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**SOCIAL FUNCTION AND VALUE CAPTURE:
DO THEY OR SHOULD THEY HAVE A ROLE TO PLAY
IN POLISH LAND DEVELOPMENT REGULATION**

1. INTRODUCTION: THE CURIOUS CASE OF WARSAW

A U.S. visitor in Warsaw can feel alarmingly at home. Unlike many other cities in Eastern Europe – Budapest, Prague and Krakow, for example – Warsaw’s urban fabric is uneasily familiar. The capital city – not unlike U.S. mega-regions like Atlanta or Dallas, for example – evidences the same disconcerting pattern of urban sprawl, aided by automobile dependence and a host of other, well-known and mostly negative consequences for the physical and built environment¹. Even the beautifully reconstructed historic center, lovely as it is, recalls some of the most frequently voiced concerns about U.S. urban redevelopments in cities like New York – with its South Street Seaport – or of Los Angeles’s old downtown – creating havens of relative privilege and neighborhoods that are nice to look at but do not much resemble vibrant urban districts that embrace a true cross-section of the city’s urban residents, activities and characteristics².

What is it about Warsaw³. Again like many U.S. cities, and particularly the “Sunbelt” cities of the south and southwest that saw such rapid and often uncon-

¹ See generally, e.g., A. Duany, E. Plater-Zyberk, J. Speck, *Suburban Nation: the Rise of Sprawl and the Decline of the American Dream*, New York 2010.

² See, e.g., L. Adamic, A. Sekula, *Facing the Music: Documenting Walt Disney Concert Hall and the Redevelopment of Downtown Los Angeles*, Los Angeles 2015 (on Los Angeles); J. M. Lindgren, *Preserving South Street Seaport: The Dream and Reality of a New York Urban Renewal District*, New York 2014 (on New York City).

³ In this we recall Julian Juergensmeyer’s similar query about Atlanta. See *Foreword: an Introduction to Urban Sprawl*, 17 Ga. St. U. L. Rev. 2001, No. 17, p. 923.

trolled growth after the Second World War⁴, Warsaw's land development since the collapse of the Soviet Union indicate that it was the product of a comparable period of economic expansion in which social and environmental concerns were often subordinated to the interests of capital accumulation⁵. Although this is not an original story, it is nonetheless one for concern.

Following this introductory Part I, in Part II, two of the three authors here, both U.S. law professors, seek to identify some conceptual and practical legal tools for a more orderly and balanced land use development in the Warsaw metropolitan region, one that promotes not just economic and industrial growth but one that also serves medium- and longer-term social and environmental interests as well. Part III, written by the third author – a Polish law professor, will evaluate the prospects for, as well as the challenges and impediments to, implementing these legal tools in the Polish context. Finally, in Part IV we offer some concluding observations.

2. LEGAL TOOLS FOR WARSAW'S LAND USE FUTURE?

2.1. SOCIAL FUNCTION OF PROPERTY

In 1911, the French jurist León Duguit gave a series of six lectures in Buenos Aires, Argentina, in which he outlined recent evolutions in his legal philosophy⁶. In the last of those lectures he articulated his view of the social function of property⁷. What has come to be known as the social function doctrine has been enormously influential – not only in Duguit's native France and in Argentina, where he gave the lectures, but across most of the civil law world⁸.

By contrast, one of the first principles of property law learned by most U.S. law students is the idea that the greatest right possessed by a holder to title of property is that he or she has the *right to exclude*. This idea is central to a view of property that vests the owner with the power to use and control the property as he or she wishes, subject only to external limits on that use. The external limits,

⁴ See generally, e.g., K. T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, New York 1985.

⁵ See, e.g., J. Goldman, *Warsaw; Reconstruction as Propaganda*, (in:) L. J. Vale, T. J. Campanella (eds.), *The Resilient City; How Modern Cities Recover from Disaster*, New York 2005, pp. 135–158.

⁶ S. R. Foster, D. Bonilla, *The Social Function of Property: A Comparative Perspective*, Fordham L.R. 201, No. 80, p. 1003.

⁷ L. Duguit, *Las transformaciones del Derecho Público y Privado*, Buenos Aires 1975.

⁸ See, e.g., M. Garcia-Villegas, *Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States*, *Law & Soc. Inquiry* 2006, No. 31, p. 343.

enforced by the formal legal system, are created in order to respect the corresponding property use of others. Thus, for example, I may use my land as I wish but if, say, I build a water reservoir on my land and the reservoir bursts, causing damage to my neighbor's land, I am responsible for the extent of the damage⁹.

