

MA in Law Tomasz Szpojankowski; summary of the doctoral dissertation i.e. “Interference of public authorities in property law in the investment-construction process in the Polish legal system”.

The title of the doctoral dissertation refers directly to legal issues, i.e. “*Interference of public authorities in property law in the investment-construction process in the Polish legal system*”.

The starting point for reflections on the title of the dissertation is the institution of property law in general. Roman law was the reference point for this law as a legal institution; it constituted the main source of inspirations for the Polish Law, also in the area of property law (the fact was mentioned in Gallus Anonymus’ and Wincenty Kadłubek’s chronicles of the history of Poland – 12th and 13th century; moreover, the systematics of Roman law was adopted by the prominent lawyers of the 1st Republic of Poland from the 18th century, Teodor Ostrowski and Andrzej Zamoyski, in their works). It is important, as the law of property in Roman law never was an absolute law, but its aim was, like nowadays, to facilitate the achievement of public goals. The law of property in Roman law was not defined; however, its purview may be deduced from the structure of the institution, being the right of an individual to possess and rule a thing in an absolute and unlimited way as long as it does not infringe the legal system in force. This means that the law could be subject to various restraints. Yet the most successful was the Bartolus’ definition from the Middle Ages (14th century), who defined the right to property from a negative side, i.e. that power over something can be disposed freely unless the law introduces prohibitions in this area. The law of property in the Polish law was defined in a similar way in the article 140 of the Civil Code.

In this respect emerges a question which is crucial for the subject of the dissertation: is the right to construct included in the property right in a situation when the realization of the investment-construction process is bound by a series of requirements in the field of environmental protection, land planning and construction law itself? In this area there is no discretion. On the Polish lands of the 1st Republic the incorporated Magdeburg law was in force, which regulated the way of locating towns on the basis of a location agreement concluded between the owner and the tenant, but by courtesy of the sovereign, i.e. the master. Next, as a result of the process of global enfranchisement which took place in 19th century, specific legal regulations concerning the method of the investment realization began to appear, including complex regulation of the process in standards from the 20th and 21st centuries (construction law, land management and environmental protection during the 2nd Republic of Poland, The Polish People’s Republic and the 3rd Republic of Poland). All this invites to the conclusion that the investment realization has to be lawful. The answer to the question can be searched not only in the context of the negative side of the property law, but also in the context of the entire legal system. What matters here is the way of perceiving the property law as a social function based on social relations, which was pointed out after the industrial revolution by the social teaching of the Catholic Church, particularly by Pope Leo XIII in the encyclical *Rerum Novarum*. Property law should protect not only the owner, but also all the citizens. In the Polish legal system such a perspective on property law was adopted by the Constitutional Court from the German law. Without this perspective on property law, it would not be possible to achieve common goals in the state organization, the so called “common good”, for which balancing different (sometimes conflicting) interest groups is necessary. From a philosophical perspective, elements of such a balancing were considered by such philosophers like Cicero, Plato, Aristotle, Ulpian, St. Augustine and St. Thomas Aquinas. Later on, the idea was developed by Robert Alexy in “*A Theory of*

Constitutional Rights". It is the main source of the principle of proportionality in force, which constitutes a constitutional justification of the interference of public authorities in property law, also within the investment-construction process. The base of this interference is the right to indemnity and the existence of a public goal, as well as the system of limitation of rights.

This allows to draw a conclusion that the right to construct results from property law and the possibility of limitation of the right to construct is based on identical legal instruments, which enables public authorities to interfere in property law and in one of its elements, the right to construct. Therefore, in the conclusion of the dissertation a thesis was formulated according to which the right to construct is included in civil law, but it results not only from art. 140 of the Civil Code, but also from the property law system in force. This system enables its limitation, for instance by an administrative limiting the land management in a specific way. Next, it influences the extent of the right to construct a building only in a particular way. Furthermore, administrative standards also aim to eliminate negative effects of the investment realization. Their goal is to protect different interest groups, what results from historical conditions of such standards mostly related to safety conditions and public order. Currently it is the State that arbitrates such problems, what is connected to the interference in property rights, but from a perspective of constitutionally defined standards. It is noteworthy that the standards within the investment-construction process, entirely devoted to this interference, use terms from civil law. Interpretation of these terms, including property law, requires taking into account the systemic interpretation. The right to construct should not be interpreted only through the prism of regulations of administrative law. These regulations however are of great importance for establishing possible limits of the right to construct. Otherwise, why should administrative and legal restrictions exist, supposing that this law should not exist at all.

