

Neo-liberal planlegging og eiendomsrett i Polen etter 1989

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Małgorzata Barbara Havel: Neoliberal planning and property rights in Poland after 1989

KART OG PLAN, Vol. 76, pp. 87–93, POB 5003, NO-1432 Ås, ISSN 0047-3278

Neoliberalism has recently become a topic of vivid interest within planning theory. Private property rights are an essential component of the neoliberal philosophy and play a very significant role in understanding the particular ways in which neoliberalism has shaped trajectories of urban development for countries in transition. This paper aims to critically reflect on property rights restitution and delineation and its influence on neoliberal trajectories of urban development in Poland after 1989.

Key words: property rights, planning, restitution, Poland

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Introduction

Since the global recession of the mid 1970s, the global capitalist system has become increasingly influenced by the ideology of neoliberalism. This influence has also become visible in planning theory and practice. It has shaped the dynamics of urban change, particularly since the early 1980s (Brenner and Theodore, 2002). In North America and Western Europe the ‘neoliberalization’ of policy was not simply passed down from above (Peck, 2001). Rather, as Allmendinger and Haughton (2013) argue in relation to the English context: *‘it can be seen as a continuous process that was always mediated, filtered, negotiated, contested and reformulated through various scales of governance’*. The transition from communism to capitalism in ECE countries is sometimes evaluated as *‘one of the boldest experiments with neo-liberal ideas in the world today’* (Stenning, et al., 2010). Neoliberal programs were imposed upon very different institutional legacies in-

herited from communism. The transition in Poland was implemented in the form of *‘neoliberal strategy of the modernization of the economy’* (Jasiecki, 2013, p.139). As opposed to Western European countries, neoliberal strategy was introduced by the top-down changes of the system’s rules in the economy. It was then transmitted – although at different times, extents and points of resistance – to other areas of social and economic life (Jasiecki, 2013, p.139–140).

Neoliberalism as defined by Harvey (2006, p.145) is: *‘theory of political economic practices which proposes that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, free markets and free trade’*. Private property rights are an essential component of the neoliberal philosophy and play a very significant role in understanding the particular ways in which neoliberalism has shaped trajectories of urban de-

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velopment for countries in transition. In Western Europe the dynamic processes through which neoliberalism was continuously being transformed happened within a well-established system of property rights. In the doctrine of the communist system land was common property, thought to be without value. This ideology assumed the elimination of a natural person's right to the ownership of land. Changes in the approach to property rights to land have therefore constituted a substantial part of the neoliberal transition.

After the demise of the Communist regime, the ideology of private property was an important underlying factor for the path to transition. Based on the doctrine of the so-called 'property rights' school, land and property ownership have long been identified as pre-requisites for economic development. Commonly shared themes among policy advice for the countries in transition were to balance budgets, cut subsidies, welcome foreign investment, drop tariff barriers, privatize state enterprises and legally secure property rights – the so-called Washington consensus (Lash, 2009). Economic advisors insisted that the existence of private property rights was both necessary and sufficient to induce the rise of a market economy (Bromley, 2000). The common advice to countries in transition creating new frameworks for land markets was to assign and register property rights. However, as for example Jacobs (2009, p.66) explained: *'In Albania it became clear to those of us associated with the Land Tenure Centre that the creation of private property rights was woefully insufficient absent a parallel legal system in which lawyers and jurists had a shared understanding of the legal and social role of private property rights. Without this, property rights creation, transfer, and transformation could seem as arbitrary as it had under the prior communist regime'*. This paper aims to critically reflect on property rights restitution and delineation and its influence on neoliberal trajectories of urban development in Poland after 1989.

The paper begins with a presentation of the situation in connection to the restitution of property rights and then the delineation of

property rights (Havel, 2014). Delineation of property rights refers to the way the boundaries of rights over land have been drawn, or the conditions under which the right can be exercised. Delineation of property rights defines a boundary in the fundamental rights of property and the balance between public and private rights to land (a balance between property rights and the public interest). For urban land development processes and its outcomes it falls mainly within the remit of land use regulations. Delineation of property rights as applied to the urban context will be discussed taking into consideration examples of an approach to value capture, compensation and the right to develop.