Duguit's idea of property's social function turned this highly individualistic notion on its head. In brief, Duguit argued that property was not something that, in the prevailing liberal tradition, entitled the title-holder to do whatever he wanted with his property so long as he did not infringe on the property rights of others. On the contrary, by virtue of the fact that human beings are by nature social creatures who live together in societies, Duguit, said, property by definition was subject to *internal* limits. That is, Duguit believed that property had to respect not just the immediate needs of its owner but also those of other members of society. First and foremost, as a result, property could not be allowed to be held and remain unproductive; property had to produce value¹⁰. This was true, Duguit believed, once again, because property exists not just to enrich the owner but the entire society. Unproductive property hurts us all, he would say, because it inhibits the ability of society to develop as fully as one would wish. To use his idea in a somewhat anachronistic way, this is to argue, for instance, in the language of law and economics, that property ownership necessitated using the property in the most economically efficient manner possible because this would, by extension, create the greatest social utility.

Importantly, however, Duguit was, beyond the central claim about the internal limits to ownership that characterized property's social function, less than clear about what behaviors by property owners would satisfy their social obligations. That is, he did not argue, for example, that the social function meant that a privately held forest reserve always remain a forest because, say, what we today call greenspace contributes to the productive use of a clean environment. Conversely, he did not argue that, for example, rented property had to remain such forever, even when a city had a housing deficit. On the contrary, the land had merely to be "productive". Thus, Duguit's theory did not per se prevent urban renewal, even when it may end up displacing some persons¹¹. What Duguit's theoretical framework did do was provide an intellectual legal frame that balanced the individual rights of use and exploitation against the collective need for mutually beneficial uses.

At this point, two observations deserve making. First, Duguit's writing very much demonstrates that he was acutely conscious of the need to respond to the world's relatively recent industrial transformation and then growing urbaniza-

⁹ As famously explored in the English case of *Rylands v. Fletcher*, (1865-66) L.R. 1 Ex. 265; [1865-66] All E.R. Rep. 1; (1866) 4 Hurl. & C. 263 (Ex Chamber), affirmed by *Rylands v Fletcher*, (1868) L.R. 3 H.L. 330 (HL).

¹⁰ S. R. Foster, D. Bonilla, *The Social Function of Property*..., p. 1007.

¹¹ *Ibidem*, pp. 1007-1009.

tion¹². His theory of property's social function gave voice to a recognition that individualistic property holding notions did not well serve dense and intensive land use. Given that we are now a majority urban planet, with the global population expected to be over two-thirds urban by 2030¹³, his concerns are thus even more relevant in 2015 than they were a century ago. Second, Duguit's notion of property's social function was neutral with respect to the type of productive use to which property should be put.

As indicated above, Duguit's idea has had a lot of traction since he first elaborated it. Property's social function is an idea that, for example, now has constitutional protection in a number of countries¹⁴. Moreover, in many places, the content of the productive use has been defined, either by legislation or by judicial decision or by a combination of the two. In Colombia, the constitution provides not only that property must observe its social function but also that the inherent limits on property include an ecological function¹⁵. Elaborating that conceptual extension, the Colombian Constitutional Court has, for example, restricted the rights of owners with private property within the boundaries of declared national parks to dispose of and use their property as they see fit, citing the larger public interest¹⁶. It is fair to say that in many if not most instances, that the modern interpretation of property's social function uses its view of internal limits to restrain and limit uses in service of collective goals beyond merely assuring that property is "productive"¹⁷.

Curiously, however, the notion of property's social function appears to have had little influence in post-Soviet Poland¹⁸. This is surprising for at least three reasons. First, one of the features of economic development in Soviet-influenced Eastern Europe was the heavy toll it took on the environment and the lives of the people who lived there¹⁹. In Poland, one of the more industrialized countries under Soviet influence, the social-environmental consequences of the Soviet period were especially serious and required intervention to cor-

¹² See, e.g., L. Duguit, *Traité de Droit Constitutionnel*, Vol. 3: *La Théorie Générale de l'État*, Paris 1930, pp. 658–674 (on necessary changes in property law in the modern world).

¹³ UNFPA [United Nations Population Fund], *State of World Population 2007: Unleashing the Potential of Urban Growth*, New York 2007, pp. 6–8.

¹⁴ S. R. Foster, D. Bonilla, *The Social Function of Property*..., p. 1008.

¹⁵ H. Alviar García, C. Villegas del Castillo, *La Función Social de la Propiedad en las Constituciones Colombianas*, Bogotá 2012, pp. 63–77.

