

CIVIL LAW ASPECTS OF THE CONFLICT OF PRIVATE AND PUBLIC INTERESTS AND REALIZATION OF GUARANTEE OF THE RIGHT OF OWNERSHIP IN THE BOUNDARY REGULATION PROCEDURE*

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ABSTRACT

The right of ownership has become the paradigm of modern life. On the one hand categorically guaranteed by the Universal Declaration of Human Rights, The Convention for the Protection of Human Rights and Fundamental Freedoms, and even the Constitution of the Republic of Croatia as one of the highest values that the state can offer an individual, the right of ownership is at the same time subject to public restrictions. In that sense, the question arises as to whether any interference with the right of ownership under the pretext of public interest is really justified. This paper will focus on the issue of the realization of guarantee of the right of ownership, especially by analysing the boundary regulation procedure based on the Act on the State Survey and Cadastre of Real Estates. The main emphasis is on the realization on private, proprietary interests versus the public interest. Through the presentation of court practice and the procedures of administrative bodies, the authors will analyse the protection reach of the institute of the right of ownership and provide guidelines for the regulation of certain open questions de lege ferenda.

Keywords: boundary line, construction, ownership, public interest

1. INTRODUCTION

The right of ownership presents a central role the Croatian and European legal system. As one of the fundamental rights of individuals, it is strongly protected

by international, European, and national regulations. On the one hand, the role of the right of ownership in the legal system is exceptional and the application of the right of ownership institute is spread across all aspects of everyday life, on the other hand it is subject to limitations. The balance of private right of property is particularly evident in procedures where they come into conflict with public interests. In this way, an attempt is made to maintain a balance between the needs of the wider community and the needs or rights of individuals. The guarantee of the right of ownership may be particularly at risk in boundary regulation procedure. Although such procedures do not determine the right of ownership, the regulation of boundary lines implies a presumption of ownership up to the marked boundary line. In this respect, the first part of this paper deals with the general definitions of the right of ownership, guarantee of the right of ownership, and legal protection. The second part of the paper is devoted to boundary regulation procedure¹, particularly through the Act on State Survey and Cadastre of Real Estates, as well as the judicial protection available through civil proceedings when a boundary line is marked.

2. GENERAL CONSIDERATIONS ON THE INSTITUTE OF THE RIGHT OF OWNERSHIP, ITS GUARANTEE AND PROTECTION IN THE LEGAL ORDER

The right of ownership is the central and most important institute of real rights, from which the development of other areas within the entire system of civil law arises.² The importance of the right of ownership is also demonstrated by the fact that it is reflected in the overall socio-economic system of individual states.³ The prevailing concept of ownership relations has determined the entire structure and organization of a country's national economy and society, depending on the

¹ In addition to civil law, or property law relations, the area of state surveying includes also administrative law relations. Due to the interdisciplinary nature of the procedures that in relation to real estates, cadastral parcels and land register plots, take place before public authorities, administrative and civil courts, we can speak of private construction and public construction law. Private construction law holds norms that regulate private law relations in the field of construction, in which the principle of equality between the parties is present. Public construction law regulates the public law matter of construction in which the principle of subordination is present. Rajčić, D., Nikšić, S., *Uvod u građevinsko pravo*, Hrvatska sveučilišna naklada, Zagora - Zagorje, 2008, pp. 15-17.

² Among the institutes of civil law in general and among the institutes of real rights law in particular, the institute of the right of ownership holds a central position. The importance of the institute of the right of ownership in the social and legal order of a country is demonstrated by the fact that it is regularly subject to constitutional regulations, which is not the case with any other institute of property or civil law. Klarić, P.; Vedriš, M., *Gradansko pravo*, Narodne novine, Zagreb, 2006., pp. 225 – 226.

³ Jurin, Bakotić, V., *Gradanskopravna zaštita prava vlasništava i njihovo ostvarivanje pred sudom*, Elektronički zbornik radova Veleučilišta u Šibeniku, Vol. 8., No. 1-2, 2014, p. 143.

ownership model dominant within that state.⁴ The latter particularly applies to the legal systems of the continental European circle, in which the right of private property, freedom of contract, and the right of inheritance form the outline of the entire civil law system.⁵ For this reason, changes in the right of ownership inevitably affect almost all legal relationships.⁶

2.1. THE RIGHT OF OWNERSHIP IN POSITIVE LEGAL PROVISIONS

The significance of the institute of the right of ownership in the functioning of the entire state system is recognized through important international documents. The Universal Declaration of Human Rights (hereinafter: the Declaration)⁷ explicitly states that everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.⁸ Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) establishes the protection of property.⁹ According to this instrument, all legal subjects - whether natural or legal persons - enjoy the right to the peaceful enjoyment of their possessions.

However, it should be emphasized that the right of ownership does not give its holder unlimited legal power.¹⁰ The limits of the right of ownership are clearly outlined under the ECHR in cases where the public interest prevails over proprietary interests. As the Court has stated on numerous occasions, Article 1 of Protocol No. 1 comprises three rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful

⁴ *Ibid.*

⁵ The Republic of Croatia has long shared the continental European legal tradition, which we re-adopted after moving away from the socialist legal system. Gavella, N., *et. al. Teorijske osnove građanskog prava – Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalnoeuropskom pravnom krugu*, Zagreb, Pravni fakultet, 2005, p. 7.

