

Academia Istropolitana Nova, Svätý Jur
Built Heritage Conservation and Development

Legal protection of cultural heritage continued: *The argument about the cultural heritage value and its assessment and the legal consequences*
Trimester Paper III

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I. Introduction:

In the first trimester papers¹ I have dedicated my attention to the general study of legal framework for the protection of cultural heritage in Slovak Republic, which primarily rests with the Act n. 49/2002 Coll. on the protection of monuments and historic sites (the „Monuments Act“) as amended by the Act n. 479/2005 a 208/2009. Finally I would like to narrow the scope of my paper to the specific substantive and procedural aspects of the Monuments Act: the assessment of cultural heritage value as the criterion for the inscription into the National Heritage list, the steps in the administrative procedure for inscription and the scope of substantive protection afforded to the objects which have not been inscribed into the National Heritage List, but where the procedure has been instituted by the competent authorities.

In order to clarify these aspects I will use specific type of heritage: the industrial heritage in Bratislava. This heritage type is the most neglected one and receives the least attention. The lack of support from the public can be perhaps attributed to the absence of the “romantic” qualities, which the wider public usually associates with the heritage (i.e. castles, manor houses etc.). The industrial monuments are admired by enthusiasts or experts who appreciate their special architectural qualities. And that maybe the reason why the majority of this heritage in Bratislava has not managed to escape from the bulldozers.

In my work I will highlight particular case of Gumon factory, which has been demolished during public holiday between 29th August and 1st September 2008, when most of general public was not present in Bratislava and when the competent authorities were not in service². It seemed to be coordinated action prepared by its owners, who used all of the available legal and illegal means to bring this outcome.

The purpose of this paper is not just 'digging in the mud' and bringing to the light the well known facts of the Gumon case, but to draw a conclusion for the future and to prevent

¹ See Šípková, M.: *Legal protection of cultural heritage: Does the legal framework strike a right balance between public and private interests?*, Trimester Paper, Academia Istropolitana Nova, Svätý Jur, 2009.

² It still remains in my memory, how astonished I was to find out upon my arrival from holiday that the beautiful building of Gumon factory, disappeared.

similar cases by clarifying the scope of the legal framework and examining the possibilities to save the heritage in the future.

II. Gumon - Hi(S)tory

The site of former Gumon factory is situated in the south-eastern direction off the historical centre of Bratislava on the broad plain near Danube. This area regularly flooded by Danube has been only scarcely inhabited with farmsteads until the regulation of Danube river in the last third of 18th century. Due to its location and the passage of several roads and horse railway (1840 - 1872) the site has been predetermined for development of industry. The political compromise between Austria and Hungary in 1867 removed the last obstacles to the industrial development and Bratislava soon became one of the most important industrial centres of Austrian – Hungarian empire³. Gumon factory had been established in Bratislava by Viennese entrepreneur Otto Bondy as a branch of his already existing Cable factory. The management of the factory was handed over to his son Egon Bondy in 1910, who was due to his success able to acquire similar factories elsewhere in Central Europe. Egon Bondy bought the plots at south-eastern direction from the city centre at nowadays location and on 13th July 1911 created new „Gumon factory Mlynské Nivy“, which specialised in the production of early plastics, namely bakelite⁴. Gumon factory has been in operation throughout the first Czechoslovak Republik (1918-1939), and period between 1948 - 1989 in the legal form of state - owned enterprise (Gumon n.p.) and after 1990 in the form of corporation (Gumon Bratislava a.s.). Year 2005 has been milestone for its future: the plots with the adjoining factory buildings have been acquired into the ownership of a company which terminated the production in Gumon. Almost all of the buildings belonging to the former Gumon factory have been demolished in the symbolic dates between Friday 29th August and Monday 1st September 2008, where 29th August is reminder of Slovak National Uprising in 1944 against

³ Between 19th and 20th century major factories were built and operating, in particular : Tobacco plant, Kuhmayer's plant (technical glass), Patrónka, Gruneberg's plant (brushes), Marschall's plant (carriages) Dynamitka, Durvay's brick plant, Menzl's plant for cardboard and asphalt, Klingerka, Kablovka, Apollo refinery, Stollwerck plant, Sfinx (smalto kitchenware), Siemens-Schuckert's plant (BEZ), Cvernovka, Matador, Brothers Harschs' saw mill, Danubius (textiles) and Gumon.