¹⁶ Sentencia [Decision] C-189 of 2006, at <http://www.corteconstitucional.gov.co/relatoria/2006/C-189-06.htm>.

¹⁷ See, e.g. *supra*, pp. 135–167.

¹⁸ Lecture by Dr. D. Sześciło, Faculty of Law and Administration, *University of Warsaw, Influence of 'Participatory Funds' on Redevelopment of Warsaw*, University of Warsaw, June 18, 2015.

¹⁹ See, e.g., D. J. Peterson, *Troubled Lands: the Legacy of Soviet Environmental Destruction*, Boulder, Colorado 1993.

rect them²⁰. Second, the explosive economic growth that has characterized the post-Soviet period in Poland, and above all in Warsaw²¹, call out for guiding principles to help balance and restrain that growth's undesirable effects, such as sprawl. Third, Duguit's notion of property's social function was in fact a direct response to socialist ideology. Remember that Duguit delivered his famous lectures early in the second decade of the 20th century; the 1917 Bolshevik Revolution was six years away. Debates about socialism were the intellectual electrical current of the era²²; they could not be avoided by a serious legal theorist. Duguit's theory was thus in part an effort to articulate an intellectually coherent legal response to socialism. His was an attempt, within a capitalist, free-market context, to recognize collective needs, so as to damper some of capitalism's harsher social effects²³.

For all of the above reasons, one would have thought social function theory would be attractive to Poland. Like Soviet occupation or not, collectivist notions made their way into the political and legal consciousness²⁴. Social function theory provides ideas that respect collective needs but also with a legal theory designed to work within a free-market system that respects individual rights. Furthermore, as indicated above, a contemporary articulation of social function theory would provide a coherent legal theory both to address negative social and environmental consequences of the Soviet period and also help control the post-Soviet growth.

Consider, for instance, a famous Warsaw land use example. In front of the Stalinist Palace of Culture in central Warsaw sit several large parcels – today devoted exclusively to parking. Among those concerned about land use, the parcels constitute a particular waste of space and an opportunity for densification in the city center (not to mention being a real eyesore). They cry out for a – in Duguitian terms – more productive use. Social function theory would in this instance provide a legal theory to push for a denser, more broadly beneficial use of that space. Similarly, social function theory could help Warsaw's population control sprawl. It would provide a legal theoretical framework to evaluate the costs and benefits of sprawl that embraces not only economic concerns but also social and political ones. This would be true for discussion about transportation infrastructure as well since social function theory would provide a forum and impose a legal requirement to consider the consequences of unbridled car dependence and seek

²⁰ See, e.g., M. Nowicki, *Environment in Poland: Issues and Solutions*, Dordrecht 1993, pp. 15–30.

²¹ G. Gorzelak, M. Smetkowski, *Warsaw as a metropolis – successes and missed opportunities*, *Regional Science Policy and Practice* 2012, Vol. 4, No. 1.

²² See, e.g. R. Pipes, *Russia Under the Old Regime*, New York 1974, pp. 261–275.

²³ S. R. Foster, D. Bonilla, *The Social Function of Property...*, p. 1009. See generally K. Marx, *Capital*, Vols. 1–3, New York 1992.

²⁴ See, e.g. B. Porter-Szücs, *Poland in the Modern World: Beyond Martyrdom*, Oxford 2014, pp. 328–340.

alternatives that would benefit the entire population and not merely cater to the convenience of single drivers.

2.2. LAND VALUE CAPTURE

Another approach to land development regulation that is found in many countries but which seems at best underutilized in Poland is the concept of land value capture: “Value capture refers to the recovery by the public of the land value increments (unearned income...) generated by the actions other than the landowner’s direct investments (...). Although all such increments are essentially unearned income, value capture policies focus primarily on the increment generated by public investments and administrative actions, such as granting permission for the development of specific land uses and densities. The objective is to draw on publicly generated land value increments to enable local administrations to improve the performance of land use management and to fund urban infrastructure and service provisions. The notion is that benefits provided by governments to private landowners should be shared fairly among all residents”²⁵.

The concept is broad and applied to many different ways that land use control authorities require new development to bear the cost – partially or completely, although usually the former- of the infrastructure needs created by the new development. The idea is by no means new. For example, requirements that land owners contribute to the cost of public improvements that benefit their land can be found in the Roman Empire, and in Portugal, Spain, France, England and Mexico as early as the 1500s and 1600s²⁶. In modern Spain, Catalonia in particular, land value capture is used to fund the provision of affordable housing²⁷. In Latin America, where land value recapture has seen the most widespread adoption, a wide range of traditional and social infrastructure is financed by recapture of the increased value received by land accorded development permission²⁸.