⁶ Gavella, N., *et. al., Stvarno pravo*, Narodne novine, Zagreb, 2007, pp. 343 – 344.

⁷ The Universal Declaration of Human Rights was adopted and proclaimed at the General Assembly of the United Nations No. 217/III on December, 10 1948. In the Republic of Croatia a Decision on the Publication of the Universal Declaration of Human Rights was enacted, Official Gazette, No. 12/09 (hereinafter: Declaration).

⁸ Art. 17 of the Declaration.

⁹ The (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Treaties, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 3/17 was signed in Rome on November 4, 1950. Protocol No. 1 to the Convention was adopted in Paris on March 20, 1952, while the Republic of Croatia signed it on November 6, 1996. It was ratified and entered into force on November 5, 1997.

¹⁰ Gavella, N., *et. al. op. cit.*, note 6, p. 401.

enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of property and subjects it to conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should be construed in the light of the general principle enunciated in the first rule.¹¹ When the European Court determines whether this requirement has been met, it recognizes that the state enjoys a wide margin of appreciation both in selecting the means of implementation and in assessing whether the consequences of that implementation are justified by the public interest, in order to achieve the aim of the law in question.¹² Urban and regional planning policies are, *par excellence*, spheres in which the State intervenes, particularly through control of property in the general or public interest. In such circumstances, where the community's general interest is pre-eminent, the Court takes the view that the State's margin of appreciation is greater than when exclusively civil rights are at stake.¹³ These difficulties constitute a part of the process of transition from a socialist legal order and its property regime to one compatible with the rule of law and the market economy, the process which, by the very nature of things, is fraught with difficulties. However, these difficulties and the enormity of the tasks facing legislators having to deal with all the complex issues involved in such transition do not exempt the Member States from the obligations stemming from the Convention or its Protocols.¹⁴ It is precisely the notion of public and general interest that is sometimes questionable, because the determination of such interest requires not only compliance with the form and procedure of all proceedings in which decisions are made to limit the right of ownership under the justification of public interest, but also the actual exhaustion of all mechanisms available to the public during the procedure.

Starting from international provisions that recognize the right of ownership as a fundamental private right of the individual, one arrives at national regulations governing the institute of the right of ownership. Through the prism of the Con-

¹¹ *Ališić and others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* (2014) European Court of Human Rights, Application No. 60642/08, § 63; See: Elijaš, D.; Marković, S.; Trgovac, S.; *Povreda konvencijskog prava na mirno uživanje vlasništva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, pp. 239 – 258.

¹² Jelušić, M.; Šarin D., *Ustavno-pravni aspekti određivanja naknade za potpuno izvlaštenje*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 2, 2015, p. 838.

¹³ *Gorraiz Lizarraga and others v Spain* (2004) European Court of Human Rights, Application No. 62543/00, § 70, Judgement of 27 April 2004.

¹⁴ *Schirmer v Poland* (2004) European Court of Human Rights Application No. 68880/01, § 38.

stitution of the Republic of Croatia (hereinafter: the Constitution), the inviolability of ownership is recognized as a highest value of the constitutional order of the Republic of Croatia.¹⁵ Article 48 of the Constitution guarantees the right of ownership, but holders of property rights and their users are also obliged to contribute to the common good. Likewise, Article 50 of the Constitution provides for the restriction or expropriation of the right of ownership in the interest of the Republic of Croatia, with compensation at market value. In this way, the social function of the right of ownership is realized through the imposition of limits on the right of ownership. Under the social bond of the right of ownership, one must understand the connection between the owner's fundamental freedom and their duties towards other entities and society. In this regard, the scope of restrictions that the legal order imposes on the owner depends on the role and social function of the owner's property, which, in addition to serving the private interests of the owner, also serves the common interest.¹⁶ The social function of ownership does not affect the substance of the right of ownership, but it does affect the exercise of that right - by limiting it.¹⁷ When public authorities have a legal basis to interfere with private ownership, from a constitutional perspective, they should guarantee compensation at market value. The fact is that the European Court of Human Rights (hereinafter: ECtHR) has developed a different approach in certain cases, taking the position that legitimate objectives of public interest, such as measures of economic reform or those aimed at achieving a greater degree of social justice, may justify the payment of an amount lower than the market value.¹⁸

The right of ownership is defined by the Act on Ownership and Other Real Rights (hereinafter: the AOORR) as a real right on a particular thing authorizing the holder to use the thing and any benefits arising from it as he sees fit, and to exclude any person from it, unless that is contrary to such other person's rights or limitations imposed by law.¹⁹ The very legal provision outlines the social relationship inherent in the institute of the right of ownership through the exclusion of third parties who might undertake certain legal actions to the detriment of the owner. On the other hand, if the right of ownership is observed from the perspective of a legal subject - a natural or legal person - then, in relation to the object of owner-

¹⁵ Art. 3. of The Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (hereinafter: Constitution).

¹⁶ Gavella, N., *et. al. op. cit.*, note 6, p. 378.

¹⁷ *Ibid.*

¹⁸ *James and others v UK* (1986) European Court of Human Rights Application No. 8793/79, § 54.