⁴ Bakelite was an early plastic developed in 1907–1909 by Belgian chemist Dr. Leo Baekeland. It was a material with thousand uses: dial telephones, radios, cameras, jewellery, wire installer material etc. It has become a standard item in the family home of the 1930s and 1940s. <http://en.wikipedia.org/wiki/Bakelite>

the Nazis and 1st September is a Constitution Day to remind declaration of Slovak Constitution in 1992, which had the ambition to establish democracy.

III. Gumon – his legal story– substantive and procedural aspects

Assessment of the cultural heritage value

The whole legal argument usually surrounding cultural monuments should be centered on the question whether they have a cultural heritage value and thus deserve to be protected. The burden of proof rests with the Ministry of Culture and Monuments Board against the opponents/adversaries who should attempt to question and to refute the arguments in favour of the cultural heritage value. But as I will demonstrate, this was not the case in the story of Gumon, where the party opposed to the protection invoked other grounds for challenging it.

Pursuant to Act n. 49/2002 Coll. on the protection of monuments and historic sites (the „Monuments Act“) as amended by the Act n. 479/2005 and 208/2009 Coll. applicable from 1st of June 2009 *cultural monument* is a movable or an immovable object, which has a *cultural heritage value*⁵. The *cultural heritage value* or a *cultural interest* is the objective and the sole determining criteria for assessment of cultural heritage. It is defined as an *aggregate of an important historic, social, rural, urban, architectonic, scientific, technical, visual art, artistic and craft values*⁶. Only those movable and immovable objects having such a value can be declared as cultural monuments and inscribed on the National Heritage List.

At which stage of the specialized administrative procedure for the inscription of cultural monument on the National Heritage List is the object protected?

Pursuant to § 2 section 1 second sentence of the Monuments Act *objects or property in relation to which a specialized administrative procedure for inscription on the National*

⁵ Granada Convention defines as monuments “*all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings.*” See the Convention for the protection of the architectural heritage of Europe, Granada, 3.10. 1985, Council of Europe, European Treaty Series – No. 121

⁶ § 2 section 2 of the Act n. 49/2002 Coll. on the protection of monuments and historic sites (the „Monuments act“) as amended by the Act n. 479/2005 a 208/2009.

Heritage List has been commenced, shall also be considered as a cultural heritage. In order to determine the duration of the legal protection of the objects, potential monuments, it is necessary to answer the question when the administrative procedure begins. It is not so clear from the wording of §15 of the Monuments Act: Ministry of Culture shall declare a movable or immovable object of cultural heritage value as a cultural monument on a proposal from central Monuments Board. The owner of the object is a party to the administrative procedure and has a right to submit his observations (§ 15 section 3). Therefore it has to be inferred that the procedure starts upon the *notification of the procedure to the owner*. Such a notification creates legal effect for the owner by imposing standstill obligation – the owner is obliged i) to abstain from any action which would damage the object and, ii) to enable state officials to conduct the historical, architectural and other survey of the building for the purpose of the procedure. The procedure is brought to an end when the final decision against which there is no appeal, has become *res iudicata* - entered into force. The final decision confirms inscription or rejects it (§ 15 section 5).

Is the nature of the decision making purely legal and technocratic?

Pursuant to the old version of the Monuments Act applicable until 1st of June 2009 (to the facts of the Gumon case) the first instance authority taking the decision on the application for inscription of the monument has been vested with the *Ministry of Culture*. The application for inscription has been elaborated and submitted by the *central Monuments Board* (Monuments Board of Slovak Republic). The owner as a party to the procedure had the right to file special legal appeal against the decision of the Ministry (“*rozklad*”), which would be reviewed by the *Minister of Culture consulting special committee* (“*rozkladová komisia*”) whose opinion is not binding on Minister. Thus the nature of the decision-making had been political and precisely for this reason the real purpose behind § 2 section 1 second sentence to prevent demolition of objects *before* the completion of administrative procedure has been negated.

The amendment of the Monuments Act n. 208/2009 Coll. applicable since 1st of June 2009 attempts to resolve this problem by transferring the administrative procedure from the political ministerial level to the specialized technocratic level of central Monuments Board, where it really should have been from the moment the Monuments Act entered into force (1st April 2002). Nowadays the application for inscription is submitted by the regional

Monuments Board or section of the central Monuments Board to the central Monuments Board, which adopts the first instance decision subject to appeal to the Ministry of Culture still retaining the final control over the inscriptions.

Was the administrative procedure in the case of Gumon without unnecessary delay?

