Chapter 1. Concept and Genesis of Contemporary Public Land Resources

1.1. Introductory remarks

If we take the dictionary's definition of public lands or, more broadly, the public domain, we see that public domain lands are those that cannot be sold since they are considered to belong to the whole community. Public domain land is managed by a public entity like, in different countries, the State, a region, a province or a municipality, directly or by institutes or state companies[1].

Below we will attempt to characterize the actual and legal structure of this considerable resource in terms of ownership of public lands. We will highlight such elements throughout this book as public land types, in particular with the distinction of resources that have historically formed in separate administrative areas. We will also need a wider perspective regarding the general administrative apparatus in the country to better identify the authorities serving public lands. Inseparable element of reflection is to describe the scope of land administration authorities, basic regulations that create a specific regime for the administrative control of the acquisition not excluding the disposal and day-to-day management of public lands. In this study, we will focus, apart from the general characteristics of public land, primarily on the analysis of the land property of the State Treasury. Those types of public land, in relation to their potential, have to be examined separately from communal lands. State Treasury lands are divided into significant separate assets. There are also state-owned resources in the disposition of administrative apparatus of the ministers, which differ to some extent in the principles of management. This is because of state security, namely we can describe it as special land use for the police, diplomatic or military purposes. The general management rules, in the case of the aforementioned public units, have additional special rules, which will not be developed in this book as in the case of forest resources belonging to the country or municipalities.

[1] https://en.wikipedia.org/wiki/Public_domain_(land)

Description of the legal foundations and regulations for particular land resources will also be discussed using legislation and case law. This approach is to identify the systemic differences underlying the principles of management and systemic differences that are shaping the public and private land sectors.

Particular attention will be devoted to two public land resources, which constitute the largest area of their volume. We mean here, the State Treasury Lands Resource[2] (STLR) and State Treasury Agricultural Land Resource (STALR). The State Treasury Lands Resource is managed in a multiple use manner by the governmental units and dedicated local government authorities. The State Agricultural Land Resource is under the custody of a separate executive governmental agency that has been reformed three times so far.

The second largest resource of state lands is the State Treasury Agricultural Land Resource (STALR)[3]. The basic regulations regarding this land appeared, after reforms in 2017, in two separate laws. The first is the Act of 1991 on the management of agricultural property of the State Treasury; the second act is the act of 2016 on The National Center of Agricultural Support (NCAS Act). The management of STALR after 1990 was centralized and passed to the state agency, namely the Agricultural Property Agency. Since 2017, that public body has been replaced by another state agency called the National Center for Agriculture Support (NCAS). According to the Act from 21 August 1997 on real estate management[4], beforehand mentioned State Treasury Land Resources, in which we will focus more on in this book, are properties owned by the State Treasury, excluding land for perpetual enjoyment usufruct and land covered by surface water.

And finally we have a third resource called" National Property Resources" (NPR) as the result of the dynamics of legislative changes following the recent parliamentary elections in Poland. The measurable effect of changes within the agricultural sector and investments into social policy are continuously forming from existing State Treasury resources. The main source of those properties will therefore be the shifting of property masses from existing public resources such as STLR, STALR or State Forest Resources. Properties collected in these resources, beginning September 2017, are to serve exclusively

[2] According to the Act of 21 August 1997 on real estate management (Journal of Laws of 2015, item 782, with further amendments), beforehand mentioned State Treasury Land Resources, in which we will focus more on in this book, are properties owned by the State Treasury, excluding land for perpetual enjoyment and land covered by surface water.

[3] According to the Act of 21 August 1997 on real estate management (Journal of Laws of 2015, item 782, with further amendments), beforehand mentioned State Treasury Land Resources, in which we will focus more on in this book, are properties owned by the State Treasury, excluding land for perpetual enjoyment usufruct and land covered by surface water.

[4] Journal of Laws of 2015, item 782, as amended.

to create conditions for increasing the availability of housing, also for the implementation of housing investments and apartments with statutory regulated rent. The direct cause of the creation of the third public land resource, in accordance with Article 2 and Article 4 from an Act from July 20, 2017 on the National Property Resource, is the State Treasury entrusts executing the ownership and other property rights of the State Treasury. NPR is managed by an entity with the same name, which is not an executive agency but only a legal entity of the state[5].