¹⁹ Art. 30 of Act on Ownership and Other Real Rights, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

ship, the subject holds specific entitlements: the right to possession, use, utilization, and disposition of a thing.

2.2. GUARANTEE OF THE RIGHT OF OWNERSHIP AGAINST INTERFERENCE BY PUBLIC AUTHORITIES AND LEGAL PROTECTION

Modern legal systems guarantee that interventions done by public authorities will not violate the right of ownership. This is an emanation of the guarantee of personal freedom of legal subjects for their actions in the property law area.²⁰ The restriction of the right of ownership is permitted if it is determined in accordance with the constitutional prerequisites for legal restrictions on ownership. These prerequisites are that the restriction of property rights is necessary for the protection of the interests and security of the Republic of Croatia, nature, the human environment, and public health, and that it is based on law. Additionally, it is necessary that each restriction of the right of ownership is proportional to the nature of the need for restriction in each individual case.²¹ If a violation of the right of ownership occurs through a decision made in judicial proceedings, protection is sought before the Constitutional Court of the Republic of Croatia (hereinafter: CCRC) by filing a constitutional complaint.²² Articles 62, paragraphs 1–3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: CACCRC) stipulate that any person may file a constitutional complaint with the CCRC if they believe that a human right or fundamental freedom guaranteed by the Constitution has been violated by an individual act of a state authority, a body of local or regional self-government, or a legal person with public authority, by which a decision was made regarding their rights or obligations. If another legal remedy is allowed due to the violation of constitutional rights, a constitutional complaint can be filed after that legal remedy has been exhausted. In cases where administrative dispute is allowed, or where a revision is permitted in civil or non-contentious proceedings, the legal remedy is considered exhausted after decisions have been made regarding those legal means. Once all legal remedies before domestic courts have been exhausted, protection of the right of ownership can be pursued before the ECtHR.²³

²⁰ Gavella, N., *et. al. op. cit.*, note 6, p. 354.

²¹ Art. 50 p. 2 of the Constitution.

²² Art. 62 of The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette, No. 99/99, 29/02, 49/02.

²³ In relation to the application of the ECHR and the initiation of proceedings before the ECtHR, it should be emphasized that such proceedings are initiated by the party themselves. To meet the formal admissibility requirements for applying to the ECtHR, and in accordance with the principle of

Protection from unlawful interference with the right of ownership by acts of the legislative authority is provided through the guarantee of ownership, which is exercised by the CCRC through the review of the conformity of laws with the Constitution and the conformity of other legislation with the Constitution and the law. Thus, the CCRC will annul a law or specific provisions of a law if it determines that they are inconsistent with the Constitution and will invalidate a subordinate legislation that violates fundamental freedoms and rights of man and citizen, among which is the inviolability of ownership.²⁴

It can be concluded that public authorities are authorized, under certain assumptions, to intervene in the right of ownership of private legal subjects, to limit those rights, or even to deprive them. In the not-so-distant past, public authorities used confiscation of property as a form of punishment (sometimes confiscating of entire property of certain individuals). However, in the contemporary Croatian legal system, confiscation of property and the mechanisms by which public authorities affect citizens' property rights are subject to strict control of the judicial authority.²⁵

However, it should be pointed out that the need for the intervention of the CCRC in the procedures before public authorities also arises in the recent cases of violation of the right of ownership. Moreover, new regulations in the field of spatial planning create unpredictable situations and in relation with the issue of interference in the right of ownership on real estate's emerge open questions which have not received satisfactory answers in practice. In this context, the decision of the CCRC U-III-5095/2017 from 3rd December 2019 is important. Namely, administrative bodies in procedures for issuing locations permit²⁶ for the construction of infrastructure facilities have limited their actions to checking the compliance with spatial planning documents and complaints of landowners that the burden and encroachment in the right of the ownership should be distributed more evenly

subsidiarity, the party must first exhaust all available legal remedies before domestic courts. Only after doing so is, it permitted to turn to the court in Strasbourg for the protection of fundamental human rights and freedoms. In the Croatian legal system, seeking legal protection from the ECtHR is allowed only after the CCRC has rendered a decision in response to a constitutional complaint. If the applicant succeeds in proving a violation of rights under the ECHR, the next legal step is to return to the domestic courts and propose the reopening of the proceedings. Gović Penić, I., *Izabrana praksa europskog suda Europskog suda za ljudska prava i građanski postupci pred hrvatskim sudovima*, Organizator, 2022, p. XXVI.

²⁴ Gavella, N., *et al. op. cit.*, note 6, pp. 359 – 360.

²⁵ Pichler, D., *Građanskopravni aspekti politike kontrole oružja*, Politička misao: časopis za politologiju, Vol. 61 No. 3, 2024, p. 105.

