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The issue of forest ownership in the Polish law

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Forest ownership is seemingly not a significant problem both in theory and in practice. A legal act which is of key importance for the analysis of this problem, i.e. the Act on Forests of 28 September 1991¹ (further referred to as the Act) focuses mostly on the issue of forest protection and its economic use in line with the principles of sustainable forest management. The legislator instantly in article 1 of the Act indicates the issues which are the most essential in this legal act.

However, while analysing the whole Act, it can be clearly noticed that the issue of forest ownership runs through the whole Act, in various normative contexts. Since the legislator does not pay special attention to forest ownership in the Act, the subject matter is scattered throughout the whole document.

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¹ Journal of Laws of 2011, No 12, item 59 with amendments.

The purpose of this article is a comprehensive analysis of the approach of the Polish legislator to the issue of forest ownership in the Act. Despite significant dispersion of this problem in the Act it is possible to reconstruct the legislator's approach to forest ownership. This study also refers to other legal acts which are related to the specificity of forest ownership, first of all in the context of protection of national strategic natural resources.

Forest ownership is not a special and extraordinary type of ownership. Its specificity applies only to the object of the property right, however, the object of this right significantly determines the enforcement of an ownership title and even the imposition of specific obligations on an owner.

The object of ownership is a forest. Pursuant to article 3 of the Act: 'For the purposes of the Act, a forest is land:

- 1) of contiguous area of at least 0.10 ha covered with forest vegetation (plantation forest) – trees and shrubs and ground cover – or else in part deprived thereof, that is:
 - a) designated for forest production, or
 - b) constituting a nature reserve or integral part of a national park, or
 - c) entered in the register of monuments;
- 2) associated with forest management, occupied in the name thereof by buildings or building sites, melioration installations and systems, forest division lines, forest roads, land beneath power lines, forest nurseries and timber stores; or else put to use as forest car parks or tourist infrastructure.'

The legal definition of a forest clearly indicates that its basic component is the notion of land, since the legislator clearly states that a forest is land. This component is determining in nature, and at the same time allows for assuming a consistent attitude that a forest can be the object of ownership as land property, although we cannot equate the notion of land with the notion of land property². However, in the legal definition the legislator includes specific components which make it possible to distinguish this land from other lands.

From the analysed point of view it is significant that a forest is land comprising the area of at least 0.10 ha. Defining the minimal area of the property is an exceptional situation in the Polish legal system and, as a matter of fact, applies only to special-purpose land.

² B. Rakoczy, Act on Forests. Commentary, Warsaw 2011, p. 27.

To declare a given land to be a forest, other circumstances mentioned in this provision, such as the existence of forest vegetation or its temporary absence, its association with forest management or alternatively the inclusion of forests in the register of monuments are also important³.

From the perspective of the object of ownership analysed in terms known in the civil law, a forest should be qualified as undeveloped land property⁴. According to article 46 of the Civil Code (further referred to as the CC): ‘§1. Immovable properties are parts of land constituting separate object of ownership (land), as well as buildings fixed to the land or parts of such buildings provided that they constitute an object of ownership separate from the land by virtue of special regulations.

§2. Keeping land and mortgage registers is regulated by separate regulations.’

In the literature related to civil law it was noticed that ‘Based on the function, land properties are divided into agricultural properties (defined in article 46 (1) of the CC) and forest land (the Act on Forests)⁵.’

Thus, forest ownership shall be seen and considered as the ownership of land property, basically undeveloped, with specific characteristics.

Such specific characteristics include existence or temporary lack of forest vegetation, designation for the purposes of forest management, or finally treating the land as a monument. The specificity of forest ownership manifests itself not only in the special object of this right, but also in the formulation of subjective scope and contents of the ownership.

The Polish legislator is consistent and since it is assumed that a forest is land, and in the context of the civil law it is undeveloped land property, it is further assumed that practically any entity subject to the civil law, and even an organisational unit referred to in article 33¹ of the CC may be subjects to forest ownership. To say more, the legislator even points to equal treatment of forest ownership irrespective of the owner. Equal treatment of all types of forest ownership is expressed in article 2 of the Act which provides that: ‘The provisions of this Act shall apply to forests, irrespective of their form of ownership.’

³ Cf. W. Radecki, *Act on Forests. Commentary*, Warsaw 2012, p. 35 et seq.

⁴ However, in exceptional situations, this can be also developed property.

⁵ M. Bednarek, *Mienie. Commentary on Articles 44–55 (3) of the Civil Code*, Zakamycze 1997, p. 88.

This provision suggests that a forest is the object of the same ownership protection, irrespective of the owner. However, despite the legislator's declaration expressed in article 2 of the Act and related to equal treatment of forests irrespective of their owner, different treatment of various types of forest ownership can be seen in the Polish legal system, depending on whether it is a private or a public owner. This difference can be seen, first of all, in the Act itself.

