Garlicki (Warsaw: Wydawnictwo C.H. Beck, 2011), 499, 503.

This is clearly demonstrated by the wealth of forms of ownership restriction used under the currently applicable law on monuments protection,¹⁰ related to the whole range of classical ownership rights,¹¹ from the concept of possessing property (restrictions demonstrated by the owner's obligation to accommodate to another person conducting works, such as examination of the monument – art. 29–30, supervision work of the provincial inspector of monuments – art. 38; deprivation of ownership, i.e. temporary seizure of a monument – art. 50 paras. 1–3), through using and deriving benefits (restrictions holding in a cultural park – art. 17; restrictions concerning area development for utility purposes involving an immovable monument which has been entered in the register – art. 25 para. 1; the obligation to carry out conservation works – art. 26; the duty to notify the provincial inspector of specific facts related to monuments – art. 28; the duty to cover the costs of archaeological research and the documentation thereof – art. 31; obligations related to the discovery of an object during construction or earth works which is suspected to be a monument – art. 32; similarly in the case of finding an object which may well be an archaeological monument – art. 33; the duty to obtain the inspector's permission to carry out a number of activities and works involving the monument – art. 36; the duty to restore the monument to the previous state of repair as requested by the provincial inspector of monuments – art. 45; stopping works on the monument – art. 46; conducting conservation or construction works on the monument as requested by the provincial inspector of monuments – art. 49), and finally disposal (restrictions of the exports of monuments – art. 51ff¹²), or even the acquisition of ownership (objects which are archaeological monuments, discovered or acquired accidentally in the course of archaeological research, become the property of the State Treasury – art. 35; priority right to a monument and the preemptive right to buy possessed by a registered museum – art. 20 of the act of November 21, 1996 on museums;¹³ the preemptive right to purchase an immovable monument possessed by a municipality – art. 109 para. 1 point 4 of the act of 21 August 1997 on immovable property management¹⁴).

¹⁰ Act of 23 July 2003 on the protection and care of monuments, Journal of Laws of 204, item 1446 as amended. [hereafter cited as PCM].

¹¹ Similarly in B. RUSZKIEWICZ, "Wpływ decyzji wojewódzkiego konserwatora zabytków na wykonywanie własności zabytków nieruchomości," in *Prawo ochrony zabytków*, ed. K. Zeidler (Warsaw–Gdańsk: Wolters Kluwer, 2014), 321. For a broader discussion of ownership restriction, see M. DRELA, *Własność zabytków* (Warsaw: Wydawnictwo C.H. Beck, 2006), 111–236; and with regard to movable monuments see A. JAGIELSKA-BURDUK, *Zabytek ruchomy* (Warsaw: Wolters Kluwer Polska, 2011), 102ff.

¹² For more on this topic, see T. SIENKIEWICZ, "Wywóz zabytków za granicę w świetle polskich regulacji prawnych," in *Prawo ochrony zabytków*, 373ff.

¹³ Journal of Laws of 2017, item 972 as amended.

¹⁴ Journal of Laws of 2016, item 2147 as amended [hereafter cited as IPM].

All of these forms of legal restriction of ownership, motivated by monuments protection, are subject to review under the conventional and constitutional standards of property protection.¹⁵

3. PERMISSIBILITY CRITERIA FOR OWNERSHIP RESTRICTION

3.1. FORMAL CRITERIA

The basic formal criterion for the permissibility of ownership restriction is the requirement of there being a statutory basis for an interference, as stipulated by both art. 31 para. 3 and art. 64 para. 3 of the Polish Constitution. There is an interpretative issue concerning this requirement in the literature and case law to date: is it about restrictions by means of a statute or restrictions on the basis of a statute?¹⁶

Some proponents of the doctrine deny the permissibility of introducing ownership restrictions by means of lower-order regulations, in particular in the form of local land development plans, which are enactments of local law. The supporters of this conception advocate a faithful interpretation of the phrase “by means of a statute” used in art. 64 para. 3 of the Polish Constitution.¹⁷

However, it is pointed out that there are spheres of social life where statutory regulation is not feasible due to its excessive generality and abstractness, which do not allow the unique character of such a regulation to be taken into account. One has to consider relations that highly variable and result from sudden and unpredictable phenomena, characterised by considerable regional or environmental variability. In all these cases, statutory regulation is too rigid; flexible regulation is necessary to enable prompt response to changes or to account for local circumstances.¹⁸

¹⁵ In line with our initial methodological assumption, we will omit cases of the most profound interference with ownership, that is takeover of a movable monument and monument expropriation of (art. 50 para. 4 PCM). Due to their extensive scope, these issues deserve additional research.

¹⁶ See, among others, T. DYBOWSKI, “Ochrona prawa własności na tle konstytucyjnej koncepcji źródeł prawa w orzecznictwie Trybunału Konstytucyjnego,” in *Trybunał Konstytucyjny. Księga XV-lecia*, ed. F. Rymarz and A. Jankiewicz (Warsaw: Biuro Trybunału Konstytucyjnego, 2001), 114ff; S. JAROSZ-ŻUKOWSKA, *Konstytucyjna zasada ochrony własności* (Kraków: Zakamycze, 2003), 176ff.

¹⁷ Cf. Z. CZARNIK, “Miejscowy plan zagospodarowania przestrzennego jako podstawa wykonywania własności nieruchomości,” *Zeszyty Naukowe Sądownictwa Administracyjnego* 2 (2006): 42ff; IDEM, „Istota i zakres władztwa planistycznego gminy,” *Administracja. Teoria. Dydaktyka. Praktyka* 3 (2010): 13–16, 18–19.

¹⁸ Cf. K. WOJTYCZEK, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* (Kraków: Zakamycze, 1999), 110; and D. DĄBEK, *Prawo miejscowe*, Warsaw: Wolters Kluwer Polska, 2015), 116. In a similar vein, see JAROSZ-ŻUKOWSKA, *Konstytucyjna zasada*, 181.