²⁵ M. Smolka, *Implementing Value Capture in Latin America: Policies and Tools for Urban Development*, Cambridge, Massachusetts 2013. “In Spain, municipalities capture part of the value increase in urban extension areas by requiring landowners to cede between 5 and 15 percent of the serviced building plots to the municipality. In addition, landowners must provide the land needed for infrastructure, pay the related costs for service provision, and pay the overhead costs and a profit margin”. *Ibidem*, p. 14.

²⁶ *Ibidem*.

²⁷ J. C. Juergensmeyer, *Developer Funding of Affordable and Work Force Housing Through Impact Fees and Land Value Recapture: A comparison of American and Spanish Approaches*, *Revista de Derecho Urbanístico y Medio Ambiente* 2015, No. 297, p. 131; N Calavita, J. Clusa, S. Mur, C. Wiener, *Spain’s Constitutional Mandates: The Right to Housing, Land Value Recapture, and Inclusionary Housing*, Chapter 7, (in:) N. Calavita, A. Mallach, *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion and Land Value Recapture*, Milwaukee 2010.

²⁸ On the Latin American example, see, e.g. M. Smolka, D. Amborski, *Value Capture for Urban Development: An Inter-American Comparison*, *Lincoln Land Institute working paper*,

One land value capture study focused on Latin America identifies three categories of the voluntary and mandatory implementation of the concept: 1) “property taxation and betterment contributions;” 2) exactions and other direct negotiations for charges for building rights or for the transfer of development rights;” and 3) “large-scale approaches such as development of public land through privatization or acquisition, land readjustment, and public auctions of bonds for purchasing building rights”²⁹.

While most studies of the application of land value capture techniques have centered on Latin America, Western Europe, and, to a lesser degree, the United States, a recent conference and case studies have focused on Sub Saharan Africa. Ethiopia, Kenya and Zimbabwe have been objects of studies and great interest is being expressed in South Africa³⁰.

In the United States and Canada the use of land value capture normally occurs without the use of the term and accomplished rather differently and in ways that may be easier for Polish cities to adopt. The U.S.-based organization, the Lincoln Institute of Land Policy, has long advocated the consideration of land value capture per the Latin American model. In a recent newsletter the Lincoln Institute reported: “The concept of value capture, which recognizes the increases in property value triggered by government action and public investments, has been in the news of late, not coincidentally right here in our backyard. The Massachusetts transportation secretary, Stephanie Pollack, floated the idea as a way of confronting cost overruns in the proposed Green Line **light rail extension** north of Boston. The state has established a **Value Capture Commission** to explore ways of engaging the private sector in the financing of critical transportation infrastructure. The City of Cambridge similarly suggested that private developers and landowners might **contribute** more directly to transit operations that are such a critical element in the success of such booming areas as Kendall Square: “Our research on value capture in the context of land-based financing tools goes back many years, and the idea has a prominent place in the promotion of **municipal fiscal health**. Martim Smolka, director of the Program on Latin America and the Caribbean, and author of the report **Implementing Value Capture in Latin America**, has been conducting research, courses, lectures, and workshops, most recently in São Paulo, where additional floor-area ratio (FAR) is auctioned in a stock market. Those discussions have centered on several common concerns in the implementation of value capture, such as whether charges to property owners are passed along to consumers in the form of higher prices, or doubts about the

2007, at http://www.lincolninst.edu/pubs/1279_Value-capture-for-Urban-Development. On land value capture in general, see, e.g., G. K. Ingram, Y.-H. Hon, *Value Capture and Land Policies*, Cambridge 2012.

²⁹ See M. Smolka, *Implementing Value Capture in Latin America...*

³⁰ At <http://www.africancentreforcities.net/land-value-capture-and-infrastructure-finance-in-sub-saharan-africa/>.

ability of local officials to determine the precise land value increment linked to government action”³¹.

Even though classic value capture may indeed be “catching on” the most important implementation of the concept in the United States had been developer-funding requirements tied to impact analysis based required dedications and impact fees³².

One of the key tenets of US land development regulation law since the inception of growth management programs has been submitting development proposals to an impact analysis— a concept no doubt borrowed from the Environmental Impact Statement process established by the National Environmental Policy Act of 1969. The impact analysis measures the effect of the proposed development on the need for infrastructure to service that new development. At first the infrastructure considered was so called “hard” infrastructure, for example, roads, parks, schools, and public buildings. Now, however, various items of environmental protection infrastructure and social infrastructure such as affordable housing and childcare facilities are included. Since the developer is required to pay for infrastructure out of his potential profit from the new development, the result is a capture of a portion of the increased value the developer receives as a result of obtaining development permission.