²⁶ A location permit determines whether the planned project complies with the spatial planning documents and other relevant regulations and under what conditions it can be carried out. Mrak-Taritaš, A., *Lokacijska dozvola od prostornog plana do upravnog akta*, Četrnaesti forum poslovanja nekretnina, Zagreb, Hrvatska gospodarska komora, 2009, p. 61.

between the subjects in the procedure were rejected with the explanation that the procedure for issuing location permit does not resolve property relations, but only determines the location conditions of the intervention in the space and that the landowners may present their property - related complaints in the expropriation procedure. This position was taken not only by the competent administrative bodies, but also by the administrative courts that have been involved in these proceedings.²⁷

In constitutional complaint, the applicants pointed out that their right of the ownership, which has been guaranteed in the Article 48 p 1 of the Constitution was violated because public authorities and courts, during the procedure of adopting the decision on the determination of a building plot, failed to take into account that the building plot²⁸ was formed in a way it included land owned by the applicants. Moreover, the applicants stated that their right should be protected by administrative as well as judicial bodies in decision making.²⁹

The CCRC has adopted the constitutional complaint and had abolished judgments of the High Administrative Court of the Republic of Croatia, the Administrative Court of Zagreb as well as decisions of the Ministry of Construction and Physical Planning and the decision of the City of Zagreb, City Office for Physical Planning, Construction of the City, Utility Service and Transport, and returned case for a new procedure. In this decision, the CCRC pointed out that all state authorities must respect the Constitution, meaning that they must ensure that the highest values of the legal order of the Republic of Croatia won't be taken into question in protection of the right of ownership, whose content is defined by the

²⁷ In this context, the question arises: What exactly does the term "property relations" cover? Does it refer exclusively to the protection of the right of ownership, or should it also include a broader range of property law institutions, such as those that may arise between co-owners of real estate, between owners and investors, holders of compulsory rights on a land register plot, or holders of other real rights on the property? Another important question is the meaning of the phrase "resolved property relations" - specifically, can property relations be considered clarified if there are ongoing disputes with owners of neighboring properties, disputes concerning the disposal, utilization or possession of the property or disputes concerning limited real rights on real estate? Josipović, T., *Zaštita vlasništva u postupku izdavanja lokacijske i građevinske dozvole*, in: Galić, A., *Novosti u upravnom pravu i upravnosudskoj praksi*, Organizator, Zagreb, 2022, pp. 89 – 91. See: Žagar, A.; *Zaštita prava vlasništva u postupcima provedbe prostornih planova*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, p. 689.

²⁸ A building plot is essentially a single cadastral parcel whose shape, location and size correspond to the spatial plan, and which has access to a traffic surface. The building plot is defined in accordance with the spatial plan, and if this is not possible, then in accordance with professional standards, but it must be ensured that the building plot is defined in such a way that its shape and size allow regular use of the building. Šikić, M.; Held, M., *Prostorni planovi i tržišna vrijednost nekretnine (pravni interes)*, in: Galić, A., *Novosti u upravnom pravu i upravnosudskoj praksi*, Organizator, Zagreb, 2022, pp. 73 – 74.

²⁹ Constitutional Court of the Republic of Croatia, U-III-5095/2017, Judgement of 3rd December 2019.

Constitution. That bodies are obliged to ensure equitable balance of private interests and public interest in sense of opposing interest for the protection of the right of ownership and those established by the public interest which may include the protection of conflicting rights and interests of third parties.³⁰ The CCRC cited four rules that public authorities and administrative courts must follow when a complaint of breach of the right of ownership is brought in proceedings before them. First rule is that the competent body or court must examine whether it involves property that is included in the scope of the protection of the guarantee of the right of ownership prescribed in the Article 48 p. 1 of the Constitution. Second rule is that the competent body or court must examine whether required interference with the guarantee of the right of ownership is based on the law. Third rule is that the competent body or court must examine whether the required interference aims to achieve a legitimate objective.³¹ Fourth rule is that the competent body or court must examine whether the legitimate objective which sought to be achieved is proportionate to the proposed means of interference. These rules are not self-contained and unrelated. Any interference in the right of ownership must ensure equitable balance between the demands to respect and protect the constitutional right of ownership of private persons and the demands that are set by state or the public or general interests of the community.³²

Therefore, although all real rights that may exist on land according to the general rules of our property law can also exist on the building land, building land is considered a good of interest to the Republic of Croatia and enjoys its special protection. Because of that, there is a constant need of judicial supervision over the influence of public authorities on the exercise of the subjective rights of civil law subjects on that land.³³

³⁰ Constitutional Court of the Republic of Croatia, U-III-5095/2017, § 36, Judgement of 3rd December 2019.

³¹ According to the ECtHR, in the field of land management and spatial planning, the Contracting States should have a wide margin of appreciation in the area of land management and spatial planning in order to implement a spatial planning policy. The margin of appreciation refers to the “room for manoeuvre” granted by the Convention bodies, which allows national authorities of the Contracting States a certain degree of discretion in their actions. This national discretion, which is reserved to the Contracting States, is not examined or affected by the ECtHR. Omejec, J., *Ustavno i konvencijsko jamstvo prava vlasništva, Liber amicorum in honorem* Jadranko Crnić, Zagreb, Novi informator, 2009, p. 144.

³² Constitutional Court of the Republic of Croatia, U-III-5095/2017, § 34, Judgement of 3rd December 2019.

³³ It should be noted that building land may be subject to another special legal regime for certain types of things or several such regimes. The application of the norms of these other special regimes may bring some other specific legal restrictions, but also that there are some special types of real rights on building land, e.g. on building land that is an immovable property - a cemetery, there may be specific subjective

3. THE ISSUE OF BOUNDARY REGULATION PROCEDURE

The state of the real estate cadastre and land registers in the Republic of Croatia has been an issue addressed by legal theory and practice since the beginning of the reintegration of the Croatian property law system into the continental European legal tradition.³⁴ This topic has also generated exceptional disputes in finding adequate solutions for the regulation of our land registry system.