As a solution to this dilemma, a conception is proposed which treats enactments of local law issued by statutory authorisation as remaining tightly intertwined with the statute on the basis of which they were issued – as a sort of “laws in the substantive sense.” Being authorised by a statute, the municipal council can, on behalf of the legislator, introduce generally binding legal provisions, including those determining the limits imposed on the freedom of ownership with regard to a specific area.¹⁹ A similar perspective is visible in the argumentation of jurisprudence maintaining that the very statutory authorisation for the adoption of local land development plans – in which local municipalities set out the purpose and principles of land development, thus restricting the exercise of ownership rights – is sufficient for the constitutional requirement that such restrictions have a statutory form to be respected.²⁰

Under ECHR, the condition for the permissibility of an administrative interference in ownership is its legality, which requires that the intervention should be based on the provisions of the national, currently binding law, and on the rules implied by international law. The provisions whereby someone was deprived of their ownership need to be sufficiently precise and available in the proper scope.²¹ Restrictions on ownership applied under by-laws issued pursuant to statutory authorisation do not violate the conventional standard since in such a case we deal with acts which can be regarded as sources of universally applicable law. In the light of the standard required by the Convention, the requirement of legality is also associated with the ban on arbitrariness with respect to public authority. This implies that the procedural rules must be so structured that the addressee of the interference can undertake defensive measures to protect his interests.²²

In the context of the issue at hand, our discussion is quite relevant because some restrictions which are motivated by monuments protection takes the form of acts

¹⁹ W. JAKIMOWICZ, “Władztwo planistyczne gminy – kompetencje, zadania, wolności,” *Administracja. Teoria. Dydaktyka. Praktyka* 1 (2012): 20–26; Z. NIEWIADOMSKI et al., „Artykuł 6,” in *Planowanie i zagospodarowanie przestrzenne. Komentarz*, ed. Z. Niewiadomski (Warsaw: Wydawnictwo C.H. Beck, 2013), 61.

²⁰ See, among others, the following judgements of the Supreme Administrative Court: July 5, 2005, file ref. no. OSK 1449/04; May 19, 2006, file ref. no. II OSK 207/06; October 18, 2007, file ref. no. II OSK 1191/07; November 8, 2007, file ref. no. II OSK 909/07; May 15, 2008, file ref. no. II OSK 1716/07; June 4, 2008, file ref. no. II OSK 1883/07; June 1, 2012, file ref. no. II OSK 844/12 – all available in Centralna Baza Orzeczeń Sądów Administracyjnych [hereafter CBOSA], www.orzeczenia.nsa.gov.pl.

²¹ Cf. C. MIK, “Prawo własności w europejskiej konwencji praw człowieka,” *Państwo i Prawo* 5 (1993), 30; WRÓBEL, *Protokół nr 1 do Konwencji*, 505.

²² Cf. M.A. NOWICKI, *Europejska Konwencja Praw Człowieka. Wybór orzecznictwa* (Warsaw: Wydawnictwo C.H. Beck, 1998), 380, 386 and the ECHR judgements referred therein; C. MIK, “Ochrona prawa własności,” 220.

of local law, as illustrated by the resolution passed by a municipal council on the establishment of a cultural park (art. 16 PCM).

The creation of a cultural park constitutes interference whose limits are quite broad and fuzzy. The grounds for adopting the resolution are based on imprecise notions which have an evaluative character (“in order to protect a cultural landscape and preserve areas distinguished by their landscape with immovable monuments characteristic of the local building and settlement tradition”). By contrast, the scope of restrictions which may be imposed within the area of a cultural park is quite extensive but also vaguely defined.²³ For obvious reasons a clearer statutory definition of the limits of municipal interference in the right of ownership is not possible because it is necessary to account for the local conditions in this regard. For the protection of the owner’s rights, on the one hand, the procedure of passing a resolution will be of vital importance since it requires that an opinion of the provincial inspector of monuments be consulted and the submission of relevant motions made possible. On the other hand, it will be necessary to respect the basic substantive standards of the permissibility of restrictions when determining them, the principle of proportionality being the most fundamental.

As indicated above, the formal requirements of the permissibility of interference in property rights include also guarantees of legal protection. Restrictions related to monuments protection were also taken into account by the ECHR in its judgment of March 29, 2011 in the case of *Potomska and Potomski versus Poland*.²⁴ According to the Court, the guarantees of ownership protection under the Convention are not limited merely to the State’s negative obligation of not interfering, but they may give rise to positive obligations which entail measures necessary for the protection of ownership rights. The State in particular is obliged to ensure a system of judicature for an efficient settlement of disputes regarding ownership and to ensure compliance of these mechanisms with the procedural and substantive guarantees enshrined in the Convention. This principle becomes even more important when a state engages in a dispute with an individual.

²³ In the light of art. 17 PCM, prohibitions and restrictions can be imposed on a cultural park or a part thereof regarding: 1) the execution of construction works and industrial, agricultural, breeding, commercial activity or services; 2) modification of the manner of using immovable monuments; 3) placement of boards, inscriptions, advertisements and other signs not connected with the conservation of the cultural park, except for road signs and signs associated with the protection of public order and safety, subject to art. 12 para. 1; 3a) the principles and conditions for the location of items of street furniture; 4) storage or deposition of waste material.

²⁴ Complaint no. 33949/05, the judgement is available in the original at: www.echr.coe.int; for discussion in Polish see M.A. NOWICKI, *Europejski Trybunał Praw Człowieka. Wybór orzeczeń* (Warsaw: Wolters Kluwer Polska, 2012), 433.