I will resume individual procedural acts in the administrative procedure in the chronological order:

- 5th December 2007 - submission of application for inscription (návrh na vyhlásenie) by the central Monuments Board to the Ministry of Culture – the procedure has not started yet,
- 8th February 2008 - notification of the start of administrative procedure at the Ministry of Culture to the parties - the owner as a party to the procedure has to submit the observations within 10 days deadline,
- 21st February 2008 - observations of parties – negative opinion of the owner presented by his legal representative,
- 25th March 2008 - opinion of Mestský ústav ochrany pamiatok (City Institute for the Protection of Monuments) – specialized body consulted according to the § 15 section 2,
- 6th May 2008 - adoption of decision on inscription of building “lisovňa” (press shop) into the National Heritage List by the Ministry of Culture (decision of first instance),
- 30th May 2008 - legal representative of the owner appeals against the decision on the inscription, appeal is reviewed by the Minister of Culture,
- 20th August 2008 – Minister adopts decision (of second instance) to *set aside* the decision on the inscription (decision of first instance) and *forward* it for new procedure at the first instance,
- 29th August and 1st September 2008 the owner orders demolition of almost all of the buildings of Gumon complex,
- 29th August – activists and one person from regional Monuments Board acting in private capacity intervene at the site, call police which does not act against the demolition,
- 11th September 2008 – survey of the site by the regional Monuments Board,
- 6th November 2009 - survey of the site by the Ministry of Culture
- 30th November 2009 - decision on termination of administrative procedure due to non existence of subject of protection.

Selected aspects of the procedure

As regards the speed of the procedure, we see that it has not started until early February, so the Ministry took two months from the delivery of the application of central Monuments Board to start procedure by notifying the owners. During this time the buildings were not protected. There was further delay in decision making of 60 days in addition to 30 days within which the administrative authority is obliged to decide in ordinary circumstances. So the procedure was lengthy with severe delays suggesting reluctant attitude of the Ministry of Culture to act to protect the potential monument. The Ministry of Culture request for opinion of Mestký ústav, which highlighted the building of “lisovňa (press shop)” as the most valuable one. On the basis of this the Ministry decided to narrow down the scope of protection from the originally proposed three buildings (lisovňa, nástrojáreň, kotolňa) to “lisovňa”. But this can also easily understood as a compromise and deference to the exigencies of the owner which contributed to the destruction of the potential monument.

The justification for declaration of cultural monument is only its cultural heritage value. According to the abovementioned procedural documents the value of Gumon, esp. “lisovňa” is constituted by its historical, urban and architectural values. The building of “lisovňa” was built in 1911 and survived all the latest interventions and additions in unspoilt form. Its architectural design was influenced by the Viennese school of architects i.e. Josef Hoffman, Otto Wagner and Bruno Bauer, although the authorship of the building is unknown. It was very representative example of industrial architecture at the turn of the 19th and 20th century. Its urban value consisted in the fact that it was facing Košická Street and made visual impact on its surroundings. Its historical value concerned its importance in Austrian-Hungarian empire and I. Czechoslovak Republic and demonstrated changes in society caused by the development of industry.

The assessment of cultural heritage value was conducted on the basis of research based on the available literature, the memories of contemporaries published at that time and photographic documentation, which was obtained by the officials of MB who entered the premises of the factory open to the public without the written consent of the owner.

The arguments of the legal representative of the owner

The defence of legal representative is interesting to read. What is astonishing is that it does not attempt to raise any specific arguments challenging the assessment of the cultural heritage value, but it only challenges the decision on rather general grounds and mostly procedural grounds.

1. Illegal entrance – the officials of Monuments Board allegedly entered the premises of Gumon factory without written consent of the owner. In reality the most important building of “lisovňa” is facing the street and can be photographed by any passer-by. Secondly, we do not really know the facts – according to the officials the area has been accessible to the public. According to § 15 of the Monuments Act the owner must enable the survey of the building, but only after the start of the administrative procedure.
2. Another public interest – the legal representative demonstrates an unusual concern for the protection of environment and public health. He attached various environmental reports which allegedly proved that the only means of removing ecological burden is removing the building of “lisovňa”.
3. Expert opinion in the field of static – the legal representative hired an expert which concluded that the technical state of the building of “lisovna” was not in conformity with the technical norms and that it threatened its stability, in contradiction with the opinion of the Monuments Board. In reality the static expertise is not obligatory part of administrative procedure, because the scope of assessment of the Ministry of Culture concerns *exclusively and does not go beyond* cultural heritage value. Environmental impact assessment or static assessment would be an action *ultra vires* and could be another ground of legal challenge.
4. Invitation of wide range of persons and entities to be parties of the administrative procedure and to hold oral hearing with all of them– from Ministry of Justice to Ombudsman, media, director of the schools etc. – this proposal in clear breach of the applicable laws, it is a shame for a lawyer to suggest anything of this kind – both Administrative Procedure Act as *lex generalis* and Monuments Act as *lex specialis* expressly determine who has *locus standi* in the administrative procedure concerning the cultural monuments. I suppose the real intention behind this proposal was to delay the procedure as much as possible.