If you start with the basic statistical data, almost 1/3 of all land in Poland is still owned by the Republic of Poland namely the State Treasury managed by various government agencies and state entities[6].

A comparative commentary will be needed at this point, in particular for the American reader. In the European nomenclature, in countries where there is no federal system, the concept of the country also occurs under the concept of the state. Both, the concept of state and the notion of the state treasury are also distinguishable in Polish theories of state and law. Although the criteria for this distinction is not too harsh and is still subject to discussion, the very notion of the state treasury is to a lesser extent identified with the property masses. The State Treasury is defined in the Civil Code in Article 34 as a legal person, which in civil-law relations is a subject of rights and obligations regarding state property not belonging to other state legal persons.

The State Treasury is represented by public administration bodies and other authorized entities, in accordance with their jurisdiction set out primarily in the act written 8 August 1996 on the rules for the exercise of rights vested in the State Treasury (Journal of Laws of 2012, item 1224), secondly in various substantial laws. The ownership structure of land in Poland is as follows: State Treasury 33.9%; Individuals 57.8%; Local governments 4.1%; Other than State legal entities 4.2%. Gradual identification of public administration structures concerning public domains in the land sector, especially the scope of land administration authorities, elementary information on law and regulations, the administrative control of the acquisition, usage, and day-to-day management of public lands create a specific normative regime.

[5] In accordance with the Act of 20 July 2017 on the National Property Resources and Article 9 point 14 Act of the public finance.

[6] Compare official data of State Treasury Ministry from 2014. https://bip.msp.gov.pl/bip/mienie-skarbu-panstwa/sprawozdania-o-stanie/9882,31-grudnia-2014-r.html

1.1.1. From the official state treasury property classification[7]

As it is easy to see below, official government classifications are partly not harmonized with the concepts of legal theory. The notions of public property are not distinguished in so much detail as the doctrine does. According to governmental statistics and typology to the State belong the following public property and administrative property:

- public property, made available to citizens and their organizations to support their various economic and non-economic activities, for example, cultural assets, different types of documentation, natural resources or roads;
- administrative property, namely objects entrusted to state administration and public services, to perform the functions of the government and tasks in particular areas of the State's activities, such as defense, citizen security, administrative service;
- economic property (e.g. stocks and shares in companies that are entrepreneurs or property in kind intended for sale to private persons – such as agricultural property resource or other property and rights after liquidation of state organizational units), whose function is to generate income or revenues for financing public needs;
- property rights obtained in exchange for state property separated into state legal entities created for carrying out scientific, cultural, educational, health or other activities specified in acts.

The government and statistical authorities with the so-called cumulative Basic Registry of the State Treasury assets sometimes supplement the whole picture of state treasury assets. Numerous state institutions, administrative bodies and organizational units that execute or hold the State Treasury property record the various assets of the State Treasury. This is required by the statutory rule of the state budget implementation, which enforces responsibilities in the field of a transparent economy, internal control, establishing factual or legal status for statistics or economic security, or other special purposes.

Cumulative data on the State Treasury property is kept, based on the relevant statutory provisions in each public entity. For example, binding state accounting regulations constitute the basic records of assets used by state organizational units, and other special provisions determine the manner of conduct and the scope of data on the components of subjectively recorded public land, the natural roads and resources etc.

[7] http://bip.msp.gov.pl/bip/mienie-skarbu-panstwa/ewidencja-majatku-skar/2354,Ewidencja-majatku-Skarbu-Panstwa.html

Collective records of State Treasury assets are widely used by the State governmental administration. For example, the Regulation of the Council of Ministers from the day of 14 September 1999 on detailed rules for the recording of State Treasury assets[8], obliges the governing bodies and other public regulators that are entrusted by the State Treasury to submit to the Minister all sources of data for a collective registry. The collective registry of State Treasury assets is a collection of information containing aggregated data from periodic reports prepared by basic recording units and information submitted to the Minister of the State Treasury. The detailed rules for recording the assets of the State Treasury are set forth in the Regulation of the Council of Ministers, which is an implementing regulation from Article 20 of the Act from the day of 8 August 1996 on the principles of exercising the powers vested in the State Treasury. According to the above-mentioned regulations a collective registry is managed primarily in the generic system (i.e. taking into account the purpose, value, method of management and recording of individual components or their generic categories) and they include:

1. National cultural goods – museums, monuments and library resources – constituting public property of the national heritage that the State intends to maintain indefinitely for their unique historical, cultural or environmental characteristics;
2. Archival resources;
3. Natural resources, namely natural resources in the unprocessed state, which may be available to the public without restriction for non-commercial purposes, but their economic use requires obtaining a license or permit: minerals, water, living sea resources, radio and television frequencies, forests (forest areas and forest stands);
4. Land: State Treasury Lands Resource administered by the chiefs of the districts, land in the permanent management of state organizational units, including those used for statutory purposes by the offices of state authorities, land in the State Treasury Agricultural Land Resource Land managed by State Forests, land entrusted to the Military Property Agency and the Military Housing Agency, public land used in perpetual usufruct by legal entities other than the state and individuals;
5. Infrastructure equipment (equipment and installations generally available or used to facilitate the delivery of goods and services and to ensure smooth operation of the State and the economy): Roads, bridges and flyovers, inland and marine waterways facilities, other facilities, including meliorations;

[8] Journal of Laws No. 77, item 864.

6. Buildings and structures: used by state organizational units to perform their administrative and public service tasks, entrusted to Agencies performing tasks related to the management of elements of assets of the State Treasury, remaining after the liquidation and bankruptcy of state-owned and state-owned companies;
7. Financial assets of the State Treasury, including primarily shares in trading companies;
8. Components of assets turnover, including receivables of the State Treasury, among others on the grounds of the donation of property for chargeable use and other contracts concluded by the State Treasury and its legal predecessors;
9. State economic reserves;
10. Entitlements resulting from contributing financial assets to state-owned enterprises;
11. Entitlements in relation to the assets of other state-owned legal entities established by Acts (agencies, funds, academic institutions) or on the basis of Acts (cultural institutions, scientific institutes, state independent public health institutions, state higher education institutions, budgetary institutions);
12. Monopolies established by law, including the monopoly on gambling and mutual wagering.

There are also liabilities and burdens of the State Treasury included in the collective records as well.

Principles of valuation of assets of the State Treasury for the recording purpose of State Treasury assets are valued according to the principles and criteria set out in the law. The valuations are based on separate regulations. Considering these criteria it giving us further division of the public property into three groups:

– goods that are not tradable, permanently owned by the State Treasury, for which it is impossible to determine the value on the basis of expenditure incurred on acquisition, production or reconstruction (freehold property, mineral deposits, monuments);
– goods not intended for sale, purchased or made for public use by public bodies in order to carry out their tasks.

It is also easy to see that the issue of the above three separate criteria, constructed based on legal burdens, reflects largely the theoretical classifications of public property.

1.2. Concept and genesis of contemporary public land resources

The problem of public land is closely related to and significantly influenced by political changes in Poland after 1990, which are the consequence of the overthrow of communism by Polish nation Public land matters should be analyzed and summarized in several areas. Legal and organizational solutions have evolved from the extremely liberal projects of the 1990s until the return, in recent years, to the significant interference of the public administration.

In the still binding Constitution of the Republic of Poland from 1997, property rights are substantially strengthened as a basic free market institution. The principle of indivisibility and constitutional privilege of State Treasury assets, being a paradigm during communist times, was abandoned. The legal authority had been also given to local authorities (municipalities) and a new category of property was introduced – communal property. Further transformation in the sphere of state lands was carried out in such activities as communalization, appropriation, transfer of agricultural property to the State Treasury, transfer of land to the districts (powiaty) and provinces (województwa).

Difficult and complicated history of Poland and its constant struggle for independence is the background from which emerges a fundamental set of legal acts that shaped the contemporary resources of public lands. Using the methodology of G. Bieniek will be extremely helpful in presenting these institutions in chronological order. Further specifying the subject leads us to the sphere of a legal basis for this acquisition of public lands by the State Treasury, in particular land properties[9]. It is impossible not to recall the basic legal and political events that have influenced the current status of public lands in Poland.

Description of these basic events should be unquestionably started from the end of the First World War and 1918. These dates form a social source of diverse legal titles allowing the state to acquire land and group it in the State Treasury and municipal resources.