By virtue of the administrative nature of the types of interference related to monuments protection, the possibility of challenging them before an administrative court has a fundamental significance for obvious reasons. Here, two remarks seem justified. Firstly, the said judgement in the case of Potomski and Potomska demonstrated that guarantees of effective legal protection are not always available. This will be discussed later. Secondly, the formal permissibility of challenging a particular act of interference does not guarantee the effectiveness of legal protection due to certain restrictions of judicial control caused by the specific nature of acts of interference, based on premises formulated as evaluative and imprecise notions. However, this is not the question of substantive criteria for the permissibility of interference. This will be discussed further on.

3.2. SUBSTANTIVE CRITERIA

3.2.1. THE SUBSTANTIVE CRITERIA OF INTERFERENCE IN THE LIGHT OF THE CONSTITUTION AND THE CONVENTION

From the perspective of substantive law, the criterion of proportionality of interference in the sphere of ownership rights becomes the central concept, both in the constitutional and the conventional standard.

Under the Polish Constitution, the requirement of proportionality is derived from art. 31 para. 3, which makes it possible to restrict any subjective rights, hence the right of ownership, too, if this is necessary in a democratic state in order to protect public security or order, for natural environment protection or to safeguard health and public morals, or to protect the freedoms and rights of other persons. In the interpretation of the Constitutional Tribunal, “on the one hand, the legislator is always faced with the necessity to determine the actual need for interference with the scope of the law or the freedoms of an individual under particular circumstances. On the other hand, the principle should be construed as a requirement to use legal measures which will be effective, that is serving the goals set by the legislator. Further, we are speaking of measures which are indispensable in the sense that they will safeguard certain values in a manner or in such a degree which would not be attainable using other measures. Indispensability also implies the use of measures which are the least onerous for entities whose rights or freedoms will be restricted. Interference in the sphere of individual status must, therefore, be rationally proportional to the ends the protection of which justifies the restriction imposed. For this reason, the «necessity» referred to art. 31 para. 3 of the Polish Constitution embraces the postulate

of indispensability, usefulness and proportionality of the imposed restrictions in the strict sense.”²⁵

It is vital for the conditions for permissibility of restrictions of ownership to specify the values justifying an interference. Art. 31 para. 3 of the Constitution enumerates these values (security of the State, public order, protection of the natural environment, protection of health and public morals, or the freedoms and rights of other persons), yet in the literature we find views saying that this catalog is not exhaustive. There are many cases in which the right of ownership is interfered with but which are not necessary for the protection of any of the values referred to in art. 31 para. 3 but seem to find their justification in the need for the protection of other constitutional values which are not directly mentioned in this provision, yet no less important, for example protection of the cultural heritage of the nation.²⁶

The limits of the legislator’s permissible interference when determining the content and scope of the right of ownership are imposed by the essence of law in the light of both art. 31 para. 3 and art. 64 para. 3 of the Constitution. The Constitutional Tribunal argues that at stake here is the determination of “a certain inviolable core of a particular right or freedom which should remain free of any interference of the legislator even in a situation when it is operative to safeguard the values indicated in art. 31 para. 3 of the Constitution.” An infringement of the essence of law would occur if the imposed restrictions affected the basic entitlements forming the content of a given right and prevented it from fulfilling its role in the legal order based on the premises of art. 20 of the Constitution.²⁷

Under the standard proposed by the Convention, the permissibility of interference with the sphere of ownership rights hinges on the fulfilment of conditions of: purposefulness (the deprivation of a right is performed in the public interest), legality (interference must occur on terms specified by the universally applicable national law and general principles of international law) and proportionality (there must be a reasonable proportion between the means and the pursued goal).²⁸

²⁵ A similar interpretation can be found in the judgements of the Constitutional Tribunal dated June 13, 2011, file ref. no. SK 41/09, OTK 2011, no. 5A, item 40; judgement of the Supreme Court dated January 10, 2012, file ref. no. SK 25/09, OTK 2012, no. 1A, item 1. Similarly in the literature – cf. WOJTYCZEK, *Granice ingerencji*, 139ff.; B. BANASZKIEWICZ, “Konstytucyjne prawo do własności,” in *Konstytucyjne podstawy systemu prawa*, ed. M. Wyrzykowski (Warsaw: Instytut Spraw Publicznych, 2001), 38–39; DYBOWSKI, “Ochrona prawa własności,” 112–13; L. GARLICKI, “Komentarz do art. 64 Konstytucji,” in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3, ed. L. Garlicki (Warsaw: Wydawnictwo Sejmowe, 2003), 20–21.

²⁶ BANASZKIEWICZ, *Konstytucyjne prawo do własności*, 41.

²⁷ Judgement of the Constitutional Tribunal dated January 12, 1999, file ref. no. P 2/98.

²⁸ Cf. MIK, *Ochrona prawa własności*, 218–20; NAKIELSKA, *Prawo do własności*, 163ff; WRÓBEL, *Protokół nr 1 do Konwencji*, 503–4.

Public interest is understood broadly. It is connected with the State's right to pursue its own social and economic policy, the right endorsed by ECHR. Accordingly, states use their wide discretionary margin to assess the needs born out of the general interest. This condition is understood to have been violated only when the State's argument about the existence of public interest has no rational grounds, when it constitutes a misuse of power or self-evident arbitrariness.²⁹

The condition of proportionality permits the public interest to be properly balanced against the private interest when interfering or a fair balance to be maintained between the interest of the community and the protection of rights of individuals.³⁰ This condition permits a certain degree of discretionary margin for the State with regard to the appraisal of the need for a specific measure in a given situation – the measure evaluated by ECHR. It is thought that this freedom is breached when the imposed burden is excessive, disproportionate or when the affected subject's financial position is radically changed as a result of the interference – when the balance is upset and a disproportion created for no good reason.³¹

In the context of the discussed substantive conditions governing the permissibility of imposing a restriction on ownership, the question of monuments protection entails three basic issues that require our consideration.