5. Lastly, alleged denial of the right to hearing – this statement does not reflect the truth. The parties did submit their observations and the Ministry of Culture has taken them into account resulting in the narrower than original protection limited to „lisovňa“.

The final decision in the procedure

The appeal of the owner was reviewed by the Minister and the outcome was unfavourable to the future of “lisovňa”. In the second instance decision the Minister set aside the first instance decision „as it is in the breach of the legal order of Slovak Republic (?), because it does not base itself on the proven facts“.

The basis of this finding was that the Ministry of Culture has not obtained static expertise and opinion of Ministry of Environment. In the second instance decision the Minister reduced himself to taking up the arguments of the legal representative. It declared that the Ministry of Culture, a specialized authority in the area of cultural heritage, must balance the public interests in the protection of environment with the protection of heritage. Therefore in no case can these two goals be fulfilled at the same time without compromising each other. It is clear that the Minister of Culture is inclined to let the environment prevail over the heritage, as if he was Minister of the Environment forgetting what his portfolio consists of. If he is not the one to defend the cultural heritage, then who else?

The decision on the appeal takes for its legal basis Administrative Procedure Act, regardless of its *lex generalis* nature and disregards Monuments Act which is *lex specialis* applicable to the cultural monuments⁷.

The general reference „legal order of Slovak Republic“ without specifying which provision had been infringed does not prove the illegality of the first instance decision to sufficient legal standard. The author of the reference exploits to his benefit the inconsistencies found throughout the legal system. The decision is vague and of low quality. Such weak legal defence should not suffice in a form of government ruled by law.

⁷ Relationship between Administrative Procedure Act (*lex generalis*) and Monuments Act (*lex specialis*) is characterised by the principle of subsidiary application: the *lex specialis* prevails and *lex generalis* can be applied only if the *lex specialis* does not regulate the specific question.

Did Gumon benefit from the protection as a cultural monument during the demolition?

I would like to turn my attention now to the contentious § 2 section 1 second sentence to ask the question if Gumon could benefit from the protection under this provision during the demolition. In that case such an action would be considered a demolition of cultural monument and would create the legal consequences on the basis of Monuments Act. In order to find the answer, it is important to decide the moments when the administrative procedure begins, continues and is finalized.

Decision on the appeal (decision of second instance) i) confirms the decision of first instance, ii) sets aside the decision of first instance and reverses it by adopting new decision , iii) sets aside the decision of first instance and forwards it to the first instance authority for new decision without adopting meritory decision. Therefore the legal question raised remains unresolved. According to the legal commentators the administrative procedure is finalized by the decision on appeal irregardless of the outcome⁸. But did this apply to the case of Gumon, where its status remained unresolved?

The problems were caused by different interpretations of different authorities and the legal representative chose the most suitable one.

- a) Ministry of Culture interpreted the decision on appeal in this way: the administrative procedure on inscription was finalized and until the Ministry of Culture starts new procedure concerning Gumon, the buildings concerned do not have the status of cultural heritage and do not benefit from the protection under the Monuments Act. That meant that after 20th August 2008 Gumon was no longer protected, unless the new procedure started immediately next day.
- b) This same Ministry have stated in the letter to Building Inspection on 2nd September 2008, when it found out about the demolition that Gumon was considered a cultural heritage and was protected under Monuments Act. Regional Monuments Board of Bratislava also adopted interpretation that Gumon was protected under the Monuments Act.

⁸ Vrabko Marián a kol.: Správne právo – procesná časť, Univerzita Komenského v Bratislave, Právnická fakulta, 2009.

Had the demolition of Gumon been in accordance with the law?