The question then arises: why is the legislator, despite the declared equal treatment of forest ownership, inconsistent? Is this normative declaration inappropriate, or maybe we should seek for the sources of such inconsistency in the inappropriately formulated contents of public and private ownership?

In my opinion, the source of such inconsistency is the faulty declaration of the legislator expressed in article 2 of the Act, because it is impossible to achieve the same effects of protection with the use of the same normative instruments with reference to state forests and other forests.

Legal literature commonly accepts the view, which has its roots in the Roman law, according to which one can distinguish between public and private law. A closer analysis of the views presented in the doctrine and the judicature on the issue of this division would go beyond the scope of this study. Nevertheless, this division has influenced the views of the doctrine formulated in the civil law, which distinguishes between public and private ownership⁶. The basic criterion for the division of such ownership is a subjective criterion, depending which entity is the owner of a property. However, not only subjective aspects, but also objective ones related to the purpose of the property and its function are emphasized⁷.

When we take a closer look at the division of ownership into public and private, we can notice that the legislator places the Treasury property and the property of territorial administration units under public ownership. The property of other entities is placed under private ownership⁸.

Meanwhile, the division of ownership in the Act is formulated in a slightly different manner. The division into private and public ownership is maintained, however with the reservation that public ownership comprises only the forests owned by the State Treasury. Such a conclusion can be drawn based on the fact that the legislator gives a lot

⁶ Cf. A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warsaw 1998, p. 187.

⁷ Op. cit. p. 188 et seq.

⁸ M. Habdas, *Publiczna własność nieruchomości*, Warsaw 2012, p. 45.

of attention to the Treasury property. However, public ownership does not include property of a gmina and other territorial administration units. Forest ownership to which these entities are entitled is neither separately regulated, as is the ownership of forests owned by the State Treasury, nor it is noticed by the legislator in any way whatsoever. Consistently, the ownership of forests of territorial administration units should be treated in the Act as private ownership. There are no normative guidelines based on which a conclusion could be drawn that the ownership of territorial administration units should be exceptionally treated as public ownership. Therefore, the division of ownership as presented in the Act goes along the line of the State Treasury property and property of other entities. Thus, the legislator diverges from the more common division of ownership into public and private. In the case of the Act the property of territorial administration units, although public in nature, is treated as private property. Possibly, the basis for such a choice was the conscious decision of the legislator, which was the consequence of establishing an organisational unit known as the National Forest Holding 'State Forests'. The Act does not provide for any special treatment of the property owned by territorial administration units.

It seems, however, that such a solution is not the correct one, since forests owned by territorial administration units may play functions which are equally important and vital as in the case of state-owned forests. However, these are not included in the same subjective category as state-owned forests. Forests owned by territorial administration units are included in the same category as forests owned by private law entities. Therefore, the legislator's postulate expressed in article 2 of the Act is not consistently executed in subsequent parts of the Act. While pointing to normative differences between ownership of state-owned forests and ownership of forests owned by other entities, first of all we should note a different approach to the issue of transmission line easement. This issue is regulated in article 39a of the Act, which provides that:

1. The district forest manager may, with the consent of the director heading a regional directorate of the State Forests, lease out for a fee the property under the administration of the State Forests (right-of-way or transmission line easement), in accordance with the principles of forest management. Such consideration shall constitute own income of the State Forests.
2. The fee for establishing the transmission line easement for the power company which transmits or distributes electricity shall be equal to the

value of taxes and fees incurred by the State Forests for the part of the property the use of which is restricted due to such an easement.

3. The entrepreneur for whom the transmission line easement was established shall be obliged to remove the trees, shrubs or branches which put at risk the operation of devices mentioned in article 49 § 1 of the Civil Code.’

It should be noted that this provision refers only to the forests owned by the State Treasury, and administered by the National Forest Holding ‘State Forests (further referred to as the State Forests)’⁹. Firstly, the regulation adopted in article 39a of the Act refers to the establishment of easement only for a fee, and secondly requires compliance with the principles of forest management while implementing such a right of easement, as defined in article 8 of the Act. It provides that: ‘Forest management is pursued in accordance with the principles of:

- 1) the universal protection of forests;
- 2) the persistent maintenance of forests;
- 3) continuity and sustainable use of all forest functions;
- 4) ongoing augmentation of forest resources.’