3.2.2. THE VALUE OF MONUMENTS PROTECTION AGAINST OTHER VALUES JUSTIFYING INTERFERENCE PURSUANT TO ART. 31 PARA. 3 OF THE CONSTITUTION

The above-mentioned problem of too narrow an interpretation of conditions for the permissibility of restricting the constitutional rights and liberties, addressed by art. 31 para. 3 of the Constitution, is fully revealed with respect to the question of monuments protection. The narrow interpretation of the notions used by art. 31 does not permit them to embrace monuments protection. However, it cannot be doubted that this is also a value which is enshrined in the Constitution as an element of the national cultural heritage to be safeguarded by the State, with access thereto consti-

²⁹ WRÓBEL, *Protokół nr 1 do Konwencji*, 504.

³⁰ Cf. NOWICKI, *Europejska Konwencja*, 388 and 390 plus the ECHR judgements referred therein; see also MIK, *Ochrona prawa własności*, 220, NAKIELSKA, *Prawo do własności*, 182ff; WRÓBEL, *Protokół nr 1 do Konwencji*, 506.

³¹ Cf. MIK, *Ochrona prawa własności*, 220; and NOWICKI, *Europejska Konwencja*, 390 and the ECHR judgements referred therein.

tionally guaranteed (articles 5, 6 and 73).³² Therefore, there arises the problem of finding suitable arguments to justify the claim that the value of monuments protection can justify an infringement of the right of ownership.³³

The solution would be to adopt either of the following: to subsume monuments protection under one of the values referred to in art. 31 of the Constitution or to make the catalogue contained in it open-ended by assuming that the enumeration it offers does not exhaust all values which might justify the restriction of constitutional rights and freedoms.

Recently in the doctrine and case law there has emerged a concept justifying restrictions of monument ownership by means of criteria of rights and freedom protection (mentioned by art. 31 para. 3 of the Constitution) – the right to enjoy the products of culture which is ensured to everyone (art. 73). To be able to make this freedom work, state authorities must take specific measures with a view to protecting monuments, including restrictions of ownership rights.³⁴

This line of interpretation raises some reservations, though, because it leads to a turnaround of the whole philosophy of monuments protection, as we would have to acknowledge that all norms concerning monuments protection are justified by the individual's subjective right to use this aspect of cultural heritage. Admittedly, the individual's subjective right to enjoy culture constitutes an important element validating monuments protection yet this is not the only one.³⁵ Protection of cultural heritage also lies within the State's sphere of interests, ones of key importance, because it represents an element of *raison d'état* and it is among those values which determine the existence of the State. Moreover, the concept of public interest is even broader. In today's world, protection of monuments is an element of cultural heritage preservation which benefits the whole humanity.

³² Similarly in J. SŁUGOCKI, *Opieka nad zabytkiem nieruchomym. Problemy administracyjnoprawne* (Warsaw: Wolters Kluwer, 2014), 15–17. The protection of cultural heritage interpreted as a task of the State and the right of citizens to have access to cultural assets are standards which are readily adopted at the level of constitutional regulation in many states of our sphere of legal culture – see a comparative legal review prepared by J. Łukaczyński, “Wybrane zagadnienia prawnej ochrony dziedzictwa kulturowego w krajach Unii Europejskiej,” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 89 (2012): 22ff.

³³ The problem is also addressed by RUSZKIEWICZ in *Wpływ decyzji*, 325, but he does not offer any specific solutions.

³⁴ DRELA, *Własność*, 22, and the judgement of the Constitutional Tribunal dated October 8, 2007, file ref. no. K 20/07, OTK-A 2007/9/102.

³⁵ Similarly in M. TRZCIŃSKI, “Głosa do wyroku Trybunału Konstytucyjnego z dnia 8 października 2007 r.,” *Zeszyty Naukowe Sądownictwa Administracyjnego* 2 (2008): 169; Zalańska even uses the formulation “detrimental and erroneous perception of the issue of monuments protection from the exclusive perspective of individual rights,” see K. ZALAŃSKA, “Rola państwa i obywatela w ochronie zabytków,” *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 89 (2012): 56.

This aspect is addressed by the Constitutional Tribunal in its judgement dated October 8, 2007,³⁶ where the necessity of restricting monument ownership rights is also validated by the value of public order. The Tribunal asserts that monument ownership restrictions represent the realisation of the constitutional tasks of the State with respect to the safeguarding of national heritage and assurance of equal access to products of culture (art. 5 and 6). The realisation of these tasks lies in the scope of protection and achievement of public interest while this value is tied to the condition of public order referred to in art. 31 para. 3 of the Constitution. Public order as a condition for the restriction of rights and freedoms of an individual, interpreted perhaps as an instruction to organise public life in such a way as to ensure the minimal observance of public interest. The Tribunal, then, endorses the conception that in the context of art. 31 ownership restrictions – dictated by the need for protecting monuments – are justified by values represented by rights and freedoms of others as well as those of public order.

The Tribunal's position rests on the premise that the idea of an exhaustive list of values justifying restrictions of ownership should be reconciled with the need for a general interpretation of the notions contained in this catalogue so as to ensure the rationality of interpretation of constitutional requirements.³⁷

Another way of solving the problem at hand is to adopt the concept of opening – or expanding – the catalogue of values that justify interference with the right of ownership by assuming that this catalogue is not exhaustive and that the restrictions of ownership can also be validated by means of other constitutional values.³⁸

The method using a sufficiently inclusive interpretation seems less controversial; nonetheless a great deal of caution is suggested when using each of these methods. An overgeneralised interpretation of the constitutional limits to interference with ownership rights can considerably diminish the real effects of the constitutional guarantees of ownership protection.

³⁶ File ref. no. K 20/07, OTK-A 2007/9/102.

³⁷ Similarly, see the following judgements of the Tribunal: P 2/98 of January 12, 1999; P 11/98, OTK 1999, no. 2, item 22 of January 12, 2000; and K 27/00, OTK 2001, no. 2, item 29 of February 7, 2001. In a similar vein, see WOJTYCZEK, *Granice ingerencji*, 20. Attempts at a broad interpretation of the general notions provided by art. 31 para. 3 of the Constitution of Poland are criticised by some proponents of the doctrine – for more on this, see JAROSZ-ŻUKOWSKA, *Konstytucyjna zasada*, 198–99.