The Act on State Survey and Cadastre Of Real Estates (hereinafter: the ASSCRE) clearly states that the data from the real estate cadastre form the basis of the land registers maintained by the land registry departments of municipal courts.³⁵ However, a problem has been observed in that the data from the real estate cadastre are very often not a suitable basis in cadastral survey procedures, particularly prior to the preparation of geodetic reports. For this reason, on October 1, 2021, the Croatian Parliament adopted the “Multi-Year Program of Cadastral Surveys of Construction Areas for the Period 2021–2030”, which emphasizes the primary goal of establishing cadastral records for the real estate cadastre and the renewal, i.e., establishment of land registers based precisely on data obtained through cadastral surveys for properties located in construction areas. The importance of implementing this program arises from the fact that the surface area of construction zones in the Republic of Croatia amounts to approximately 550,000 hectares, which represents 9.7% of the country’s total area, and where more than 80% of all economic activities take place.³⁶ In the Proposal of the Act on Amendments to the Land Registration Act from 2017, it was emphasized that in the period from 2000 to 2014, only 5% of land register plot and cadastral parcels had been harmonized, a figure that is concerning, especially considering that it refers to a period of a fourteen years.³⁷

By regulating boundaries, the borders of individual properties, cadastral parcels are also organized, and thus, the boundaries of ownership of individual proper-

rights to utilize burial places. Gavella N., *et. al.*, *Stvarno pravo – posebna pravna uređenja*, Narodne novine, Zagreb, 2011, p. 49.

³⁴ Gavella, N., *et. al. op. cit.*, note 6, p. 14.

³⁵ Art. 7 of the Act on the State Survey and Cadastre of Real Estates, Official Gazette, No. 112/18, 39/22, 152/24.

³⁶ Multi – Year Program of the Cadastral Surveys of Construction Areas for the Period 2021 - 2030, Official Gazette, No. 109/21.

³⁷ Proposal of the Act on Amendments to the Land Registration Act, 2017, [<https://vlada.gov.hr/UserDocsImages//2016/Sjednice/2017/06%20lipanj/44%20sjednica%20Vlade%20Republike%20Hrvatske//44%20-%202.pdf>], Accessed 1 March 2025.

ties belonging to legal subjects are determined and marked.³⁸ The prerequisites for boundary regulation procedure are prescribed in Article 103 of the AOORR.³⁹ In this regard, it is important to highlight the terminological inconsistency between the cited provision of the AOORR, which uses the term “cadastral sketch”, and the ASSCRE, as the fundamental regulation governing cadastral surveys, as well as the subordinate legislation, the Rulebook on the Land Cadastre (hereinafter: RLC), which defines the documents containing data on cadastral parcels but do not recognize the term “cadastral sketch”.^{40, 41} Instead, the ASSCRE and the RLC refer to the cadastral plan, which is a composite graphical representation of cadastral data, maintained in electronic form, and contains information on the numbers of cadastral parcels, boundaries and other limits of cadastral parcels, addresses of cadastral parcels, and buildings (including their position, shape, and house number).⁴² For this reason, for the sake of legal certainty, it is therefore necessary, *de lege ferenda*, to harmonize the terminology of the provision in the AOORR with the special regulation, in the sense that the “boundary is aligned with the cadastral plan”.⁴³

It should be emphasized that the correctness of the cadastral survey procedure is influenced by many factors. For example, in cadastral survey procedures conducted by the State Geodetic Administration, professional geodetic tasks are carried out by geodetic engineers who use satellite systems that provide a higher level of precision for the data obtained through measurement. Although the use of advanced technologies increases precision, the system still has deviations. Cadastral surveying involves collection and processing of all data necessary to form cadastral

³⁸ The designations of cadastral parcels must be consistent with the data from the cadastral records. Until the data in the cadastre and the land registers are harmonized with respect to the holders of registered rights, the relevant data are those recorded in the land registers. This reflects the principle of the protection of trust in the land registers, which are presumed to truthfully and completely reflect the factual and legal status of the land. Pichler, D., *Novo zemljišnoknjižno uređenje*, Pravni fakultet Osijek, Osijek, 2022, p. 41.

³⁹ The court shall restore or correct the property line according to the cadastral sketch, if this is possible and if the parties agree to it. If the court is unable to regulate the boundary in accordance with the cadastral plan, it shall restore or correct the line based on the agreement of the neighboring owners whose shared boundary is in question. If no agreement is reached, the court shall proceed based on the most recent peaceful possession, and if that cannot be determined - according to an equitable assessment. Art. 103. Act on Ownership and Other Real Rights, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17 (hereinafter: AOOR).

⁴⁰ Rulebook on the Land Cadastre, Official Gazette, No. 84/07, 148/09 (hereinafter: RLC).

⁴¹ RLC was adopted under the previous ASSCRE from 1999. Although it has since then been amended, it is still in force despite the adoption of the new ASSCRE.