Among the most important historical events and related legal acts, first, we should mention the acquisition by the State of any property rights, including ownership of the property as a subject of international law. Historically such acquisition of the resource is rare. We should mention here the Treaty of Versailles 1919. The Treaty of Riga 1921, the Treaty of St. Germainen Laye 1919, under which the Kingdom of Poland, subjected to partition by Austria, Prussia

[9] *G. Bieniek*, *M. Gdesz*, *S. Kalus*, *G. Mastusik*, *E. Mzyk*, *S. Kalus* (ed.), Ustawa o gospodarce nieruchomościami. Komentarz [Act on Real Estate Management. Commentary], p. 120–121.

and Russia – after gaining independence – acquired all the assets (including real estate) formerly belonging to the former Polish Kingdom, and in addition – in certain territorial limits – other appropriated assets of all partitioners. Subsequent historical events are already associated with the Second World War. After World War II, under the arrangements of the superpower countries, there was a shift of Polish borders from east to west. Every property (including primarily real estate) located in an area within its new borders became the property of the State Treasury (cf. Decree of 5 September, 1947 to move to the State owned land the rest of the displaced people to the Soviet Union[10]). Another way of purchase of property (including real estate) solely by the State Treasury is nationalization**.** However, it must not be forgotten that nationalization as a legal institution, generally conceived as taking overland by public authorities (fully legal), was of a different nature in Poland during the communist era. During communist times, it very often meant taking private property, based on the laws of the communist regime, without compensation from entire social groups considered enemies of communism**.**

Historically, the State treasury through public authorities purchased the property after both World War I and after World War II using the following legal acts:

- the decree of Chief of State of 16 December, 1918 on the management of compulsory state[11],
- Decree of the Polish Committee of National Liberation of 6 September 1944 of Agrarian Reform[12],
- the Act of 3 January 1946 about taking over the ownership of the State basic branches of the national economy[13],
- Decree of 15 November 1946 on the seizure of the assets of the countries remaining with the State of Poland in war "between" 1939-1945 and property of legal entities and citizens of those countries and on management forced over these estates[14],
- Act of 18 November, 1948 on moving the ownership of some of the State forests and other land local self-government[15],
- law of 25 February 1958 on the regulation of the legal status of property administered by the State[16].

[10] Journal of Laws No. 59, item 318, as amended – repealed.
[11] Journal of Laws No. 21, item. 67.
[12] Journal of Laws of 1945, No. 3, item 13, as amended.
[13] Journal of Laws No. 3, sec. 17, as amended.
[14] Journal of Laws No. 62, item 342, as amended.
[15] Journal of Laws No. 57, item 456.
[16] Journal of Laws No. 11, item 37, as amended.

Another legal institution in Polish law that allowed enlarging the area of public land was – as a manner of purchase of property (including real estate) by the State Treasury – the so called prescription by the legal concealment. An example of that is the decree of 8 March 1946 on abandoned and of former German estates[17]. Article 34 of the Decree stipulated that the State Treasury and the associations of local communes (self-governments) acquired by the prescription the title to the abandoned estates, in case of the real estate property – after a period of ten years, in case of the movables – after a period of five years starting from 31 December 1945. Under these provisions, only the State Treasury acquired real estate and movables, as the local self-government unions were abolished by the law[18]. In fact, the acquisition based on this decree took place by concealment (that was the name of this manner of acquisition in theory and practice). Here, the premise of acquisition was not the actual exercise of immobility by the state authorities and the uninterrupted legal possession of a post-war period for the statement of acquisitive prescription. The important law that regulated the issue of land management during the communist era repealed the decree. It was the Act of 29 April 1985 on Land Management and Expropriation[19]. According to the Supreme Court's ruling, in some cases this act is still in force (for example, regulation of acquired property *ex lege*). The Supreme Court in its decision[20] decided that circumstance that the decree was repealed has no impact on effectiveness of acquisition of property rights and on ability to determine the claim of that acquisition by the court resolution.

Another basis for resource enlargement of the State Treasury is the institution of expropriation.

Expropriation is an institution with a similar construction to this day. It assumes deprivation of the property right after previous negotiations regarding the price. In the case of failure to reach a consensus with the owner of the property, the public authority takes over the property after issuing the administrative decision by itself, setting the sum of compensation. Owner of the deprived property may challenge the decision of the public authorities to the court. All properties, according to the Article 113 paragraph 1 can be expropriated only for the benefit of the State Treasury or local commune units. The institution used in the Polish legal order is also a waiver. State and local self-government legal persons may perform tasks of waiver of property ownership.

[17] Journal of Laws No. 13, item 87, as amended – repealed.