³⁸ For a supporting view, see BANASZKIEWICZ, “Konstytucyjne prawo do własności,” 43; for a critical approach, see GARLICKI, “Komentarz do art. 64 Konstytucji,” 20.

3.2.3. THE PRECISE DEFINITION OF LIMITS OF INTERFERENCE DETERMINED BY MONUMENTS PROTECTION

This is a multi-faceted issue. It is manifested already at the level of constitutional regulation which is based on underspecified (fuzzy) concepts. This method of defining the criteria of interference in the sphere of ownership rights can be either an advantage or a drawback of the regulation under discussion. As rightly pointed out by M. Zdyb, such notions carry some normative legal potential, whereby law becomes more sensitive to the reality and the circumstances which can neither be predicted or defined by the constitutional legislator. Underspecified notions certainly provide some normative latitude but such freedom not only allows one to act freely (arbitrarily) but more importantly it makes one find the content of this notion. At the same time, underspecified notions used by the Constitution entail the risk of public administration bodies making law by shifting the weight of legislation from the law-making bodies to law enforcement agencies. This carries the risk of diminishing the value of legal security. The key role in the countering of such risks is played by judicial review of the legality of administrative activities.³⁹

Stepping down regulation increases the vagueness of the limits of interference. Restrictions of ownership rights apply to a monument. The statutory definition of this notion embraces a whole range of underspecified and evaluative notions. It starts by determining whether a given object “represents a testimony to a past era or event,” then evaluates its “historical, artistic or scientific value,” and finally determines whether the preservation of this object “is in the interest of society.”⁴⁰ The discretionary margin of the body applying the statutory definition of a monument cannot be contested although it is different in each of these elements.

In the doctrine of administrative law (especially the German legal doctrine), it is pointed out that underspecified notions (*unbestimmte Rechtsbegriffe*) do not form a homogenous group. We can distinguish empirical notions and notions–types. In the case of empirical notions (*empirische Begriffe*), their underspecification is

³⁹ Cf. M. ZDYB, “Administracyjnoprawne ograniczenia praw rzeczowych,” in *Prawo administracyjne materialne*, ed. R. Hauser, Niewiadomski, and A. Wróbel, vol. 7 of *System Prawa Administracyjnego* (Warsaw: Wydawnictwo C.H. Beck, 2012), 554–56.

⁴⁰ The issue of discretionary margin resulting from the definition of monument and the statutory determination of conditions under which a monuments protection authority can intervene has been pointed out in the doctrine for the last several years: see especially T. SIENKIEWICZ, *Pozwolenie w ochronie zabytków* (Lublin: Wydawnictwo KUL, 2013), 105, 117, 285 and 354; W. KOWALSKI and K. ZALASIŃSKA, “Strategia regulacji prawa ochrony dziedzictwa kulturowego,” in *Prawo ochrony zabytków*, 75–76 and M. TRZCIŃSKI, “Definicja zabytku archeologicznego – problemy i kontrowersje wokół stosowania prawa,” in *Prawo ochrony zabytków*, 116.

conditioned by factual circumstances associated with time and place, which implies that in a particular place and at a particular time a notion can be objectively and unambiguously “specified.” The application of these notions by bodies of administrative authority can be subject to full supervision of a court because it rests on objectively verifiable criteria.

In contrast, notions–types (*Typenbegriffe*) do not lend themselves to a precise specification since they refer to certain areas, spheres of facts, interests or values, rather than specific objects within those areas. Depending on circumstances, the objects designated by these notions can vary greatly. Inasmuch as “empirical” notions can be further specified using legally defined and verifiable measures, in the case of underspecified notions in the strict sense anything that fits in the area of one type is legitimate while anything that does not lacks such legitimacy. It is therefore impossible to define unambiguously the content of a notion which is underspecified in a particular case using cognitive reasoning. Content which is permitted by law fits a certain scale. The use of these notions not infrequently requires not so much empirical assessment as evaluative appraisals.

Administrative decisions based on the application of underspecified notions are controlled by administrative courts. Here, the fundamental *Quis iudicabit* problem arises (*who will judge*), namely the question who has ultimate say in the cognitive process intended to determine the content and mode of application of a notion in a specific case: is it public administration or the administrative court which exercises the supervision thereof?⁴¹

All of the underspecified notions invoked above and appearing in the statutory definition of a monument have the character of notions–types. This is particularly discernible in the aspect of “historical, artistic or academic value.” The reasoning in this respect will obviously make reference to empirical knowledge to some extent, however, this line of thought will proceed in the sphere of values, that is evaluations but these can never be made fully objective. Similarly, it is impossible to determine whether a given object represents “a testimony to a past era or event” based solely on empirical knowledge without making reference to evaluations, nor is it possible, for that matter, whether its preservation “lies in the interest of society.”

M. Zdyb, referred to above, rightly claims that judicial supervision of legality with respect to administration authorities is crucial in preventing them from crossing

⁴¹ Cf. F. OSSENBÜHL, “Rechtliche Gebundenheit und Ermessen der Verwaltung,” in *Allgemeines Verwaltungsrecht*, ed. H. U. Erichsen (Berlin–New York: Walter de Gruyter, 1995), 182–92; H. WOLFF, “Gesetzesgebundenheit und Verwaltungsspielräume,” in *Verwaltungsrecht I* by H. WOLFF, O. BACHOFF, and R. STÖBER (Munich: C.H. Beck Verlag, 1994), 362–66.

the red line. However, if we take into account the unique nature of judicial control of administration authorities, which do not allow the court to institute its own independent explanatory proceedings (including obtaining opinions from experts) and reduce the role of the court to verification and appraisal of an administrative authority, there arises a serious issue of the efficacy of courts in the prevention of excessive interference in ownership rights.