A lack of solution for the restitution of property rights

Poland avoided the total nationalisation of land with the exception of agriculture reforms, industry, forest and Warsaw the capital, where in 1945 all land within the pre-war city borders was communalized. The nationalisation of industry causes the expropriation of big private ownership. The agriculture reform proceeded in two stages – nationalization and parcelling. In the first stage of the agriculture reform the State took over large landownership – e.g. properties exceeding 100 ha in total or 50 ha of agricultural land. In the second stage the land was parcelled-out and given to peasants with little (up to 10 ha) to no land, if they had a large family to support. The State took over areas of forest, which were more than 25 ha and owned by natural or legal persons. Industry previously in private hands, including land, was nationalized. After reform the majority (ca. 70%) of agricultural land remained in private hands of individual farmers, even if they did not possess the documents to confirm the right of ownership². In private hands also remained 66.7% of housing stock in 1960 (Kirejczyk, 1997, p. 53). The potential market activity, however, was limited by several restrictions and the State land policy practice (nationalization procedures, pre-emption rights of the State as well as rigid

2. See Ney and Poczobut-Odlanicki (1998) for the details concerning agriculture reform and nationalization of land

regulation concerning urban development and housing standards)³.

In the 1990's the protection of private property rights and the right to the value of land were of crucial importance. The process of compliance with the law safeguarding ownership was confirmed by a provision of the Constitution of 1989. The first Act on Spatial Development of 1994 confirmed the right to the value of land and material consequences of changes imposed on property use in a local plan. Furthermore, the Constitution of the Republic of Poland of April 2nd, 1997, confirmed that ownership could only be limited by means of a statute and only if it did not violate the substance of such right.

The debate about property rights restitution was very significant at the beginning of the transition (Załęczna and Havel, 2008). The 1990s saw work on a number of bills concerned with reprivatization and compensation, of which none gained the approval of Parliament. Individuals considered for restitution included: owners of property which was taken away for the purpose of rural land reform; owners of property nationalized on the basis of the 1946 Act on Nationalization of the Basic Branches of the National Economy; owners of property located within the borders of the City of Warsaw; and persons who left their property beyond the Bug river – Poland's former territory. However, successive drafts to the law failed to have enough political or social support to be implemented (for the discussion concerning different drafts see Załączna and Havel, 2008).

Today there is still a lack of the restitution law necessary to return property to former owners, their heirs or to compensate them for it on a large scale. Twenty-seven years from the beginning of the transition have not produced any clear solution to the challenge of old expropriation and nationalization methods for land in Poland. In a process called 'small restitution' some owners try to regain their former property by virtue of civil and

administrative courts' verdicts. Currently especially in Warsaw it constitutes a serious problem. There are a few thousand cases submitted which have created a big uncertainty in the land market. Several of the cases concern for example the land of schools and kindergartens built during the previous period. City activists and journalists are making the public aware of the activities of restitution dealers who are buying the claims; the corruption around the processes; the need of support for people evicted from their apartments after 'small restitution'; the lack of data and solution to the problem, etc.

Contrary to policy advice for the countries in transition dynamic urban development took place despite the ownership status of the land being unsettled and questionable. We can see this especially in Warsaw. After 1989 the central part of the capital city developed rapidly despite the uncertainty with regards to property rights – a lot of new construction took place. Land was the subject of the perpetual usufruct lease from the local community (*gmina*). Simultaneously, several of the investors, due to unclear legal status of land in central locations, have chosen a more peripheral location for their development purposes. This resulted in the urban sprawl of the metropolitan area of Warsaw during the 1990s (Korcelli and Krukowski, 2000).

A balance between property rights and the public interest – value capture and compensation

The value of land may both increase and decrease due to land-use planning regulations and public works. This part reflects on the distribution of rights and liabilities in relation to these two processes affecting property value. The legislative responses to both sides of the property-values effect caused by land-use regulation and public works contribute to the definition of the balance between public and private rights in land (a balance between prop-