⁴² Art. 60 of the The Act on State Survey and Cadastre Of Real Estates, Official Gazette, No. 112/18, 39/22, 152/24 (hereinafter: ASSCRE), Art. 10 of the RLC, Official Gazette, No. 84/07, 148/09.

⁴³ Gavella, N., *et. al., op. cit.*, note 6, p. 651.

parcels, register buildings, register specific legal regimes on land and the manner of land use, create cadastral records for the real estate cadastre, and enable the renewal, establishment, or amendment of land registers. Since data about real estate must be collected and processed before the preparation of the geodetic report, and these are primarily obtained from the cadastre, certain problems occur in practice when cadastral sketches and cadastral data, due to the passage of time, are not clear enough to reconstruct the state on the ground or when they have been destroyed.

A cadastral survey is carried out with respect to cadastral parcels, which represent the smallest unit for the individual identification of each property.⁴⁴ The boundary line is its border, and the boundaries of cadastral parcels themselves are defined by break points, whose positions are determined by coordinates within a prescribed level of accuracy and are marked on the ground with visible permanent markers.⁴⁵

Amendments to the ASSCRE from 2024⁴⁶ regulated the survey procedure in such a way that the survey is initiated by a public decision published in the Official Gazette, other public media, and on the website of the State Geodetic Administration. As part of the preparation of the geodetic report, all persons registered in the land cadastre records, those listed as owners in the land registers, land cards, document deposits, as well as all individuals who have a legal interest in the process of marking the boundaries of cadastral parcels, are invited to participate. The law thus aims to include a broader circle of individuals who may be affected by the boundary regulation procedure, allowing them to actively present their proposals and indicate, or physically show the break points of the land. Then a list of cadastral parcels is made for which individuals have shown breakpoints, and which the surveyor must mark and display on the survey sketch. The surveyor then compiles a record of the marking, and it is particularly important that they must state the facts about the land boundaries that are disputed, as legal protection in the form of non-contentious proceedings (boundary regulation procedure) is provided for such cadastral parcels.

3.1. USE OF CADASTRAL DATA IN SURVEY PROCEDURES

In cadastral survey procedures, data are primarily obtained from cadastre. Sometimes, there are cases where such data cannot be used, then alternative methods are

⁴⁴ Kontrec, D., *Parcelacija nekretnine i provedba prijavnog lista u zemljišnoj knjizi*, in: Jelčić, O. (eds.); Brežanski, J.; Jelčić, O.; Josipović, T.; Kontrec, D.; Perkušić, A.; *Nekretnine kao objekti imovinskih prava - aktualnosti u stjecanju i raspolaganju pravima na nekretninama*, Official Gazette, Zagreb, 2005. str. 153 - 173.

⁴⁵ Art. 25 of the ASSCRE, Official Gazette, No. 112/18, 39/22, 152/24.

⁴⁶ ASSCRE, Official Gazette, No. 152/24.

provided for marking the boundaries between neighboring parcels. Court practice shows that the objective possibility of using cadastral data is not always guaranteed. In a case before the Municipal Court in Zlatař, the reasoning of the decision stated following: The representative of the geodetic expert company, when asked by the court whether it was possible to determine and indicate the boundary on-site according to the cadastral plan - specifically between the respondent's parcels no. 1870 and 1869/1 and the applicant's parcel no. 1881/4, cadastral municipality S. - responded that the current possession status differentiates too much from the cadastral plan and that any attempt to fit the cadastral plan to the actual state on the ground would not provide a realistic depiction of the boundaries... The geodetic expert opinion concluded that it was not possible to regulate the boundary between the parties' properties because the actual state of the properties on the ground significantly deviates from the cadastral plan, meaning that any attempt to align the cadastral plan with the current state would not give an accurate representation of the boundaries.⁴⁷ Furthermore, the County Court in Varaždín, Permanent Service in Koprivnica, noted that according to the opinion of the geodetic expert, the position of the boundary markers deviates from the boundaries of the properties as shown in the cadastral plan, and the expert clearly and fully indicated this on the field sketches. From the reasoning of the decision, it follows that in this proceeding, it was not possible to regulate the boundary based on the cadastral records, as they substantially differ from the actual state of the properties, nor was there an agreement between the parties regarding the regulation of boundary...⁴⁸ Similarly, the County Court in Pula - Pola, in a case where the expert marked the boundary according to the cadastral records, found that such a boundary did not correspond to the state of possession. Consequently, the expert proceeded to mark the boundary according to the most recent peaceful possession.⁴⁹

Analyzing the decisions rendered by courts in boundary regulation procedures, it can be concluded that the applicability of cadastral data - more precisely, their correspondence with the current state on the ground - is in many cases of limited significance. The reasoning of the decisions shows that courts were unable to decide based on the cadastral sketch, as the sketch does not provide a realistic representation of the boundary position in physical space. Due to the inconsistency between the actual state and state in cadastre, courts must not rely solely on those data, nor attempt to regulate boundaries exclusively on that basis. For this reason, an additional requirement for the boundary regulation procedure based on the sketch

⁴⁷ Municipal Court in Zlatař, R1-22/2019-42, § 17, 21, Judgement of 25th January 2022.

⁴⁸ County Court in Varaždín, Permanent Service in Koprivnica, Gž-931/2021-3, § 7, 10, Judgement of 27th September 2022.