Further problems stem from the fact that the legislator did not adopt the criterion of formal recognition of an object as a monument, postulated in the doctrine, that is did not accept that this notion should be reserved only for items entered in the register of monuments. Hence a curious situation arises. On the one hand, a sort of legal fiction arises because all monuments are subject to legal protection (in various forms) regardless whether registered or not. Consequently, the owner of a thing may not be aware of possessing a monument and the necessity of certain restrictions. On the other hand, monuments protection authorities can fully deliver their tasks only with respect to objects whose “historical value” is known to them. This knowledge they gain from the register of monuments. Here, the theoretical question arises how to safeguard monuments not known to this authority.⁴²

Futhermore, it has to be noted that the level of underspecification of the limits to interference increases considerably in the case of specific forms of interference whose conditions rely on underspecified notions or may be connected with a broader decision margin – administrative discretion.

The institution of immovable or movable monument seizure can serve as an example. As it is evident from art. 50 para. 1 PCM, if there is a threat to a movable object entered in the register or the List of Heritage Treasures in the form of its potential destruction, damage, theft, loss or illegal export, the provincial inspector of monuments may, and the competent minister of culture and national heritage will, issue a decision on securing this monument in the form of a temporary seizure until the threat has been removed. In accordance with art. 50 para. 3 PCM, in the event of a threat to an immovable monument entered in the register in the form of its potential destruction or damage, the county governor, upon the request of the provincial inspector of monuments, may issue a decision on securing the monument in the form of a temporary seizure until the threat has been removed.

The notion of threat to a monument undoubtedly belongs to the category of the said empirical notions, which can be objectively specified. The authority applying this form of restriction has to demonstrate solid arguments making reference to the actual condition and indicating a threat. In principle, this argumentation is subject to full

⁴² Cf. DRELA, *Własność*, 52.

control of the administrative court, restricted to the above-mentioned model of judicial control consisting in mere verification of evidence collected by the authority.

From the perspective of the limits of interference, we should be concerned about the use of the word “may.” This is a traditional formula indicating the authorisation of the authority to act within the framework of administrative discretionary standard, though a great deal of prudence is advised here. The basis for recognition can be established only after the whole norm has been reconstructed, not on the basis of a fragment of the provision.⁴³

A fuller analysis of various regulations underlying the competences of bodies of public administration to apply this form of interference demonstrates that their discretionary powers are very restricted. Some discretionary margin is visible in the question of assessment whether the threats stipulated in the legal norm do exist and whether the only method of securing a monument is its seizure. The authority must consider the constitutional and conventional guarantees of the right of ownership, especially the requirement of proportional interference. When making a decision, the administrative body must consider conflicts of interests between the monument owner and society, hence it has to weigh up all interests involved and the concession it can make in a particular case. The assessment is subject to full control of the administrative court. On the other hand, if the authority’s deliberations lead to the conclusion that it is impossible to prevent the threat other than by seizing the monument, failure to use this form of interference should be regarded as a contravention of the obligation to protect monuments imposed on the authority.

3.2.4. PROPORTIONALITY OF THE LIMITS DETERMINED BY MONUMENTS PROTECTION

In this context, two judgements deserve our attention where the problem of proportionality becomes a central issue in the light of the constitutional and conventional standards of ownership protection.

The first judgement of the Constitutional Tribunal is the one already invoked, that is the one issued on October 8, 2007, in which art. 31 PCM is deemed to be incompatible with the Constitution (art. 64 paras. 1 and 3 in conjunction with art. 31 para. 3 and art. 73). According to the provision, a natural person or an organisa-

⁴³ Cf. M. JAŚKOWSKA, “Uznanie administracyjne a inne formy władzy dyskrecyjnej administracji,” in *Instytucje prawa administracyjnego*, by R. Hauser, Z. Niewiadomski, and A. Wróbel, vol. 1 of *System prawa administracyjnego*, ed. R. Hauser (Warsaw: Wydawnictwo C.H. Beck, 2010), 265–66.

tional unit intending to carry out construction works on an immovable monument entered in the register or subject to a conservation scheme pursuant to a local area development plan, or planning on afforestation or changing the character of the existing forestry operations in an area with archaeological monuments, was under an obligation to bear the costs of archaeological research and its documentation if such research was necessary in order to protect those monuments.

The crucial argument which ultimately determined the unconstitutionality of the statutory regulation was the fact that the legislator effectively imposed the whole financial burden of archaeological research and its documentation on natural persons or organisational units failing to ensure any assistance from the State or provide any compensatory measures. In the Tribunal's opinion, the heart of the problem lies in the question whether a restriction imposed on the right of ownership (or other property rights) in order to secure the public interest implies the State's duty to participate financially, or whether citizens' rights are adequately catered for by the State's capacity to provide benefits. The Tribunal underscored that, in principle, the Constitution does not exclude the possibility of imposing public law encumbrances of ownership to outweigh the benefits derived from its object. Nevertheless, the permissibility of this kind of obligations (encumbrances) is not unlimited as they may not in particular infringe the essence of ownership or be an implicit (indirect) form of expropriation. Neither may they involve the transferring of obligations resting on public authorities onto the owner. In compliance with with art. 84 of the Constitution, everyone – including a property owner – is to comply with statutory burdens and public duties. This provision implies the possibility of imposing on an owner certain special obligations which, as it has already been suggested, will serve to secure the public interest, not to transfer the obligations of public authorities onto the owner himself. In conclusion, the Tribunal argued that the lack of proper balance (proportion) between the private and public interests provides ground for an assumption that art. 31 para. 1 of the act on monuments protection is at odds with art. 64 paras. 1 and 3 in conjunction with with art. 31 para. 3 and art. 73 of the Constitution.