I answer this question negatively irregardless of whether Gumon was or wasn't protected under § 2 section 1 second sentence of the Monuments Act. During the administrative procedure for inscription the owner applied for demolition consent for all the buildings of Gumon under the § 88 of the Building Act which requires consent for every demolition. The Building Bureau rejected his application to the extent concerning “lisovňa” but authorised the demolition of all other buildings. The owner abused and exceeded the scope of demolition consent by demolishing “lisovňa”. His legal representative defended his action by stating that static of the structure of “lisovňa” was destabilized and “spontaneously” crashed and had to be removed to protect life and health of humans.

The tragedy was accidentally discovered by one official of regional Monuments Board on 29th August, when she was not in service. She requested the employees of the owner to halt the demolition and called the police. The police arrived and explained that they cannot do anything because they do not have competence to act in the area of building law.

III. Lessons for future

People of Bratislava woke up to the morning after holidays to realize that Gumon will not embellish their city anymore. The case of Gumon received a media attention and Bratislava City Council reminded that they requested such a reform of the building law, which would allow the police to intervene in these cases, but the government found different pretexts to dismiss the request⁹.

Now the question of “building police” rises again from oblivion, as the cases similar to Gumon are becoming routine and the investors are increasingly arrogant seeing illegal construction as normal course of the business. This problem has wider scope and the protection of cultural heritage is just one of facets. The *criminal construction* is not focused only on demolition of cultural monuments, but also construction of new buildings *without any building consent* or with building consent but *derogating* significantly from the original documentation.

⁹ <http://reality.etrend.sk/realitny-biznis/magistrat-reaguje-na-gumon-stavebna-policia.html>.

In response to this municipality of Petržalka launched public campaign for amending Building Act by introducing “building police”¹⁰.

According to the state-of-the-art the Building Bureaus have no means of enforcing the obligations under the Building Act. Illegal construction is not treated as a crime, but as offence of less grave nature than crime. This reflects the maximum amount of fine to be imposed by the Building Bureau which does not offset the profit gained by the investor by breaking the law.

Members of petition committee of Petržalka propose these amendments of the Building Act and other Acts (Criminal Act, Energy Act etc.) to “give these laws more teeth” to fight against intruders:

- higher fines for existing offences – up to 10 % of the value of the new building,
- new types of sanctions – confiscation of building materials, tools and machinery, prohibition of performance of business activity,
- criminalizing the illegal construction - new form of crime in the Criminal Act punishable by imprisonment,
- effective supervision by the Building Bureau in the course of construction
- other effective measures to stop illegal construction – disconnecting illegal building from public utilities (water, energy, gas etc.).

These measures would create new competencies for Building Bureaus, which would be supplement by the competencies of the police that is better placed to intervene in cases when the crime or offence is in progress incl. public holiday when the authorities are not working¹¹.

IV. Conclusion

To sum up the points of this papers: I have examined the factual and legal framework of the Gumon case and reviewed the actions of both parties: the Ministry of Culture which is officially charged with defending the public interest in conservation of Gumon, and the

¹⁰ See www.stavebnapolicia.sk.

¹¹ Materials provided by Petržalka deputy Mgr. Oliver Kríž.

owner who pursued private interest in making the profit by developing the plots under Gumon.

I have cast the light on the arguments used by both sides. The forum for these arguments cannot be considered a level playing field because the Ministry of Culture and Monuments Board could invoke only the cultural heritage value, while legal representative of the owner used any argument to support his position and even the public interest. We have seen that the Ministry adopted deferential attitude to the owner, and restricted the scope of original proposal to one building of “lisovňa”. Finally such a compromise action proved to be useless and irrelevant as the owner aware of the fact that “the law has no teeth” decided not to follow it. The Ministry has failed to fulfil its role in the defence of public interest in Gumon case. It should learn the lesson and be uncompromising in the fight against the owners/developers in the future.

In addition to the Ministry of Culture NGO's and general public also have role to play as a watchdogs of the investors actions. We have seen that in the Gumon case brave activists and official of the Monuments Board as a private person would be able to stop the demolition, if the police had the competence to act in the area of Building law.

The solution to these problems is notoriously known: strengthening the competencies of Building Bureau and the Police (“Building police”). The reform in this sense was proposed several times but there proved to be no political will of the governing elite to act.

One of the political parties declared a support to the idea of building police. Therefore I hope that these will not be empty promises when we have been listening to so many times.

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VI. Annex



The building of former “lisovňa” from 1911 facing the Košická street.



The arial view of lisovňa and the Košická street site before the demolition.

The excerpt from the cadastral map.