3. Real estate was only allowed for personal use of the owner, letting it to someone else was not permitted. There were also restrictions on the capacity of usable area per person, per flat. Legislation discouraged or inhibited trading in land and property. Because the expropriation was abused frequently (property was taken over by the State for only a small compensation, or none at all) private owners believed that their powers were inferior to those of the State and real estate was not a good investment. Officially, private owners mostly sold farms to the State and public entities, but in fact there was a big informal market of farms traded between individuals. (Załęczna, 2003)

erty rights and the public interest). It delineates the property rights defining the scope of possible interferences with private property. In Poland there are very broad compensation rights for value decline due to planning regulations and for areas designated in local plans for public roads (Havel, 2016; Alterman, 2010). Compensation includes the rise in land value due to earlier planning decisions and it relates often to the value of building land. Compensation claims especially in relation to public roads, designated in the local plans, have become a significant financial burden on local government. Most municipalities do not have funds to pay the compensation, consequently the planning activities are seriously hindered. Many Polish cities are faced with a dilemma: to prepare local land use plans and be exposed to the immediate financial consequences of their adoption, or to protect their budget against these costs and at the same time give up control of the development of the city and agree to chaos in space. In order to avoid excessive financial consequences of the local plan, the cities eliminate or minimize design solutions, which require compensation. It can take form in the limitation of separation of plots for public roads, resignation of designing public spaces, and the choice of inferior quality design of the area. The easiest way to avoid compensation claims is, in many cases, to suspend the work on local planning. Then, development takes place based on ad-hoc decisions on the condition of site development (discussed below).

Current planning system policies and instruments in Poland also largely neglect how the costs of providing urban infrastructure and services are socialised and how the benefits of development processes are privatized. The use of value capture instruments is very limited. In North America and Western Europe the idea of value capture has been transformed into a plethora of indirect value capture instruments, e.g.: ‘exactions’ and ‘impact fees’ in the US, ‘development charges’ in Canada, ‘planning gain’ and ‘planning obligations’ in the UK, ‘participation’ in France, ‘cost allocation’ or ‘cost recovery’ in the Netherlands (Alterman, 2012). Legisla-

tive responses in relation to value capture contain two main mechanisms in Poland: betterment charges (*opłaty adiacenckie*) and planning fees (*renta planistyczna*), both belong to the direct value capture instruments⁴. Planning fees are largely non-operational. The use of betterment levy is limited. Poland also did not implement the ad valorem property taxation system.⁵

A balance between property rights and the public interest – the right to develop

It is assumed that from the nature of property rights that one cannot deny the owner the right to develop his real estate when the intended use of the real estate complies with the conditions set out in the local plan or in the absence of a plan – with a decision on conditions of site development. Everybody has the right to obtain the decision on conditions of site development. The right to develop is equated with the right of ownership. The law states that if there is no valid local plan for a municipality or its particular part then defining the manner and conditions of land development takes place through the decision on conditions of site development.

A decision on the conditions of land development may be issued only when all of the following conditions are met: (1) at least one plot in the neighborhood that is accessible from the same public road must be developed in such a way as to enable the requirements to be laid down for the new development as regards the continuation of: functions, parameters, features and indicators of the development and land use as well as dimensions and architectural form of buildings and facilities, the building line and the building density (this is the so-called good neighborhood principle); (2) the land must have access to a public road; (3) the existing or planned infrastructure must be sufficient for the purposes of the project concerned; (4) no permission is required for removal of land from agricultural or forestry use; (5) the decision is compliant with other specific regulations (e.g.: the Act on Environmental Protection, the Act on the Protection of Forests and

4. See Alterman, 2012 for categorization of value capture instruments

5. For discussion on betterment and compensation in Poland see Havel, 2016; Gdesz, 2010, 2011

Agricultural Land, the Act on Historical Monuments Protection) (art. 61.1 LUDPA).

Decisions on the conditions of site development are based on very broadly interpreted or overused interpretation of the neighbourhood principle and do not need to relate to any spatial plans. Because of the lack of a precise definition of 'neighborhood', the applicant for the decision is determining the function of the area and can intensify the urban density parameters. The number of decisions on land development conditions in comparison with the number of building permits show that investment activities in areas with no land-use plan has become a norm. Although the number of decisions on land development conditions for several years systematically drops, it still accounts for around half of all investments, especially in residential construction (Śleszyński, 2014). The control function over urban development in such situations is very limited. The system of issuing the decisions on conditions of site development was criticized as the source of many negative phenomena in city development (a total chaos and lack of spatial order in the developed areas, usually lacking public spaces, basic social infrastructure and services, green areas, scheduled infrastructure roads and other technical support, and lack of landscape protection) (Jędraszko, 2005; Havel and Załączna, 2009; Havel, 2009; Tölle, 2014; Kupidura, 2015). The decision on the conditions of site development allows development in the areas designed in upper-level plans for public spaces, green corridors for the city, parks, etc., and this is what actually happens.