Conceptually, value capture programs such as impact fees are grounded in the idea of using windfalls³³ landowners receive from obtaining development permission to mitigate the wipeouts suffered by landowners negatively affected by new development or the denial of development permission or negative consequences suffered by society in general. There has been much emphasis in the U.S in recent years on programs designed to compensate landowners negatively affected by land use controls but virtually no attention has been paid to the question of capturing for the public any portion of the gains conferred on landowners by virtue of public improvements and government regulations. Those few who have considered the equity – or lack thereof – involved in granting windfalls but not compensating for wipeouts often cite the writings of Henry George’s classic work *Progress and Poverty* and the late 20th century publications of one of America’s best known land use control law scholars, Donald Hagman. In 1978 Professor Hagman and Dean Mischynski published, through the American Planning Association, a collection of essays titled *Windfalls for*

³¹ At *Lincoln House*; the blog of the Lincoln Institute of Land Policy, September 24, 2015, p. 2, at <http://www.lincolnst.edu/news-events/at-lincoln-house-blog>.

³² Although U.S. impact fees are seldom, if ever, identified as embodying a land value capture approach, it is interesting to note that a leading authority on Land Value Capture describes U.S. Impact fees as a land value capture approach. M. Smolka, *Implementing Value Capture in Latin America...*

³³ The U.S. concept of windfalls bears close resemblance to the British concept of “betterment”. See English Expert Committee on Compensation and Betterment (Uthwatt Committee), *Final Report. Cmd.*, No. 6386, 1942.

*Wipeouts: Land Value Capture and Compensation*³⁴. Professor Hagman was more concerned with using windfall recapture as a source of wipeout mitigation than he was with using value capture to fund public projects. He nonetheless noted that under such a program, the community is only asking for a return of a portion of the wealth it creates.

It also should be noted, as indicated earlier, that the popular U.S. concept of transferable development rights is and should be considered a type of value capture: “TDR programs separate the development potential of a parcel from the land itself, and create a market where that development potential can be sold”³⁵. Pursuant to such programs, Hagman’s goals are more closely realized since those who experience a windfall in value as a result of government regulation directly compensate individual landowners who have a “wipeout” of land value.

The synthesizing concept underlying a social function view of property and land value capture programs is the basic growth management tenet requiring development to pay for at least some of its infrastructural, environmental and social impacts. Nearby landowners and the tax-paying public are thereby protected from suffering wipeouts while new development reaps only windfalls. As noted above, the late Donald Hagman advocated capturing windfalls from developers whose land gained value as a result of government development permitting in order to compensate landowners whose land lost economic value in the process. While current land value capture programs do not usually contemplate the transfer of captured profits to individuals, except in connection with TDR programs, they implement the windfalls for wipeouts principle by relieving the tax-paying public from bearing the costs of providing new infrastructure or absorbing the cost by experiencing lower levels of service.

We suggest that Polish local governments – even if they are unwilling to adopt social function theories and traditional land value-capture programs- should at least require new development to search for legal and regulatory mechanisms that will take larger, collective property interests into account, such as requiring developers to provide or pay for the infrastructure needs they create through infrastructure funding programs analogous to U.S. impact fees and transferable development rights programs.

³⁴ D. Hagman, D. Misczynski, *Windfalls For Wipeouts: Land Value Capture and Compensation*, Chicago 1978. A summary of their principal points can be found at J. C. Juergensmeyer, T. Roberts, *Land Use Planning and Development Regulation Law*, 3rd ed., St Paul 2012, pp. 81–89.

³⁵ *Ibidem*.

3. OPPORTUNITIES, BARRIERS AND PERSPECTIVES FOR MORE SOCIALLY MINDED POLISH LAND USE LAW AND REGULATION

3.1. THE NOTION OF SOCIAL FUNCTION IN POLAND

In order to understand the current approach to social function of property in Poland, we need to refer to the past experiences. In the Communist era, the issue of property was one of the central elements of the constitutional regulation. The Constitution of People's Republic of Poland adopted in 1952 enshrined individual property right and formally guaranteed its protection³⁶. However, the protection of property of the state (called as "the property of the whole nation") was explicitly prioritized³⁷. State property was not only differentiated from private protection, but also provided with special protection. This naturally created imbalance where the state property was deemed superior to private property. What is more, the protection of the private property of land, buildings and other means of production was guaranteed to the extent envisaged in legislation³⁸. In practice, this meant that private property could have been limited or ceased at any time by ordinary laws.

