

PROTECTION OF AN IMMOVABLE MONUMENT UNDER ART. 108 OF THE ACT ON PROTECTION OF MONUMENTS AND CARE FOR MONUMENTS

I. Definition of the term “immovable monument”

Provisions of the Act of 23 July 2003 on protection of monuments and care for monuments¹ (APMCM) do not contain the term “monumental real estate,” which would have been acceptable in accordance with the convention of Polish private law. Civil law terminology distinguishes three types of immovable estate: land which is part of the Earth’s surface that constitutes a separate property; buildings which are permanently connected with the land and which are a property separate from the land; and premises which constitute parts of buildings which, in turn, constitute a separate property. The glossary of basic terms of Art. 3 of the Act includes the term “immovable monument” and its definition, which also refers to the provisions of the Civil Code. On the basis of this provision, one can conclude that an immovable monument is defined as immovable estate or its part, or an ensemble of immovable estates which have been made by humans, whose preservation is in the interest of the society because of their historical, artistic, or scientific value. Consequently, one can assume that the legislator is making a reference to the standard civil law definition of immovable estate and its kinds without creating a new legal structure of monumental real estate. Nevertheless, the legislator clearly points at a specific functional aspect of property rights concerning an immovable monument².

II. The scope of protection of an immovable monument under the Civil Code and under other laws

The term “criminal law protection of monuments” means not only the provisions of material and process criminal law (the following articles of the Criminal Code

1 Journal of Laws No. 162, item 1568 with subsequent changes, henceforth called APMCM.

2 See T. Mróz, Historic Immovable Property – Execution of Ownership (Remarks in the Light of the Constitutional Principle of Proportionality)

of 1997: Art. 278 § 1 and § 2; Art. 284 § 1 and § 2, Art. 285 § 1, Art. 286 § 1, Art. 287 § 1, Art. 288 § 1 and § 3, Art. 291 § 1 in connection with 294 § 2; and in the Code of Criminal Procedure of 1997 with respect to the institution of auxiliary prosecutor in connection with Art. 95 item 2 of the APMCM), law on petty offences (included in the Petty Offences' Code of 1997 and in the Code of Procedure in Cases Involving Petty Offences of 2003, e.g. Art. 124 of the Petty Offences' Code, which is a counterpart of Art. 288 § 1 of the Criminal Code), but also laws resulting from international Conventions on the protection of cultural goods that Poland is a part of and that have an impact on the scope of this protection³. Nevertheless, it should be noted that these Conventions do not include provisions that define *expressis verbis* the model of protection of monuments under the criminal law, thus giving to the Polish legislator a full independence and sovereignty. Most of all, protection of monuments under criminal law is provided for in chapter 11 of the aforementioned law on protection of monuments and care for monuments of 2003. Unfortunately, the limited scope and subject of this paper do not allow for a precise analysis of the criminal law and criminal procedure aspects of protection of monuments⁴, to include a detailed analysis of the imprecise, arbitrary, and controversial criminal law definition of the term “good of special importance to culture⁵.” The most important legal provision to the protection of “immovable monuments” under criminal law, which is at the same time linked with civil law protection of such monuments, is Article 108 of the Act on protection of monuments and care for monuments which, along with the provisions of Art. 288 of the Criminal Code and Art. 294 § 2 of the

3 See, most of all: the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict along with the Regulations for the Execution of the Convention, *Journal of Laws* 1957, no. 46, item 212; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *Journal of Laws* 1974, no. 20, item 106; the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, *Journal of Laws* 1976, no. 32, item 190; the 1992 Council of Europe's European Convention on the Protection of the Archaeological Heritage, *Journal of Laws* 1996, no. 120, item 564; the 1954 Council of Europe's European Cultural Convention, *Journal of Laws* 1990, no 8, item 44.

4 The threat of insurance crimes in the area of real estate (including monumental real estate), especially concerning typical fraudulent arson aimed at beguilement of compensation, is a fact. The number of incidental events resulting in compensation is large and it is very difficult and costly to repair their effects. Also, such fraudulent efforts to obtain compensation may appear to be the simplest way to solve the financial problems of the owner of real estate. Incidents where the perpetrator purposefully covers real estate with a policy of larger value than the value of the property or purchases two insurance policies are very difficult and frequent. Typical cases of insurance fraud in the real estate market involve situations where the owner pretends that components of a building were destroyed by fire, even though they were destroyed as a result of poor maintenance, or where the perpetrator reports larger losses than those he actually suffered. Other typical cases are those where the owner insures his property to a value that is higher than its actual value, which results in larger compensation, or when he purchases multiple insurances policies in several insurance companies and then sets the real estate on fire and obtains compensation from several sources, or when the event that constitutes a basis for payment of compensation had occurred before the insurance policy was purchased, etc.