Neoliberal trajectories of urban development

Urbanization processes in Poland were left to a large extent to the market. The institutional foundations for land market under capitalism were developed subsequent to the dynamic of the market itself, which was driven by foreign investors, especially in the commercial real estate sector. The framework within which the urban land market is functioning suffers from numerous weaknesses.

The political doctrine of neo-liberalism associated with the new understanding of land ownership, a negative notion of planning as a symbol of the former totalitarian regime limiting personal freedom, influenced the balance between private and public rights in land and trajectories of urban development in Poland post 1989.

The transition period resulted in many positive influences on character of urban areas. These include re-urbanization of the dual structure of the cities⁶ including improvement of the service provision of the socialist housing estates, increased density of development in the centrally located areas in cities, and re-industrialization based on the restructuring of the large industrial complexes located in the largest metropolitan areas. However, on the other hand the dissatisfaction with the spatial results of the urban development processes in Poland is also growing. There is a massive market failure. The commonly mentioned problems referring to morphological results concern e.g. to the haphazard developments in the cities, the small scale of new interventions creating fragmented structures, massive urban sprawl, especially developments around the existing road systems, the public space problems, the gated communities, and, in relation to infrastructure, the general inadequate provision of urban infrastructure, including both the primary and secondary infrastructure (Jędraszko, 2005, p.6, 360; Havel, 2009; Maciejewska, 2014).

Property rights and neoliberal trajectories of urban planning and development

The neoliberalization of urban policy in Western Europe was a process that was always mediated within not only the well-established system of planning and property rights but also the developed balance between public and private interests in land. The institutionalized practice of different forms of developer's contributions to the cost of urban infrastructure and limitations on the right to develop imposed on individual landowners during the planning process can be seen as ele-

6. Large and homogenous housing estates constructed with the use of concrete panel technology were isolated from the old part of towns

ments of this balance. In addition the 'neoliberal' planning experiments in Western Europe maintain longstanding key characteristics of planning system, for example the separation of plan from permission and the discretionary nature of decision making on individual proposals in England (Allmendinger and Haughton, 2013). The new planning system in Poland was built from scratch. If we look at how and why the particular legal and social configuration of private property rights emerged in the United States, we see that it was a long process of tensions between 'conflicting concepts about the rights of the individual and the right of government (as representative of the community) vis-à-vis property rights' (Jacobs, 2009, p.62). It took about 200 years from the Colonial Era when a person came to possess property rights by using it, through the recognition by The Fifth Amendment to The Constitution of 1791 of the concept of private property, and takings for public use with just compensation, and several important rulings of the Supreme Court of the United States, to define the delicate balance between public and private rights in land as it is today. As Jacobs (2009) put it: '*In the last 100 years the United States has appeared to move away from a view of property rights as integral and central to liberty and democracy. Instead, it appears that government has been allowed ever-increasing authority to intrude upon, reshape, and take away property without respecting the protections afforded by the Constitution.*' (Jacobs, 2009, p.59). The underlying assumptions of neoliberal philosophy in Poland of strong, unregulated private property found their expression in policies and law, which set the balance between property rights and the public interest in planning and urban development very much in favour of private developers and landowners. Holistic discussions regarding the balance between public and private rights in land including the understanding of the right to develop, betterment and compensation, will be necessary at this point of time. Does the right to property include the right to the added value – specifically created by land-use planning decisions – or should the landowners share some of the increased value of their land with the public? To what extent do governments have the right

to reap some of the increments in value? Continuing from the other side of the property-values effect, do governments have an obligation to always compensate private landowners for any value decline due to land-use planning regulations? Does compensation necessarily include the increase in land value due to earlier land-use regulation decisions? How to determine the building rights in municipal planning? Without significant improvement in the intersection of neoliberal 'planning' and property rights, cities become 'locked' into a spatial-economic development trajectory encouraging urban sprawl with a deficit of urban infrastructure, thereby losing their capacity to adapt to spatial dynamics in a manner envisaged by the sustainable cities discussion or current EU policy documents concerning urban development.

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