SELECTED PROBLEMS OF LAKES MANAGEMENT IN POLISH WATER LAW RELATED TO THE DIFFERENCES BETWEEN POLISH AND EUROPEAN UNION LEGISLATION

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ABSTRACT. - **Selected problems of lakes management on Polish Water law related to the differences between Polish and European Union legislation**. Proper management of water resources has got significant social and economic dimension. For this reason, it is an essential element of almost every national law, European Union law, and also international law in a broad sense. Legislative authority, during legislature process, should allway s balance private and public interests to adopt compromised solutions. Furthermore these solutions must be determined mostly by hydrology to be appropriate to the nature of waters and environment. Because of mentioned issues, it is very undesirable state of affairs when law simply does not fit to the object of its regulation. In Water Law Act of 2001 Polish legislator classifies lakes, depending upon the type of watercourse (natural or man-made) flowing into or out of the lake, among either flowing water or stagnant one. This regulation is against hydrological classification of lakes. Moreover this legal act introduces different treatment of dammed lakes in the context of public access to the lakeshores. Indicated problems have got significant impact on many aspects such as ownership of lakes, obligations of the owners of the lakes, lakes and environmental protection and, mentioned above, right to public acces to the lakes.

Keywords: lakes management, Polish Water law, European Union law

1. INTRODUCTION

Protection of water resources is one of the most important elements in the doctrine of sustainable development. However, as a result of rapid socio-economic development water quality has been significantly deteriorated. Furthermore, in recent years there were more periodic water shortages, even in areas which have not been previously endangered. Water shortage is a result of both climate fluctuations and improper water management. In Poland, about 30 – 40 years ago, there was no rational water management policy. The authorities believed that water has always been and will be. This situation has changed due to water pollutions and periodic lack of water. Since that moment, water resources has become an important part of Polish legislation.

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The most important and the most common instrument of environmental protection in general is law. Because of its universality, law creates preferred standards of behavior which aim is to conserve the nature as whole or to provide proper management of each of its component. In every case the law should be based on the specific nature of the regulated relations and must be consistent with the object to which it relates. If it does not meet mentioned criteria, it not only does not fulfill its function being useless, but also leads to many confusions and conflicts like scope of the obligations imposed on citizens.

At present, in Poland there are at least few significant inconsistencies related to the management of lakes. Improper division of lakes introduced by Polish legislator leads to difficult, and even impossible to accept from hydrological point of view conclusions. This also applies to one of the fundamental Polish legal document which is the Water Law Act of 18 July 2001 (Act Reg. 2012, pos. 145 with later amendments). As a result of mentioned inconsistencies, there are secondary issues concerning protection and use of water resources. Presented situation takes place despite the fact that European Union law is formally binding and leads to numerous difficulties, and even absurdities, in the field of lake management.

In this article, authors point out two legal problems connected with the management of lakes: qualification of the lake type ("stagnant water" or "flowing water") and its consequences like different treatment of dammed lakes or restrictions in access to the lakes.

2. QUALIFICATION OF THE LAKES AS "FLOWING WATER" OR "STAGNANT WATER" IN THE CONTEXT OF THE PROPRIETORSHIP OF THE LAKES

The issue of the proprietorship of lakes in Poland is governed by Water Law Act of 2001. This act is fourth legal document which regulates discussed matters since the ragaining of independence by Poland in 1918. This act sustains introduced in 1962 and 1974 division of lakes into "flowing water" and "stagnant water". It is a negative relic of socialist system, which aim was to abolish private property in many aspects. Apart from the first Water Act of 19 September 1922 (Act Reg. of 1922, No. 102, pos. 336), the lakes are permanently and artificially divided (only on the conditions laid down by law which are in opposite to hydrological classification) into "flowing water" or stagnant one. Right now in Poland, only lake classified as "stagnant water" may be private property.

Pursuant to Art. 5, par. 3 of the Water Law Act inland surface waters are divided into flowing and stagnant waters. The lakes are considered as "flowing water" if they have natural origin, continuously or periodically, inflow or outflow of surface waters (Art. 5, par. 3 p. 1b). In the other hand, the lakes are classified as "stagnant water" in the absence of a direct and natural connection with surface flowing waters (Art. 5, par. 3 p. 2). Only stagnant waters can be subject to civil law circulation (a contrario Art. 10, p. 3), *ergo* they can be the property of entities other

than State Treasury. Division introduced by the Polish legislator has got significant meaning for certain aspects of the management of lakes. Despite the fact that, often obligations of the lakes owners are equal regardless of their classification (eg. Art. 26), discussed division sometimes leads to unjustified from the hydrological and environmental protection points of view, differences in some aspects of lakes management. An example of such a situation can be found on the ground of issues related to establishing of fishing circuits or fishery management (restocking or yield), which is discussed later in this work.