Obviously, this model of relations between private and state property was not acceptable in the context of a newly democratic society. Therefore, the Constitution adopted in 1997 introduced a new approach to this issue that is generally compatible with international standards. First of all, private property is declared to be one of the pillars of the economic system of the Republic of Poland based on the doctrine of social market economy³⁹. Everyone has a right to property that is correlated with the obligation of the state authorities to protect peaceful enjoyment of possessions⁴⁰. Expropriation may be allowed solely for public purposes and for just compensation⁴¹. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right⁴². This model of property rights is particularly similar to the one reflected in the Protocol No. 1 to the European Convention on Human Rights⁴³. Firstly, it enacts the general right to private property. Secondly, it specifies key rules regarding deprivation of property. Thirdly, it recognizes the conditions for imposing other limitations of property rights.

³⁶ Article 18 of the 1952 Constitution of the People's Republic of Poland, Official Journal 1976, No. 7, item 36.

³⁷ Article 12 of the 1952 Constitution of the People's Republic of Poland.

³⁸ Article 17 of the 1952 Constitution of the People's Republic of Poland.

³⁹ Article 20 of the 1997 Constitution of the Republic of Poland.

⁴⁰ Article 21.1 of the 1997 Constitution of the Republic of Poland.

⁴¹ Article 21.2 of the 1997 Constitution of the Republic of Poland.

⁴² Article 64.3 of the 1997 Constitution of the Republic of Poland.

⁴³ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature on 20 March, 1952.

The Constitutional Tribunal underlined that under the new Constitution the state property does not enjoy special protection and return to the system based on the domination of state property is excluded⁴⁴. On the other hand, the constitutional order does not provide for total supremacy of private property rights. Limitations to private property rights are allowed and deprivation of the right to ownership is also possible in order to protect or realize public interest. What is more, the Constitutional Tribunal explicitly referred to the concept of social function of private property. The Tribunal observed that: "(...) contemporary legal doctrine rejects the idea that the right to private property, especially land and buildings property, is designed to protect solely the egoistic interest of the owner. No one today undermines the social aspect of ownership. The consequence of this recognition is to accept that ownership is not absolute, but may be subject to restrictions. Under Polish law this idea found expression in the very definition of property rights. In accordance with Article 140 of the Civil Code, all rights of the owner are limited by laws, rules of social coexistence and socio-economic destiny of the law. (...) Constitutional legal basis for restrictions on the right of ownership is Article 64.3 of the Constitution. In many judgments (...) the Tribunal took the view that limitations to the private property rights are acceptable if they do not constitute a violation of the essence of property rights, and their implementation is justified by the need to protect or realize other constitutional values"⁴⁵.

In the light of Polish constitutional jurisprudence, then, the right to private property is not absolute and might be correlated with limitations and obligations based on public interest needs. The social function of private property is therefore accepted in practice if not in name as one of the components of the Polish constitutional conception of property rights. This is reflected in the legislation defining the scope of the right to ownership. The question nonetheless arises as to why it is so difficult to ensure the practical application of the idea of social function of property in Poland.

Our paper does not offer comprehensive explanation to this dilemma, but it sheds light on some specific obstacles for dissemination of this concept. We focus primarily on barriers created in the legislation. It should be noted though that significant problems result from political, social and ideological attitude towards property rights. The era of forced collectivism and undermining individual rights and freedoms triggered counter-reaction based on supremacy of private property, absolutization of individual ownership rights and ignoring any potential obligations of the owners towards the larger society. This type of reaction was exacerbated by the extremely low levels of trust in state and public institutions following the end of Communism, what undermines social and political support for any limitations to the property rights. As a result, the doctrine of "inviolable

⁴⁴ The judgment of the Constitutional Tribunal of 21 March, 2000, signature K 14/99.

⁴⁵ The judgment of the Constitutional Tribunal of 15 March, 2005, signature K 9/04.

and sacred”⁴⁶ private property is strongly represented today in Polish political and social discourse and these views subsequently find expression in public policies and legislation.