[18] See Law of 20 March 1950 on a Consistent Organ of State Power, Journal of Laws No. 14, item 130, as amended – repealed.

[19] Journal of Laws of 1991, No. 30, item 127, as amended – repealed.

[20] Decision of 25 February 1987 (III CZP 2/87, OSNCP 1988, No. 4, item 46).

As a result, the State Treasury acquires the property, if a state legal person / entity shall make the waiver.

Statutory heirship (inheritance) is another way of expanding the resources of public lands, according to the current wording of Article 935 of the Civil Code[21]. In cases of lack of heirs, the last statutory heir is due to the place of the testator last residence, inheritance and falls on the State Treasury only if it cannot be determined where the last place of residence of the testator at the Polish territory or the last place of residence of the testator were abroad. State Treasury may of course be a testamentary heir. State Treasury as well as municipalities may acquire ownership of real property by prescription**.**

For the acquisition of property by prescription (a method of acquiring a nonpossessory interest in land by long, continuous use of the land (20 or 30 years). The question of good or bad faith of spontaneous holder at the time of obtaining ownership is irrelevant to the same right to acquire property by prescription only, all impact on the length of the period, the expiry of which will be acquisitive prescription. Institutions of preemption and repurchase as the legal basis for the acquisition of land for resource the State Treasury provide for separate special laws some of the laws have been replaced by the NCAS Act, but such institutions as preemption or re-purchase are still in use. For example:

– Preemption of the State Treasury provided for in Article 4 paragraph 2 of the Act of 20 December 1996 on ports and harbors[22],
– Preemption of the former Agriculture Agency of the State Treasury Property pursuant to Article 3 of the Act of 11 April 2003 on shaping the agricultural system[23] and based on Article 29, paragraph 4 Act of Agricultural Land Management, the right to redeem the property by the State Treasury provided for in Article 59 of Act of Province Self-government;
– The right to repurchase real estate by the Agriculture Agency of the State Treasury Property acting on the behalf of the State Treasury provided for in Art. 4 of the aforesaid Act on Formation of Agricultural System;
– The right of pre-emption, which is in some cases granted to municipalities.

The state or municipalities may also undertake ordinary economic activities in order to acquire ownership of the property. In the case of the State Treasury, they will appear in the form of acts of Civil Law, e.g. sale, exchange, etc.

State Treasury and other public lands are also subject to market trade. The paradigm of the free market assuming, in the end, idea of full privatization of

[21] As amended by the Act of 2 April 2009 amending the Act – the Civil Code, Journal of Laws No. 79, item 662.

[22] Journal of Laws of 2010, No. 33, item 179.

[23] Journal of Laws of 2012, item 803.

public land is turning in recent years to the rule of protection and preservation. The new concept has arisen; we can define it as the principle of maintaining undiminished resources in the hands of the state or public authorities. The question of comprehensive and fair compensation for citizens deprived of ownership by communist regime law in the years 1945–1989 remains unsolved. It should be recalled that lands nationalized by the communist regime still constitute a large part of current state resources and those secondarily transferred to the local communes (e.g. State Forests, State Treasury Agricultural Property).

1.3. Theoretical problems

A brief review of past and present literature shows that in the theory of public ownership we observe some stagnation. It must be stated at the beginning that public ownership will always stay in the field of interest of two legal branches and, therefore, also the two theories of law. This includes both public (administrative) and civil law.

In various periods in Poland whilst managing the public domain, we observe alternately the intensification of the public-legal method (e.g. the period during the communist times 1945–1989) or the private-law method (the period of economic liberalism after 1989).

After Poland's accession to the European Union in 2004, there is a noticeable increase in quality of the management of public land. This quality, on the one hand, would be connected with a number of bureaucratic restrictions on trade, and on the other hand with EU subsidies[24]. All the above-described social and legal changes show us, in the case of public land, a highly complex "public market" for those goods. What constitutes a kind of a "physical constraint" in the case of public ownership is the presence of law that restricts the free management of these goods regardless of historical periods[25].

[24] See. *A. Przewięźlikowska*, Transformation of the property of the state treasury in the context of the current provisions of the law, available at http: //dx.medra.org/10.14597/infraeco.2016.2.1.030, and *M. Buśko*, *J. Bydłosz*, *A. Dawidowicz*, *M. Gross*, *A. Kwartnik-Pruc*, *L. Pietrzak*, *A. Przewięźlikowska*, *S. Trzcińska*, *A. Dokkod-Różańska*, *R. Dzieróbek*, Modern systems of land administration and real estate management, Croatia; Katowice-Olsztyn 2014, Croatian Information Technology Society, GIS Forum; University of Warmia and Mazury; University of Silesia.