Presented above, adopted by Polish legislation solution, often leads to many difficulties due to the need for classify each lake as flowing water or stagnant one and thereby to determine its legal status. In most cases the water network has been largely transformed by man. For this reason, it is very expensive and time - consuming to clearly define the origin of all, especially small, watercourses.

Good example of existing situation in which both hydrology and law are violated is legal status of Lake Radodzierz. Northern part of this lake is classified as "standing water" and the southern part as "flowing water". The character of legal classification of lakes is separable, so lake recognized as standing water can not be simultaneously considered as flowing one and vice versa. Meanwhile, due to incorrect methodological assumptions of the applicable law and conflict between public and private interest, occured situation in not possible in hydrology. In the case of Lake Radodzierz, the borderline is artificial - contractual and comes across its surface without any phisical reflection. An example of absurdity which arises from described fact, are issues related to the proper fish restocking and keeping sustainable fishery management on the part of the lake owned by the Treasury ("flowing water"), to which are obliged, on the grounds of civil contract (eg. leasehold), certain entities (eg. Polish Angling Association) (Marszelewski and Marszelewski, 2014a). As far as fishery management must meet numerous condiotions like: rational use of water resources, environmental protection and compliance with the requirements of sustainable development, the private owner can, without any restrictions (and any limitations), undertakes any fishing activities on his part of the lake.

Analized situation not only significantly reduces the quality of Polish law, but also can be considered as contrary to European Union law, because each Member State is obliged to ensure compliance of national legislation with its legislation. Pursuant to Art. 2, pkt 5 of the Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy), lake means a body of standing inland surface water. This definition complies completely with hydrological typology of lakes. However, due to the fact that the abovementioned provision is contained in directive, the European Union Member States are not committed to direct and immediate implementation to their domestic legislation. A directive is binding as to the result to be achieved, whilst leaving Member State (or States) a discretion as to the form and method of incorporation into national law. Thus it requires implementation before it can be fully effective in

law. European Union Member States should, therefore, make harmonization of its law with European Union legislation, and not refer to it by the fact of pre - existing law or administrative practice which is compliant with the requirements of the directive (Steiner et al., 2012). Although in principle, directives do not have direct effect, however, if the directive will not be properly implemented by the Member State and is suitable for direct application (ie. is sufficiently precise and unconditional), such a directive may become directly effective. This concerns vertical direct effect, which means the relations between individuals and public authorities (Kolasiński, 2013).

In the light of the above considerations, it must be noted that maladjustment of the classification of lakes in Polish law to the conditions specified in the Water Framework Directive, may significantly hinder, or even prevent, to achive the purposes set out in this Act (ie. in terms of sustainable water use, protection of aquatic ecosystems, and terrestrials ecosystem and wetlands directly depending on them - Preamble p. 23), thereby remaining in obvious contradiction to European Union law. Assuming even that, the classification of lakes contained in discussed Directive is purely technical in nature, and it is only a means to achieve its objectives, the non - compliance of Polish law, in analyzed case, leads to improper implementation of European law.

2.1. Litigation regarding the proprietorship of the lakes

Presented matters are frequently subject of legal proceedings (in recent years in Poland, the authors noticed at least a dozen of such cases). Improper statutory requirements concerning the classification of lakes imply numerous difficulties with proofs. Therefore, often in only one case raises several, and sometimes even more than ten, expert opinions. These documents, being mutually exclusive, classify disputed lake as either "flowing water" or "stagnant water". As a result, litigation costs are definitely expensive and before issuing a judgment, a number of time - consuming hearings must be held. Moreover, one should bear in mind that every time, one of the parties is entitled to act on behalf of Treasury. This party has an almost unlimited financial and human resources, which in dispute with ordinary individual is also important in the context of equality of the parties during trail.

If the lake was wrongly classified as "stagnant water", and therefore it could never be the subject of private property, the private owner of such a lake, even in good faith, will not receive any compensation. In general, it is possible to raise relevant claims under civil law, but for many reasons, these remedies should not be considered as sufficient protection in presented situation.