5 See: A. Zoll, ed., *Kodeks karny. Część szczególna. Komentarz*, Kraków 2006, p. 483ff; A. Wąsek, ed., *Kodeks karny. Część szczególna*, vol. II, *Duże Komentarze Becka*, Warsaw 2006, p. 1130ff; A. Marek, *Kodeks karny. Komentarz* Warsaw 2007, p. 536ff; T. Bojarski, A. Michalska–Warias, J. Piórkowska–Flieger, M. Szwarczyk, *Kodeks karny. Komentarz*, Warsaw 2006, p. 617.

Criminal Code, constitutes a “semi-code-based” model⁶ of protection of monuments in the current legal system⁷.

The object of protection against an offence defined in Art. 108 of the APMCM is property, ownership, and other rights to an immovable monument⁸. Therefore, a person wronged by this offence can be not only the owner of the immovable monument, but also any legal bona fide possessor (user, lessee, or tenant) who has the right, completely independently of the owner, to file a motion for prosecuting⁹. The offence defined in Art. 108 of the APMCM can be committed by any person who is capable of bearing criminal responsibility and, therefore, is a common offense. On the other hand, committing this forbidden act by negligence, in a situation where the offender does not take certain action despite his legal duty to prevent destruction of or damage to an immovable monument, constitutes an individual improper offense. This means that this offense can be committed only by a person who is a guarantor of non-occurrence of the effect that constitutes the feature of this offense. This special legal duty to prevent a negative effect in the form of destruction of or damage to an immovable monument can be defined in a legal provision, a civil law contract (e.g. lease, rental), or a decision of a competent institution or person. The source of this duty can also be a voluntary obligation of the subject to prevent the destruction of or damage to real estate. The behavior of the perpetrator of the offense defined in Art. 108 of the APMCM can take two alternative forms, stipulated in this law, of destruction of and damage to an immovable monument. A different behavior of the perpetrator does not meet the criteria for the criminal act defined in Art. 108 of the APMCM and, consequently, cannot be a basis for criminal responsibility. The doctrine points at the practical difficulties with determining a precise distinction between the causative act consisting in destroying monumental real estate and the act of damaging such estate¹⁰. It appears that the effect caused by the perpetrator of the offense is the most important factor in determining whether his behavior qualifies as destruction of property or as damage to property¹¹. In the ordinary sense of the word, to destroy a thing means to annihilate it, to wreck it, to devastate it, to exterminate it,

6 The term “semi-code-based model” is used after M. Bojarski and W. Radecki, *Ochrona zabytków w polskim prawie karnym. Stan aktualny i propozycje de lege ferenda* in: J. Kaczmarek, ed., *Prawnokarna ochrona dziedzictwa kultury. Materiały z konferencji, Gdańsk 2005, Kraków 2006*, p. 22.

7 Because of the stringent limitations, the provision of Art. 108 of the APMCM is commented in the area concerning only immovable goods. Of course, the features of the offence defined in Art. 108 of the APMCM do not limit the object of this criminal act to an immovable object, but also cover movable objects.

8 Compare the sentence of the Supreme Court of 9 December 2003, III KK 165/03, LEX no. 140098.

9 See the sentence of the Supreme Court of 24 April 1990, WR 116/90, OSNKW 1991, no 1–3, item 6; the gloss to this sentence by S. Łagodziński, *PIP* 1992, v. 10, p. 114ff, sentence of the Supreme Court of 20 May 1935, “Zbiór Orzeczeń Sądu Najwyższego., Orzeczenia Izby Karnej” 1935, no. 10, item 36.

10 Commentaries: A. Zoll, ed., *Kodeks karny. Część szczególna. Komentarz*, Kraków 2006, p. 365ff; A. Wąsek, ed., *Kodeks karny. Część szczególna, vol. II, Duże Komentarze Becka*, Warszawa 2006, p. 1130ff; A. Marek, *Kodeks karny. Komentarz [Criminal Code. Commentary]*, wyd. IV, Warsaw: LexisNexis 2007, 536ff; T. Bojarski, A. Michalska-Warias, J. Piórkowska-Flieger, M. Szwarczyk, *Kodeks karny. Komentarz*, Warsaw 2006, p. 617.