⁴⁹ County Court in Pula - Pola, Gž-117/2023-2, § 5, Judgement of 7th February 2023.

is that the parties involved must express their consent to it.⁵⁰ In this context, the cumulative fulfillment of the following conditions is required for the implementation of the boundary regulation procedure: the possibility of arrangement with the sketch and the consent of the parties. The inability to align the boundary with the cadastral plan may arise due to inaccuracies that can occur due to the small scale of the plan, or due to the contraction and expansion of the material on which the plans were drawn (known as paper shrinkage), as well as the configuration of the land itself so the boundary of the parcel according to the cadastral plan is not determinable or cannot be faithfully transferred from the sketch to the property.⁵¹ For this reason, some authors deny this method of boundary regulation procedure the status of a definitive means of regulation and consider it as one of the pieces of evidence in the boundary regulation procedure.⁵² That is why the AOORR itself provides for the subsidiary application of boundary regulation procedure based on the agreement of neighboring owners, and if no agreement is reached, then based on the most recent peaceful possession. If the state of the most recent peaceful possession cannot be established, the court decides according to an equitable assessment.⁵³

3.2. JUDICIAL PROTECTION OF THE RIGHT OF OWNERSHIP AFTER BOUNDARY MARKING

The authors previously addressed the non-contentious procedure for the correction and marking of boundary as provided by the AOORR, in which the court does not decide about the right of ownership. When the court issues a decision regulating the boundary, the boundary is simultaneously marked on-site with boundary markers, and from that moment onward, a rebuttable presumption arises that ownership exists up to the restored or corrected boundary.⁵⁴

⁵⁰ Case law has accepted the position that, when the court restores or corrects the boundary according to the cadastral sketch, the consent of the parties is deemed to exist even in situations where the court regulated the boundary by having a court expert, in the presence of the parties, place boundary markers - identified by metal pipes - according to the state recorded in the cadastral records, and where the parties had no objections to such regulation on-site. Furthermore, party consent is also considered to exist when the expert's report and opinion have been delivered to the parties for comment, and the applicant explicitly stated that they had no objections and fully accepted the expert's report and opinion, while the opposing party failed to respond. Municipal Court in Osijek, Permanent Service in Valpovo, 66 R1-129/2023-11, Judgement of 21st of February 2024.

⁵¹ Gavella, N., *et. al.*, *op. cit.*, note 6, p. 651.

⁵² Šago, D., *Uređenje međa*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 51, No. 3, 2014, p. 611.

⁵³ Art. 103 of AOORR, Official Gazette, No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17.

⁵⁴ Gavella, N., *et. al.*, *op. cit.*, note 6, p. 653.

Proof of the right of ownership in civil proceedings, in a manner contrary to the decision reached in the non-contentious boundary regulation procedure, is allowed through the possibility of proving a stronger right (in which case the delivery of possession of the encroached portion of the land is requested). Persons who participated in the boundary regulation procedure may initiate a civil lawsuit only within six months from the date the decision in the procedure became final. Ownership of the disputed area, after the expiration of the deadline, may be proven only by someone who was the owner of the land before the boundary was marked and who did not participate in the procedure, or by someone who acquired ownership independently of a person who did participate in that procedure.⁵⁵

Investors⁵⁶ sometimes, during construction, fail to respect the established boundaries of cadastral parcels and unlawfully encroach upon the private property of other individuals.⁵⁷ Owners whose rights have been violated by the crossing of a boundary or by encroachment on a portion of neighboring land adjacent to the boundary have the right to request the restoration of the previous state. However, the question arises as to how realistic the restoration of the previous state truly is, especially if a building is already in the final stages of construction? Until the previous state is restored, the landowner is entitled to compensation for the use of the land, in the amount equivalent to the rent for the encroached portion. This right exists as long as part of the building remains on the landowner's property and even after that, the landowner has the right to claim compensation for damages. However, by way of exception, a builder who was acting in good faith during construction (that is, who did not know and could not have reasonably known that construction was exceeding the boundary and encroaching on neighboring land) has, in cases where the landowner has requested the restoration of the previous

⁵⁵ *Ibid.*

⁵⁶ The authors refer equally to legal and natural persons. The issue becomes particularly contentious when construction is carried out in violation of established urban and spatial plans - especially when such actions are undertaken by the state.

⁵⁷ An organized land cadastre and land register is both a prerequisite and a driving force for economic progress and societal development. The 1980s, including in the territory of the Republic of Croatia, were marked by the dominance of so-called social ownership. This period was also characterized by the construction of large residential blocks, the allocation of so-called solidarity apartments, and a boom in the housing market. In the templates of the then-used apartment sale contracts, the designated fields for cadastral parcel numbers and cadastral municipalities were often left blank. The negligence of investors who built apartments for the market but failed to register buildings in the land cadastre and land register led to a significant discrepancy between the factual situation on the ground and the official records. This disordered state was inherited by the social changes that began in the early 1990s. These societal developments, primarily the return to a market economy, required establishment of new relationships and the resolution of the inconsistencies between cadastral, land register, and factual property status. Ružička, B., *Zemljišna knjiga. Povezivanje zemljišne knjige i knjige položenih ugovora i upis vlasništva posebnog dijela nekretnine.*, Novi informator, 2010 pp. 9 – 93.