Deliberations on the subject presented above are included in chapters I and II of the dissertation.

In the following chapters, i.e. from III to V, the dissertation includes descriptions of specific restrictions on property law resulting from legal norms of environmental protection, land planning and construction law.

Due to the requirements of environmental protection, may appear restrictions on use, actual disposal, deriving benefits and other income from the real estate, as a result of land transformation and right to exploit the investment, which can significantly influence the environment. Moreover, in view of possible exceeding the norms of environmental quality, it may result necessary to create an area of limited use, which involves restrictions on the use of the real estate situated on such an area. On the other hand, creating such an area for this type of investments is a preliminary task, without which the investment cannot be used, which leads to exceeding the norms of environmental quality. These requirements can therefore have impact on the limited use of the real estate and on diminishing its value. It is also connected to the destination of the limited use area in the plan and to the technical solution that can be used on this area.

As a result of adopting the local land managing plan, the objectively existing legal interest or acquired authorizations are infringed, but at the same time the destination and norms of management of the land located in the specific area are established. Thereby, the resolutions of the local plan can significantly influence the owner's use of the property right, from a precise determining the way of use of the real estate, to such decisions which indirectly, but unambiguously, imply expropriation, for instance in the case that the destination of the area is construction of public roads. The local land management plan constitutes therefore a legal limitation or exclusion of a specific way of executing the property right or other right to the real estate. The plan specifies the way of interference in the property right. It

aims to achieve the public goal, which is spatial order and implementation of the principle of balanced development.

Planning decisions should also aid to achieve this aim: decisions concerning the localization of public-goal investments and development conditions. Both types of administrative decisions aim to determine the land management and the development conditions for the area, so they condition the way of its management, but on the basis of the so called "national order" in force in the neighborhood of the planned investment in the area with no local plan.

Also the norms of construction law are included in the system of admissible interference of public authorities in property law. In fact, all the institutions provided by this law, including special legislation (building permit, demolition warrant, legalization of lawless building, authority's "tacit consent" for realization only the exhaustively enumerated investments), stem from the necessity to carry out a proportionality test in order to find justification for the interference of public authorities in property law. It is an important element of the investment-construction process as a whole, because when the decision on the building permit is issued, the granted rights are specified, on one hand as a factor stemming from the principle of freedom to construct, on the other hand, as a possibility of interference in property law, i.e. restrictions on the building permit aiming at protection of other values, such as spatial order, environmental protection, fire protection, safety, socio-economic development, protection of justified interests of third parties, including the property right.

The last, 6th chapter of the dissertation describes the problem of property law in the context of investment-construction law in Western Europe, taking as an example the solutions used in Germany and Great Britain. The German system is based on a freedom to construct (understood as a potential right to construct), building permit and local plan. The British system is based on planning permission and nationalized building permit. Both systems, unlike the dualistic planning system in Poland, are characterized by a greater efficiency in reaching spatial order, but, similarly to the Polish system, they enable interference of public authorities in property law.

It could seem that the systemic solutions presented above are incompatible with ideas of a democratic rule of law. However, these regulations originate not from the ideas, but from the essence of property law. The ideas of a democratic rule of law require only a development of specific legal standards, which on one hand will enable such an interference in property law, and on the other hand, will alleviate its effects. An example of such a solution are the norms of administrative law concerning the investment-construction process. It is also confirmed by the issues presented above, which show that independently from the historic period, they have always been legal instruments which limited the right to property, thus limiting the right to real estate development on the land.