11 M. Kulik, *Przestępstwo i wykroczenie uszkodzenia rzeczy*, Lublin 2005, p. 62.

to eradicate it, and to cause it to wear out, spoil, waste, and become damaged¹². Thus, for example, if an immovable monument burns, it will be a complete (or partial), major, and irreversible impairment of its substance and characteristics, which makes it impossible to use the monumental real estate in accordance with its purpose and with its characteristics. To damage a thing, on the other hand, means to destroy it partly, to cause a small defect, but also to break it, to cause it to decay, to weaken it, to impair it¹³. Thus, if a monumental property is damaged, it will also be not suitable to be used in accordance with its characteristics or purpose, its substance will be impaired, but it will not be completely destroyed¹⁴. A comparison of the two causative acts of destroying and damaging real estate clearly shows that destroying is a “qualified” (i.e. more serious) form of damaging. It should also be highlighted that destroying is an irreversible process affecting the substance of real estate. What is common in both forms of behavior of the perpetrator of the offense defined in Art. 108 of the APMCM is his interference with the object, with the difference being its intensity and scope. This interference must absolutely involve the impairment of the substance of the immovable monument. The legal provision which is the subject of this discussion does not require the perpetrator’s behavior to be directed solely against someone else’s real estate, which is the case in the features of the criminal act defined in Art. 288 of the Criminal Code. The crime defined in Art. 108 of the APMCM is a material crime due to the alternative formulation of its effect as either destroying or damaging an immovable monument. The criminal behavior of the perpetrator and the effect must be linked with a cause–effect relationship which, in the case of omission, is subject to two–stage verification. The first stage consists in determining what is the scope of legal duty of the perpetrator, whether the performance of the duty of the perpetrator really would have decreased the risk of occurrence of the effect taking the form of destruction of or damage to the monument. As for the features of the subject of the forbidden act under Art. 108 § 1 of the APMCM, this is an intentional offense. The intentional nature can take the form of either direct intent or possible intent. It should be mentioned that both the motives and the goals of the perpetrator’s behavior are relevant. Unintentional destruction of or damage to a monument is criminalized under Art. 108 § 2 of the act and, similarly to the case of intentional commitment of this offense, includes both the actions and the omissions of the perpetrator, with the exception that they must be unintentional¹⁵. The lack of intent in the commitment of the offense results in a more

12 Słownik języka polskiego Warsaw 1993, p. 381. 382

13 Ibid., 629.

14 Examples include: painting inscriptions, graffiti, or soiling monumental real estate, if they lower its material value or utility to the extent that, in order to remove them, it will be necessary to impair the building substance. See the resolution of the Supreme Court of 13 March 1984, VI KZP 48/83, OSNKW 1984, no. 7, item 71, and the sentence of the Supreme Court of 22 August 2002, V KKN 362/01, Orz. Prok. i Pr. 2003, no. 5.

15 There is a different and wrong opinion. See: R.Golat, *Ustawa o ochronie zabytków i opiece nad zabytkami*. Komentarz, Kraków 2004, p. 193.

lenient sentence. The offense of destroying or damaging an immovable monument is subject to penalty of imprisonment for a period of 3 months to 5 years. In the case of unintentional destruction of or damage to an immovable monument, the perpetrator is subject to a fine, restriction of liberty, or imprisonment for a period of up to 2 years. In the case of an intentional commitment of the offense defined in Art. 108 of the APMCM, the court is required to adjudicate exemplary damages to a specified social purpose related to the protection of monuments in the amount of three to thirty times the minimum monthly wage. In the case of unintentional commitment of this offense, exemplary damages are optional.

Streszczenie

W niniejszym opracowaniu poruszono problematykę pozakodeksowej i kodeksowej ochrony zabytku nieruchomego. Omówienie zakresu pojęć: „zabytek nieruchomy” i „nieruchomość zabytkowa” jest punktem wyjścia dla charakterystyki form ochrony zabytku nieruchomego uregulowanych w przepisach prawa karnego, przepisach o ochronie zabytków oraz normach zawartych w międzynarodowych Konwencjach dotyczących ochrony dóbr kultury, których Polska jest stroną. Szczegółowej analizie poddano art. 108 ustawy o ochronie zabytków i opiece nad zabytkami będący najistotniejszym przepisem z punktu widzenia karnoprawnej ochrony zabytku nieruchomego. Przepis ten, jako łączący się zarazem z ochroną cywilnoprawną oraz z przepisami art. 288 i art. 294 § 2 kodeksu karnego, stanowi „półkodeksowy” model ochrony zabytków w obowiązującym stanie prawnym.