state but such restoration is not possible without significant damage to the rest of the building or disproportionately high costs, a *facultas alternativa*: the right to, instead of restoring the previous state, purchase at market value the entire portion of land encroached upon by part of the building.⁵⁸ The landowner may also request the purchase of the land at market value from the builder. It is widely held that, despite the particular nature of boundary encroachment through construction, the builder should not be granted legal protection if it is evident that they knew, or according to the circumstances could and should have known, that they were crossing the boundary, especially if the owner of the neighboring land objected to this in a timely manner.⁵⁹ Exceptionally, if the encroachment involves a truly minor and insignificant portion of land, or if only the airspace or underground space of the neighboring land is affected, and the circumstances indicate that the particular owner has no specific and legitimate interest in requesting removal, it should be considered an abuse of the right of ownership if the restoration of the previous state is sought by demanding the removal of the part of the building that extends onto another's property.⁶⁰

The authors disagree with the expressed position, as the encroachment upon airspace without the consent of the neighboring property owner, essentially constitutes unlawful interference with the right of ownership. It cannot be considered insignificant, regardless of whether it concerns airspace, land, or any other part of the property.

The issue of encroachment into a property's airspace was also brought before the Supreme Court of the Republic of Croatia (hereinafter: SCRC). In a recent decision, the SCRC allowed a revision concerning the following legal question: "*Does the placement of an object by a third party - in this specific case, an air conditioning unit - in the airspace of a property owner constitute interference with that owner's right of ownership over the property?*" The SCRC granted the revision because the interpretation of the second-instance court, which had dismissed the claim, was contrary to the SCRC position, whose role is to ensure the consistent application of the law and equality of all participants in proceedings. In the case at hand, the defendant, on August 31, 2010, installed an air conditioning unit on the rear side of the eastern part of the building located on cadastral parcel no. 2359 (owned by the defendant), which extended into the airspace above parcel no. 2359 (owned by the plaintiff). The answer to the posed question is that the placement of an

⁵⁸ Gavella, N., *et. al.*, *op. cit.*, note 6, pp. 542 – 543.

⁵⁹ Prančić, V., *Prekoračenje međe građenjem*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 59, No. 4, 2009, pp. 763 – 764.

⁶⁰ *Ibid.*, p. 764.

object by a third party, in this specific case, an air conditioning unit in the airspace of a property owner *does* constitute interference with that owner's right of ownership. This is because it was indisputably established that the defendant encroached upon the airspace above the plaintiff's property by installing the air conditioning unit and failed to prove that this was done with the consent or in agreement with plaintiff. Furthermore, this involves not only the physical volume of airspace objectively occupied by the external unit but also issues such as the discharge of condensate, which naturally occurs from such device, which objectively represents an encroachment upon another's possession and ownership sphere and thereby constitutes a limitation of the plaintiff's ownership rights.⁶¹

4. CONCLUSION

A thoroughly regulated procedure for cadastral surveying, and the real estate cadastre in general, is the most important prerequisite for ensuring the highest level of legal certainty regarding the institute of the right of ownership. Cadastral surveys not only provide a foundation that directly affects ownership but also influence the completeness of the land registers and the realization of their role in the legal transactions of real estate. Cadastral data are the foundation of the functioning of the land registry and the realization of the principle of trust in the land registers. This was precisely the fundamental goal pursued by the adoption of the new ASSCRE, with the aim of establishing legal certainty through the advanced use of technology in cadastral survey procedures, and at the same time paving the way for the renewal, amendments, and transformation of land registries across the Republic of Croatia. The new legal framework introduced by the ASSCRE will open a wide range of questions related to the procedure and technique of geodetic surveying, particularly those already emphasized in this paper - first and foremost, the transfer of technical methods used in cadastral parcel measurement and geodetic activities into legal institutes and legal standards. In addition to improving the procedure through legislative amendments, the participation of a broader group of individuals, especially owners of neighboring properties are now mandatory in the cadastral survey and boundary regulation or renewal procedure. A legal framework in which all stakeholders in the procedure can actively protect their private legal interests increases the legitimacy of the process and minimizes potential violations that may arise during the procedure. Individuals with a legal interest can present objections, proposals, and statements on-site, and in doing so, respond in a timely manner during the boundary regulation and cadastre survey

⁶¹ Supreme Court of the Republic of Croatia, Rev-1092/2020-2, § 12, 13 Judgement of 4th October 2022.

procedure. The process of boundary regulation procedure should not be viewed solely through the lens of technical measurement, but rather as a procedure with a highly important legal dimension regulated by statutory provisions. One of the key issues highlighted by this paper is the terminological inconsistency between the AOORR and the ASSCRE, as well as the relevant rulebook. In this regard, the authors believe that *de lege ferenda*, a terminological harmonization of the AOORR should be carried out by replacing the term “cadastral sketch” with “cadastral plan.” This alignment is not merely linguistic; it contributes to legal certainty. The regulation of the state survey procedure, along with other aspects of this reform of real law regulation in Croatia, will ultimately be tested in practice but, legal theory is here to offer plausible solutions. This refers primarily on questions regarding balancing public law and general interests, on the one hand, with private legal interests of ownership rights holders, on the other.

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