The criterion of proportionality was also decisive for the ECHR to assume the non-conformity of ownership restrictions with the standards of ownership protection in the case of *Potomska and Potomski versus Poland*. The complainants had bought a real property on which they were intending to build a house and a workshop. The attainment of this plan was impossible because the property was subsequently entered in the register of monuments. The claimants undertook to expropriate the property several times for the benefit of the State Treasury, which had no effect because no competent authorities declared any interest therein or for lack of financial

means to pay for the expropriation. Also, their attempts at obtaining a replacement plot of land proved ineffective.

The cornerstone of the Court's line of reasoning was the question of "equitable balance" between the requirements of the general interest of society and the premises derived from the protection of the basic rights of individuals. The Court observed that with respect to the regulation of the manner of exercising ownership, and consequently the mode of interference with property rights, the State enjoys a broad discretionary margin what is "consistent with the general interest", especially in cases involving the natural environment or cultural heritage. Furthermore, it cannot be assumed that every instance of entering a property in the register of monuments after it has been purchased by a natural person is an infringement of the conventional standards of ownership protection; neither can it be assumed that the owner becomes entitled to receive some form of compensation upon the registration of his property. Ownership, including ownership of private property, also fulfils a social role, which under certain circumstances should be taken into account when determining if "equitable balance" has been maintained between the demands of the public interests of society and the basic rights of a natural person. For the assessment of the "equitable balance" in the case at hand, it was crucial to examine which measures were available to the complainants to offset the infringement of their right of ownership. In the said case, expropriation would have been the best option when accompanied by the payment of damages or an offer of a substitute property. The Court concluded that the complainants were not entitled to force the State to carry out expropriation. The conventional guarantees of ownership protection cannot be reduced to the State's obligation not to interfere but they may also give rise to positive obligations. Such positive obligations may entail measures necessary for the protection of ownership rights. In the Court's view, the national law did not offer a procedure whereby the complainants could have enforced their claim for expropriation before a judicial authority and demand that state authorities buy their property. Consequently, it should be assumed that the complainants were deprived of any means with which to force state authorities to expropriate their property. An added element was the question of the time during which the complainants had to endure the said interference. The interference commenced in 1987, and in fact was effectively in force when the Court issued its judgement. Also, the situation of the complainants was associated with a state of uncertainty they experienced, given the sustained impossibility to erect buildings on the lot they owned or to expropriate it. In conclusion, the Court decided that equitable balance between the demands of the general interest of society and those resulting from the protection of ownership rights was upset, so the complainants had to bear additional burden.

In jurists' comments for the said judgement it was aptly pointed out that on the basis of this particular judgement no inference can be made that the State is obligated to bear full responsibility for the maintenance of objects of historical value. The best solution is to distribute obligations between the State and monument owners, maintaining the proportionality of the burden. It can be inferred from the ECHR's judgement that the shifting of the majority of the burden on owners constitutes a violation of the conventional guarantees. One mechanism which could restore the balance would be to give owners a real tool, that is empower them to withdraw from the role of "a guardian" obliged to participate in the protection of a monument by making claims for buy-back or exchange of immovable property.⁴⁴

4. REDRESSING THE DAMAGE RESULTING FROM RESTRICTED OWNERSHIP

While a fair compensation is the crucial requirement when the right of ownership is interfered with in the most radical manner, that is through expropriation – in compliance with both the constitutional⁴⁵ and the conventional standard⁴⁶ – the existence of this requirement is problematic in cases other than expropriation. This is important in view of the fact that the majority of cases provided for by the law on the protection of monuments do not represent expropriation.

In the said judgement of May 28, 1991 (file ref. no. K 1/91), the Constitutional Tribunal expressed the view that due to their sense, purpose and social importance, restrictions curtailing the content and scope of the protection of ownership rights do not always call for compensation and in reality they are not always offset by compensation for the benefit of owners affected by such restrictions. *A contrario*, from

⁴⁴ Cf. D. SZEŚCIŁO, "Wyrok Europejskiego Trybunału Praw Człowieka z 29 marca 2011 r. w sprawie Potomska i Potomski v. Polska (skarga nr 33949/05)," *Samorząd Terytorialny* 9 (2011): 83. Similarly but based on the above-mentioned judgement of the Constitutional Tribunal dated October 8, 2007, see ZALASIŃSKA, "Glosa," 65–66. In this context, see SŁUGOCKI, *Opieka nad zabytkiem*, 36, in which he indicates that the State's role in safeguarding the national heritage, provided for in art. 5 of the Polish Constitution, also entails an efficient system of funding, which would support the owner of a monument.

⁴⁵ Cf. judgements of the Constitutional Tribunal dated May 28, 1990, file ref. no. K 1/90, OTK 1990, no. 1, item 2; June 19, 1990, file ref. no. K 2/90, OTK, No. 1, item 3; and March 14, 2000, file ref. no. P 5/99

⁴⁶ Cf. NOWICKI, *Europejska konwencja*, 388–90 and the judgements of ECHR referred therein; NAKIELSKA, *Prawo do własności*, 193–94; J. CHLEBNY, "Ochrona własności w sprawach administracyjnych na podstawie EKPCz," *Europejski Przegląd Sądowy* 9 (2008): 40.

the above it transpires that the Tribunal deems such a compensation necessary in certain cases. None of the Tribunal's judgements has directly addressed the criteria to be taken into account while assessing whether a given kind of ownership restriction in a particular case requires a compensation to be awarded.