3.2. A MOVE TOWARDS VALUE CAPTURE IN POLISH LAND LAW? SOME PRELIMINARY STEPS

Despite general reluctance to a socially-oriented concept of property rights, in Polish legislation we can identify arrangements demonstrating some perception of non-individual repercussions of land use. Key aspects of the land property legal regime are regulated in the 2003 Law on Spatial Planning⁴⁷. This law requires public authorities to seek the balance between needs and rights of public persons and the public interest in the context of land use⁴⁸. Specific instruments relevant to rights and obligations of owners of private land are established by the provisions regulating the content and effects of local spatial plans adopted by communal councils. Local spatial plans may impose detailed restrictions to property rights, especially to the right to land development (construction) perceived as component of property. Those restrictions may concern, for instance, excluding construction rights or establishing specific conditions such as, for example, maximum surface, height, number of floors and other, similar requirements. However, introduction of any restrictions has to be compensated by the municipality by paying compensation or buyout of the relevant property⁴⁹.

In case of improving legal conditions of land use (e.g. ceasing previous restrictions to land development) as a result of adoption of a new local spatial plan, the municipality may require the owner to pay one-off fee. This fee is calculated as a percentage of the increase of market value of property resulting from the new plan. However, it needs to be underlined that this fee might be imposed only when the owner sells the relevant property. This mechanism, called a “planning rent”⁵⁰ cannot be perceived as a form of impact fee in the sense described in Part II above, as it is not directly linked with increasing demand for public infrastructure and it is not imposed in conjunction with specific land development project. Also, the municipal revenues from planning rent do not have to be allocated to development of public infrastructure in the area where the fee was imposed.

Another mechanism, more compatible with the concept of impact fee, is the “adjacent fee” regulated by 1997 Law on Property Management⁵¹. An adjacent

⁴⁶ As declared by the 1789 *Declaration of Human and Civic Rights*.

⁴⁷ Law of 27 March 2013 on Spatial Planning, Official Journal 2013, No. 80, item 717.

⁴⁸ See, e.g., Article 6.2 of the 2003 Law on Spatial Planning

⁴⁹ Article 36 of the 2003 Law on Spatial Planning.

⁵⁰ E. Janeczko, *Renta planistyczna na tle art. 36 ustawy o zagospodarowaniu przestrzennym*, Rejent 2001, p. 40.

⁵¹ Law of 21 August 1997 on Property Management, Official Journal 1997, No. 115, item 741.

fee is imposed according to the principles established by the Municipal Council if the property has been connected to the new “technical infrastructure”, meaning roads and other facilities such as water supply, sewage, heating, electricity, gas and telecommunications transmission networks built from public funds. The adjacent fee might be imposed when the infrastructure is ready to be connected to the relevant property. However, the term “technical infrastructure” does not cover infrastructure necessary for provision of human services, such as, for instance, building schools.

Thus, the adjacent fee has some features of an impact fee, such as a direct connection with public infrastructure supporting neighboring land use. However, it represents a different model in major aspects. First of all, it is not linked to the land development projects initiated by a private owner. Secondly, it is imposed after implementation of public infrastructure development projects. As a result, the Polish adjacent fee cannot be seen as an instrument for involving private owners into development of public infrastructure that is demanded in a consequence of private land development projects. What is more, as the report of the Supreme Audit Office shows, the municipalities are inefficient in terms of imposing and collecting both planning and adjacent fees⁵².

In conclusion, it should be underlined that the Polish law does not provide for any mechanism explicitly requiring private property owners to participate in the costs of fulfilling infrastructural needs generated by the private land development projects. Planning fees and adjacent fees are only weak versions of a land value capture device and do not guarantee that developers are co-responsible for sustainable development of the areas affected by their projects. On the other hand, constitutional order and position of the Constitutional Tribunal does not exclude introduction of mechanisms similar to impact fees or of a notion seeking to protect shared interests, such as Duguit’s notion of the social function of property doctrine. The major obstacles remains to be the lack of political will and support for such arrangements.

4. CONCLUSION: TOWARDS A MORE SOCIALLY INCLUSIVE FUTURE FOR POLISH LAND AND PROPERTY LAW

What, then, are the prospects for a more publicly or a more socially minded attitude towards private property in Poland? As the above discussion suggests, at least in the case of Warsaw, the possibility for a more balanced property and land use regime, that is one that balances private and public interests, appears to

⁵² Najwyższa Izba Kontroli, *Ustalenie i egzekwowanie przez gminy województwa warmińsko-mazurskiego opłaty adiacenckiej oraz opłaty planistycznej*, Warsaw 2013.

have been compromised by the Communist experience. That is, paradoxically, the collectivist habits of Communism were tossed aside in post-Communist Poland – resulting – again in the case of Warsaw specifically – in an aggressive, highly privatized model of land use regulation that has resulted in repeating some of the worst, sprawl-like tendencies of many U.S. cities⁵³. For our part, we would urge Polish property and land use lawyers, scholars and jurists to rethink this model.