With regard to article 39a section 1 of the Act, the legislator’s care for the forest as an environmental component, consisting of the requirement to comply with the principles of forest management when implementing transmission line easement, is only ostensible. The obligation to comply with the principles of forest management does not apply to forests other than those owned by the State Treasury. Therefore, in the case of establishing transmission line easement on the land other than this owned by the State Treasury, a transmission system operator shall not be obliged to implement such an easement in line with the principles of forest management. So, differences between solutions for forests owned by the State Treasury and owned by other entities can be seen clearly. Therefore, the postulate expressed in article 2 of the Act was not achieved.

Equally substantial differences refer to the obligation to make forests accessible. As provided in article 26 of the Act:

- ‘1. Subject to sections 2 and 3, the forests constituting the State Treasury property shall be accessible to people.
2. Permanent ban on entry shall apply to forests that are:

⁹ See: B. Rakoczy, *Służebność przesylu według ustawy o lasach*, Rejent of 2012, ch. 7 – 8, pp. 103 – 116; W. Radecki, *Commentary*, p. 290 et seq.

- 1) plantations up to 4 metres in height;
 - 2) experimental areas or designated seed stands;
 - 3) refuges for animals;
 - 4) source areas for rivers and streams;
 - 5) in areas threatened by erosion.
3. District forest managers shall introduce temporary bans on entry into forests constituting the State Treasury property, in the case of:
- 1) destruction or substantial damage to forest stands, or degradation of forest-floor vegetation;
 - 2) major fire risk;
 - 3) conducting activities connected with silviculture, forest protection or timber harvesting.
4. Forests made subject to permanent or temporary bans on entry shall be marked as such by means of boards inscribed with the words *zakaz wstępu* (ban on entry), as well as an indication of the causes and duration of the said ban in force. In the case of the State Forests, a district forest manager is under an obligation to put up and maintain the signs, whereas in the case of other forests it is an obligation of a forest owner.
5. By virtue of a regulation, the minister competent for environmental issues shall define the pattern for the *zakaz wstępu* sign for forests, as well as principles in respect of its posting.'

The provision suggests that the rule of making forests commonly accessible to people applies only to forests of the State Treasury. In the case of remaining forests, in line with article 28 of the Act, it is the owner who decides on making the forest accessible or refuses to do the same. It provides that: 'An owner of a forest not constituting the State Treasury property may prohibit entry into a forest, marking such a forest with a board with the appropriate inscription.'

In this context a significant problem appears, namely how to treat forests owned by territorial administration units. These forests are not directly mentioned in the provision which regulates their accessibility. Article 28 of the Act applies to these forests, which suggests *prima facie* that it is only the will of a territorial administration unit which is decisive for giving consent to or prohibiting entry into the forest. However, this view is incorrect since failure to include the forests owned by territorial administration units in the disposition of article 26 shall not result in losing

the status of public land by these forests. On the other hand, public land (public property) is made commonly accessible based on its public nature¹⁰.

Finally, the difference between the State property and the property of remaining entities manifests itself in the forest management planning. With regard to the State Treasury forests, forest management is based on the forest management plan. On the other hand, forest management in forests owned by remaining entities is based on a simplified management plan, and with regard to forests smaller than 10 ha management takes place without any planning or inventorying.

An essential component of the concept of ownership in the Act is a solution, rarely seen in the Polish law, i.e. imposing specific obligations on forest owners in the legal norm. While such an approach of the legislator to forests constituting property of the State Treasury does not raise any reservations since such forests are public property, in the case of other entities imposing an obligation should be treated as an exceptional situation. Obligations imposed on forest owners are different depending on whether these are obligations of the State Treasury or of other legal entities. In the case of the latter group, articles 9 and 14 of the Act are of fundamental importance, which provide respectively that:

‘Article 9.1. With a view to the universal protection of forests being assured, forest owners are obliged to promote and develop balance in forest ecosystems, as well as to raise the level of natural resistance of stands, and in particular:

- 1) to pursue preventive and protective measures preventing fires from arising and then spreading;
 - 2) to prevent, detect and combat the excessive emergence and spread of pest organisms;
 - 3) to protect forest soils and waters.
2. If the obligations referred to in section 1 are not fulfilled, the starost heading a given powiat shall, by virtue of a decision, define the tasks of owners of forests, which are not the property of the State Treasury.
3. The minister competent for environmental issues shall, on the basis of an agreement reached with the minister competent for interior affairs and by virtue of a regulation, set out detailed rules for the safeguarding of forests against fire.

¹⁰ Cf. J. Szachulowicz, *Własność publiczna. Powstanie, przekształcenie, funkcje, zarządzanie*, Warsaw 2000.

Article 14.1. The augmentation of forest resources shall proceed through the afforestation of land and the raising of forest productivity in the manner provided for in a forest management plan.