This issue has also been addressed in the German case law and legal literature; the two describe such situations with one term, i.e. *ausgleichspflichtigen Inhaltsbestimmungen*, as requiring the balancing of restrictions determining the content and scope of the right of ownership. This general notion encompasses the statutory regulations which determine the content and scope of ownership rights, but they lead to a disproportionate restriction of the formerly protected legal titles and therefore they must also provide for a compensation of thus arising damage so that the infringed principle of proportionality may be restored.⁴⁷

Under the Polish legal order, it is indicated that the constitutional provisions concerning ownership protection should be interpreted in conjunction with other provisions of the Basic Law, in particular those proclaiming the principle of social justice, democratic governance and equality.⁴⁸ As a result, while assessing the need for compensation in the case of restricted ownership, a broader approach should be considered – one encompassing standards based on principles of protection of ownership, proportionality, equality and social justice. Restrictions of ownership rights, which result from the social functions of the latter, constitute a kind of public burden. In this regard, the basic standard is the principle of equality with respect to public burdens, derived from the said constitutional principles. One aspect of maintaining equality in the distribution of public burdens is the compensation for the loss suffered to protect the public interest.⁴⁹

It should be noted that not every administrative restriction on the use of immovable property, motivated by protection of monuments, entails the right to compensation. Although each lawful form of monuments protection – the entry in the register of monuments being the most popular – constitutes a restriction of ownership of an

⁴⁷ Cf. F. OSSENBÜHL, *Staatshaftungsrecht* (Munich: C.H. Beck Verlag, 1998), 181–82; H. JARASS, “Artikel 14 GG,” in *Grundgesetz für die Bundesrepublik Deutschland. Kommentar*, ed. H. Jarass and B. Pieroth (Munich: C.H. Beck Verlag, 2010), 380ff.

⁴⁸ See, for example, the judgement of the Constitutional Tribunal dated May 28, 1991, file ref. no. K 1/91; November 2, 2003, file ref. no. K 37/02, OTK 2003, No. 9A, item 96; and BANASZKIEWICZ, *Konstytucyjne prawo*, 38.

⁴⁹ For more on the principle of equality with respect to public burdens, see J. PARCHOMIUK, “Zasada równości wobec ciężarów publicznych,” in *Ius et Fides. Księga jubileuszowa z okazji siedemdziesiątych urodzin Profesora Jana Świtki*, ed. T. Guz and M. Kuć (Lublin: Towarzystwo Naukowe KUL, 2006), 359–77.

immovable property,⁵⁰ not every one of them gives rise to compensatory claims on the part of the owner. With respect to the entry in the register of monuments, it should be said that none of the provisions of the act provides for compensation claims arising therefrom. In contrast, in the case of restrictions stemming from modifications in the local land development plan, mainly in the form of the so-called conservation scheme covering monuments not entered in the register, art. 36 of the act on spatial planning and development⁵¹ serves as the basis for compensatory claims.

Neither the Constitution nor the Convention requires that a monument owner be compensated every time his right of ownership has been restricted. This interpretation was affirmed by the ECHR in the said judgement in the case of Potomska and Potomski. It was argued that “it cannot be assumed that the owner becomes invariably entitled to some form of compensation upon the registration of the monument.” The burden of care of the monument must be shared between the owner and the State with fair balance respected.⁵² No grounds for claiming compensation given such a wide range of possible restrictions concerning monument ownership can give provoke doubts whether this balance has been retained, all the more so if we take into account the rather limited means of financial support for monuments protection available to the owner, the fact pointed out by the Tribunal in its judgement of October 8, 2007.⁵³

5. CONCLUSION

There is no doubt that the protection of monuments which represent an element of national cultural heritage constitutes a value which validates restrictions imposed on monument ownership. Such restrictions can be justified both in the light of public interest (common good) and individual good (the rights of other entities to have access to cultural goods). It becomes a central issue to find fair balance

⁵⁰ See K. ZEIDLER, *Prawo ochrony dziedzictwa kultury* (Warsaw: Wolters Kluwer, 2007), 230; JAGIELSKA-BURDUK, *Zabytek*, 149–50; K. ZALASIŃSKA, *Prawna ochrona zabytków nieruchomości w Polsce* (Warsaw: Wolters Kluwer, 2010), 234.

⁵¹ Act of 27 March 2003 on spatial planning and development, Journal of Laws of 2017, item 1073 as amended.

⁵² Similarly in M. DRELA, “Glosa do wyroku Trybunału Konstytucyjnego z 8 X 2007 r., K 20/07,” *Państwo i Prawo* 11 (2008): 141: “The obligation of protecting monuments from damage rests not only on the bodies of public administration but on every entity.”

⁵³ In his address on June 14, 2011, the Ombudsman highlighted the need for statutory changes with respect to maintaining balance between the interests of owners and the public interest in the context of the said judgement of the ECHR; see K. ZALASIŃSKA, *Rola państwa*, 56.

between the conflicting values of ownership protection and the common good and the rights of others. Our considerations presented above suggest that the source of main problems in the context of permissibility of restricted monument ownership is the underspecified nature of the scope of interference, the latter not fully subject to the control of the administrative court, as well as the question of maintaining proper balance between the need for keeping monuments conceived as components of cultural heritage and the interests of their owners, sometimes overly weighed down by respective obligations.

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CONDITIONS FOR THE ADMISSIBILITY OF RESTRICTIONS
ON THE OWNERSHIP OF MONUMENTS
IN THE LIGHT OF THE CONSTITUTIONAL AND CONVENTIONAL STANDARDS
OF OWNERSHIP PROTECTION

S u m m a r y

The issue of restrictions imposed on ownership of a monument is an excellent example illustrating the tension between the unrestricted use of a property and the public interest manifested by the necessity to protect historical monuments. Monuments represent one of the most fundamental elements of the State's cultural heritage. The protection of this heritage is an element of *raison d'état*, including the need to foster the memory of the cultural identity of the nation. The aim of the article is to pinpoint the basic problems connected with the balancing of the conflicting values concerning the protection of ownership rights and those regarding the assurance of continuity of the cultural heritage of the State and whole humanity. The Author addresses the issue of monument ownership restrictions from the perspective of the basic standards of ownership protection enshrined in the Polish Constitution and the European Convention on Human Rights. The considerations make reference to the notion of a restricted right of ownership (with particular regard to the principle of proportionality) and the problem of compensation for having one's monument ownership restricted.

Key words: right of ownership; European Convention on Human Rights; cultural heritage; protection of monuments; principle of proportionality.

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