In most cases, the corts appoint an expert witnesses to classify the disputed lakes. Their opinions are mostly based only on available cartographic materials and other documents. In situation when on the maps are indicated inflow and outflow, and the expert will determine their origin as natural such a lake, according to Polish law, is classified as "flowing water". Meanwhile, unambiguous identification of the

type of watercourses is complicated. Actually, these are often a small drainage ditches from the nineteenth century (or older) which have been the subject of naturalisation, or small channels being an artificial connection between the lakes (built many years ago, in order to reduce the water level in the lake). The troughs and the banks of these watercourses are heavily overgrown with vegetation, and the flow of the water is usually only temporarily. The accurate determination of the origin of the watercourse (almost always small) requires drawing up an expensive expertise and hydrologists, geomorphologists, and even paleolimnologists, fieldwork commitment. Furthermore, sometimes historical analysis of anthropogenic changes in the water network, which were done a few centuries ago, in connection with construction of watermills and artificial reservoirs is needed. In the case where the private owner of the disputed lake does not have sufficient financial means to cover the costs of the private expertise, such a person is unable to present, during proceedings, important arguments in defense of his property. It should also be noted that often the subject of litigation are small (ranging in size from a dozen to several dozen ha) and shallow lakes, whose market value, in some cases, is lower than the cost of the necessary expertise. Hence, the chances of the private owner of the lake to receive the favourable court rulling are small.

2.2. Fishery management on lake classified as “flowing water” or “stagnant water”

Pursuant to Art. 4, par. 7 p. 2 of the Inland Fisheries Act of 1985 (Act Reg. of 2009, No. 189, pos. 1471 with later amendments), material and financial expenditures for restocking are equivalent of rent and material and financial expenditures determined in the agreement and calculated on the basis of the annual average of the last three years of the lease reduced by an annual fee. Introduced by the Polish legislation, investment requirement which must be done for restocking is relatively high. Furthermore, adopted solution in practice means, that obligation of restocking the lake is transferred to the tenant. Mentioned provision is only applicable to lakes qualified as “flowing water” making a fundamental difference between the principles of fishery management on flowing lakes and stagnant ones. An additional duty imposed on tenant is to draw up and submit a water use report and a fishery report. Reports contain detailed rules of conducting of fishery management, in particular the type and amount of restocking, and the amount of fish catches, and shall be approved by the appropriate local government unit.

In the case of the lake classified as “stagnant water” abovementioned provisions and rules do not apply. The owner should obey the general principles of fishery management, but amounts of restocking and fish catches were left to his own discretion. Despite these liberal rules, the owners of stagnant lakes usually conduct balanced fishery management, according to the principles of sustainable development. Moreover, they are often personally involved with the lake, because it often remains in the family for several generations. In the other hand, discussed lakes in most cases, are the main source of income of the owner, and therefore he

cares about the best and the same the longest, fishery management in his lake. Unfortunately, in some litigation these positive aspects are not taken into consideration. Often, it is believed that private ownership causes more damage to the ecosystem, than the public form of exercise the right of ownership.

3. LEGAL ISSUES CONCERNING THE ACCESS TO LAKES

Art. 34, par 1 of the Water Law Act, in principle, grants anyone the right of common access to public waters which includes, among others inland surface waters, lakes. This is a public right, and every man, *ex lege*, can perform some activities related to it, without any prior permission. Pursuant to Art. 34, par 2 of the Water Law Act, presented right includes: meeting the personal, household and homestead needs (with no special technical equipment), tourism, water sports and an amateur fishing. Furthermore, if certain conditions are met, the right of public access extends even to the activities related to the extraction of stone, sand, gravel or other materials. This right does not apply to privately owned waters (eg. lakes classified as "stagnant water"). In the other hand, if the proprietorship of the stagnant lake belongs to the Treasury, such a lake is also public property and right of common access can be exercised.

In strict connection with abovementioned provision, is Art. 27 of the Water Law Act, which allows to enjoy the right of public access. Art. 27 introduces prohibitions on fencing the property adjacent to the public waters at a distance not less than 1.5 m from the shoreline and prohibiting or preventing passing through this area. Shoreline shall be determined by an administrative decision, and it is the edge of the shore or permanent grass line or a line determined according to the average water level of a period of at least the last 10 years (Art. 15, par 1 of the Water Law Act). The purpose of these regulations, is to create at least 1.5 m wide strip of land around the public waters (including lakes) allowing anyone access to such waters. Unfortunately, discussed prohibition is often broken. Proceedings on restoring access to the lake waters are long lasting and not effective enough.