2. Wasteland areas may be designated for afforestation, as may farmland unsuited to agricultural production and farmland whereof agricultural use is not being made, as well as other land suitable for afforestation, and in particular:

- 1) land around the sources and springs giving rise to rivers and streams; divide areas; riverbanks and the shores of lakes and reservoirs;
- 2) areas of mobile sands and dunes;
- 3) steep slopes, areas affected by rockfalls, precipices and hollows;
- 4) spoil heaps and areas over which the exploitation of sand, gravel, peat or clay has ceased.

2a. The areas to be afforested and their distribution, and the means of achievement of afforestation, shall be as set out in the national programme for the augmentation of forest cover drawn up by the minister competent for environmental issues and approved by the Council of Ministers.

3. The designation of land for afforestation shall be as provided for in a local land development plan, or a decision on building conditions and site management.

4. The obligation that land be afforested shall be borne by district forest managers, in respect of land administered by the State Forests, or by the owners or perpetual users of other land.

5. The owners or perpetual users of land may obtain grants from the central budget allocated with a view to covering in whole or in part the costs of afforesting land referred to in section 3. The decision in respect of the allocation of means to cover the costs shall be issued by the starost heading a given powiat, at the request of an owner or perpetual user, having first received the opinion of the wojt heading a given gmina (town mayor, city mayor), considering the regulations on public aid.

6. (repealed).

7. The starost heading a powiat relevant as regards the location of land made subject to afforestation shall have an assessment made of the degree to which a plantation has taken, in the fourth or fifth year following afforestation of farmland, and shall *ex officio* qualify farmland for redesignation as a forest, where the afforestation of land has been

- carried out by virtue of regulations on support for the development of rural areas from funds originating in the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, or else regulations on support for the development of rural areas involving means from the European Agricultural Fund for Rural Development.
8. By virtue of an agreement, the starost heading a given powiat may entrust the task of assessing the performance of a plantation to a district forest manager.'

The duties of the State Treasury as the forest owner are scattered throughout the whole Act, and first of all in the chapter regulating the principles of property management.

In the case of the State Treasury, the specificity of regulating the duty also manifests itself in defining the rules of managing such land, not only with reference to forest management and use of all forest functions, but also with reference to the transfer of ownership, in concluding agreements for the use of other parties' property, designating the forests for the purposes other than forest management, handing over the forests to other public law units and entities¹¹.

From the perspective subject to examination, the act on the preservation of the national character of strategic natural resources also needs to be analysed. The issues regulated in this legal act are definitely broader in nature compared to the issue examined in this study. Nevertheless, this legal act also refers to the issues related to the concept of forest ownership.

First of all, the issue of preserving the broader nature of specific natural resources should be regulated by the Constitution, and not by an ordinary act, which has already been pointed out in the literature¹². The inclusion of such solutions in the Constitution would definitely increase their value and importance, and would allow for the avoidance of numerous redundant deliberations on amending the concept of forest ownership.

We should also note the solutions in the field of ownership as adopted in the Act of 6 July 2001 on the Preservation of the National Character

¹¹ A more detailed analysis of this problem has been conducted by M. Tyburek, *Status prawny i zadania Państwowego Gospodarstwa Leśnego Lasy Państwowe*, [in:] B. Rakoczy, *Wybrane problemy prawa leśnego*, Warsaw 2011, pp. 118–145.

¹² Cf. B. Rakoczy, *O potrzebie zmiany Konstytucji Rzeczypospolitej Polskiej w zakresie ochrony środowiska*, *Studia Prawnicze KUL* z 2009, z. 2–3, pp. 157–168.

of Strategic National Natural Resources¹³. As provided for in article 1 of this act: '1. The strategic national natural resources include:

3) state forests.'

This provision refers to a number of elements of the environment, however we should note that the last item strictly refers to the forests as such. The legislator points that the preservation of the national character of these resources by the State Treasury forests is a value for them. It is also a demand to restrict, or even eliminate, the possibility of disposing forests to other entities. Based on this provision a conclusion can be drawn that the legislator does not see the possibility *de lege lata* to dispose of the State Treasury forests.

According to article 2 of this act: 'The natural resources mentioned in article 1, which constitute the property of the State Treasury shall not be subject to privatisation, subject to the provisions of specific acts.'

To sum up, it should be pointed out that the concept of forest ownership in the Polish law is no longer valid *de lege lata* and needs thorough restructuring. Its major drawback is the fact that it does not take into account territorial administration units as forest owners. The Act on Forests mentions two types of ownership, namely the State Treasury forests and other forests. Despite the fact that territorial administration units are public entities, they should be ranked in the other group of remaining entities.

There are substantial differences between these two groups of forest owners in terms of ownership, duties, limits of its enforcement, etc. Despite the declared equality in forest protection and its independence regarding the type of an owner, the differences are clearly visible, also in the field of forest protection as such.

¹³ Journal of Laws, No 97, item 1051.