Social function theory and land value recapture devices – the two examples we have considered here – provide two obvious vehicles to begin to do that. It is our hope that the Polish legal sector can play a role going ahead in trying to shape a less highly individualistic property and land use regime, in the interest of denser, more controlled growth, a form of growth more likely to promote the interest of more than the few.

SOCIAL FUNCTION AND VALUE CAPTURE: DO THEY OR SHOULD THEY HAVE A ROLE TO PLAY IN POLISH LAND DEVELOPMENT REGULATION

Summary

This article presents a discussion between two U.S. and a Polish author about devices to promote public interests through private land development and regulation. The two U.S. authors document the fact that in many South American and European countries the concepts of social function of property and value capture play a central role in the government regulation of land development – particularly in urban areas. The social function theory of ownership, first popularized by the French jurist Leon Duguit in the early part of the 20th century, recognizes private ownership as subject to social obligations and the need for mutually beneficial use. Value capture is implemented by requiring landowners whose land values are increased through development permission granted by government regulatory entities to share some of that increased value with the public by funding public infrastructure and paying for developments such as affordable housing. In the U.S., neither term is in common usage although mechanisms such as impact fees and other development charges that require developer funding of infrastructure arguably reflect the influence of comparable concepts. The U.S. authors then posed the question to their Polish collaborator of whether social function theories and value capture are currently being implemented in Poland. The Polish author explains that the current approach to social function theories in Poland is greatly influenced by Poland's experiences under communism, during which state property received special protection as compared to private property. After the fall of communism, this distinction

⁵³ See supra notes 3–5 and accompanying text.

was removed and private property received considerable protection as a pillar of the new economic system. However, he points out that this does not undermine the social aspect of ownership and that private ownership is not absolute and may be subjected to restrictions. In regard to the U.S. approach to value capture through impact fees, the Polish author explains that the Polish "adjacent fee" bears slight similarity to impact fees, but it does not require private landowners to participate in funding the infrastructure needs created by their development. He concludes by observing that while Polish law does not preclude adoption of measures similar to impact fees, at present there is neither political will nor popular support for such arrangements.

ROLA FUNKCJI SPOŁECZNEJ I *VALUE CAPTURE*⁵⁴ W POLSKIM PRAWIE ZAGOSPODAROWANIA PRZESTRZENNEGO

Streszczenie

Niniejszy artykuł prezentuje poglądy na temat wspierania interesu publicznego przez regulacje dotyczące prywatnych podmiotów w kontekście zagospodarowania przestrzennego. Amerykańscy współautorzy artykułu zaznaczyli, że w wielu południowoamerykańskich i europejskich krajach koncepcje społecznej funkcji własności oraz „*value capture*” odgrywają główną rolę w rządowych regulacjach zagospodarowania przestrzennego. W USA żadne z tych pojęć nie jest powszechnie używane, lecz koncepcja „*value capture*” jest implementowana przez opłaty zwane „*impact fees*”, które zobowiązują dewelopera do finansowania infrastruktury. Autorzy amerykańscy stawiają pytanie, czy wspomniane wyżej teorie są obecnie realizowane w Polsce. Polski autor wyjaśnia, że obecne podejście do teorii funkcji społecznej jest uwarunkowane doświadczeniami Polski z czasów komunizmu, kiedy własność państwowa była szczególnie chroniona w stosunku do własności prywatnej. Po upadku komunizmu ten podział zanikł, a własność prywatna otrzymała znaczną ochronę jako filar nowego systemu gospodarczego. Mimo tej teoretycznej akceptacji funkcji społecznej doktryna „nienaruszalności” Prawa własności silnie wpływa na politykę i ustawodawstwo. Polski autor zauważa, że nie ma obecnie dość woli politycznej w Polsce do wprowadzenia tzw. *impact fees*.

⁵⁴ Land Value Capture to metoda finansowania czy współfinansowania nowych inwestycji publicznych w infrastrukturę przez podmioty prywatne (właściciele nieruchomości), których nieruchomości zyskały na wartości dzięki wcześniej poczynionym inwestycjom publicznym, np. budowie dróg czy linii kolejowych.

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KEYWORDS

social function of property, land value capture, infrastructure funding, land development regulations, Polish property law, property ownership concepts

SŁOWA KLUCZOWE

społeczna funkcja własności, land value capture, finansowanie infrastruktury, regulacje rozwoju przestrzennego, polskie prawo własności, modele własności