A number of controversies and inconsistencies is also accompanied by the process for determining the shorelines. Good example is that, the definitive method of demarcate the shoreline is referring to the 10 years average water level, whereas in Poland such measurements are carried out for less than 0.5% of the lakes. Also, in this point it should be noted that, despite the formal obligation to determine these lines, in some cases (specific lakes), they are not determined (Marszelewski, and Marszelewski, 2014b). Another problem is fact, that the actual shorelines often go in different location, than specified in administrative decision. This leads to many abuses, especially if the actual intersection of the land with the water surface is reversed than determined line, and as a result, large tracts of land are exposed. These tracts are often illegally managed (eg. by setting various installations, buildings, and even parking places for motor vehicles (***, 2011).

3.1. Access to dammed lakes

The considerations discussed above in the context of the right of access to public waters, however, do not apply to lakes, which although belongs to Treasury (public waters), and were dammed. Thus, the rules governing the determination of the shorelines shall not be used in such cases (Art. 9, par. 1 p. 4a of the Water Law Act) and the 1.5 m prohibition of fencing the properties adjacent to the public waters also is not applicable.

According to the authors, the rationality of determine the shorelines only for selected waters, is questionable. This is particularly apparent in relation to lakes, which are often dammed just a few to several dozen centimeters. Such small dams do not alter the lakes ecosystem regimes, and should not limit the scope of their protection, for example, by abolishing of 1.5 m wide public coastal zone. The wording and placement of the regulation contained in Art. 27 of Water Law Act, indicate that the purpose of such a zone is to allow the public access to public waters. In the other hand, from the environmental protection point of view, it has special significance for the aquatic ecosystems protection (Marszelewski and Marszelewski, 2014b).

The need for protection of coastal zone exists for both dammed and non - dammed lakes. Therefore, the often result of preventing the free acces to lakes (by fence), is occurrence of environmental damage in the coastal zone. The authors, repeatedly observed degradated, by the owners of the land adjacent to the public waters, lakeshores (eg. removal of macrophytes which "limit" a clear view of the lake). It should be emphasized that, from an environmental point of view, shoreline with a several meters strip of land on both sides, form a coastal zone, which is extremely important for the protection of the aquatic environment. This zone occurs around the lake, and under natural conditions, has different width depending on the topography and the range of lake - level fluctuations. Moreover, it performs a wide range of ecological functions (Burt et al., 2002). The most important of these functions is lake ecosystem protection against excessive inflow of nutrients (such as nitrogen and phosphorus), causing an increase of eutrophication. The coastal zone not only protects lakes, but it is also an area characterized by high biodiversity (Schmieder, 2004), and therefore an area considered as the most valuable, in terms of nature, especially in the European Union. Furthermore, it is worth emphasizing that, in some states in the United States of America, the coastal zone is considered as part of the coastal area of the lake to a depth of 1 m, and a strip of land around the lake with a width of 50 m. Hence, the recognition of the coastal zone as a strip of land with a width of 1.5 m seems far too small.

4. CONCLUSIONS

The division of lakes into "flowing water" and "stagnant water" under Polish Water Law Act, is not in accordance with the provision of the Water Framework Directive. Furthermore, it can not be justified under any circumstances,

and is completely different than, adopted in hydrology, definitions of flowing water and stagnant one. The functioning of such a division is a serious obstacle to rational water management and protection of lake ecosystem. It also causes numerous different conflicts.

Several changes of provisions, in Polish law, related to proprietorship of the lakes made the situation of private lake owners even more complicated. This state of affairs consequently leads to years of litigation.

The major problem related to the division of lakes in Poland, is necessity of determining their actual type from a legal point of view. In the event of a large transformation of the hydrological network, especially the network of small rivers, proving the natural or anthropogenic origin of a small tributary of a lake, or a small outflow from lake is mostly difficult and requires specialized field studies. These studies are expensive and many private lake owners can't afford to pay for them. In such cases, they lose the lake, which so far was their property.

Presented examples indicate important role of water law in water management. Legal provisions shall be unambiguous and based on hydrological criteria. Finally, it must be emphasized that term "water protection" incorporated under the Water framework Directive, refers not only to protect the quantity and quality, but also to aquatic and wetland ecosystems.

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