[25] Examples are the numerous statutory provisions on administrative restrictions on the sale and purchase of agricultural land, both public and private, and the detailed law prohibiting the sale of land from the State Treasury's Agricultural Property.

Considerations concerning the nature of public ownership show admittedly that the theoretical division into public and private law, and thus also on the branches of law, is relative and still not very precise[26]. The legal specificity of public land, if you look at it "from a bird's eye view", like no other, forces the perception of legal order as a whole, rather than separate branches of law. Proposals for a holistic approach, beyond branch divisions, have a certain value and are increasingly justified and useful in examining specific legal institutions.

In the more recent literature, L. Bielecki accurately states that based on classic works on this subject and after a thorough legislative analysis of the issues of public goods, it is still difficult to define the notion of public things[27]. We encounter similar problems in civil law. Administrative law (broader public) uses the terminology and understanding of things developed in civil law. Civil law, however, only formulates the general definition of things (material objects), without prejudging its character. Undoubtedly, public ownership as a theoretical concept is invariably complex. L. Garlicki expressed the view that in a constitutional approach the ownership is treated very broadly, and in this respect, ownership is more identifiable with the concept of property[28]. The subject matter of public ownership is generally broader than private property one, and although, as in the case of private property, the subject of public property can be all property rights and things without any restrictions, then there are certain pieces of property that must remain in the public domain. Another feature of public property is, as emphasized in literature, the phenomenon of legal methods of ownership of this property. This notion is connected with the ancient, Ulpian theory of division of the whole law into public and private, which was analyzed several times by the European theoreticians, in particular the German and Polish ones. For example, Otto Mayer clearly shows a different scope of activities within public ownership, and thus visibly distinguishes between civil and administrative law[29].

By distinguishing public ownership, we often give examples of private property where we deal with free and autonomous methods of shaping the legal situation. On the other hand, public property (state, municipal) is always

[26] From older literature see. *F. Fleiner*, Les principles generale du dront administratif allemand, Paris 1933, p. 35, from the newer literature *M. Możdżeń-Marcinkowski*, Problematyka gałęziowości norm prawnych na przykładzie poszukiwania kryteriów wyodrębniania prawa administracyjnego [Problem of the branches of legal norms on the example of theoretical criteria distinguishing administrative law], Studia i Materiały, Vol. 2, Warszawa 2017, p. 224.

[27] *L. Bielecki*, Koncepcja rzeczy publicznej w prawie polskim. Zagadnienia administracyjnoprawne [The concept of a public thing in Polish law. Administrative issues], Kielce 2013, p. 56.

[28] See. *L. Garlicki*, Polskie prawo konstytucyjne. Zarys wykładu [Polish Constitutional Law. Outline of the Lecture], Warszawa 2008, pp. 112–113.

[29] *O. Mayer*, Deutsches Verwaltungsrecht, I Band, 2 Aufl., Munchen und Leipzig, 1924, p. 113.

associated with a number of restrictions on disposition. Public ownership, as was once written by A. Wasilewski, is related to the sphere of planned and overarching state activity and to the dualistic concept[30].

Statutory regulations on public land law are a practical portrayal of the theoretical consequence once expressed by A. Stelmachowski that private law is not always sufficient to shape the functioning of public property in society and the economy, and an additional regulation is required to ensure necessary control of public authority[31].

This book is mostly devoted to the specifics of the largest resources of public lands, that would be State Treasury and municipal lands.

Undoubtedly, the content of the binding Polish Constitution does not help in analyzing the notion of public ownership. The Constitution does not explicitly define the concept and scope of public ownership. The provisions of the Constitution mainly focus on private property and its protection. The lack of detailed constitutional regulation of public ownership is being criticized in the doctrine for many years[32]. The consequence of such content of the Constitution in Poland is the official resignation from the division into certain types and forms of property, and consequently the ban of special constitutional protection of property according to the subject of the property and the form of such property. However, it would be unrealistic to say that the provisions of the Constitution of the Republic of Poland, in any way, do not acknowledge the existence of public property. An example is Article 165 sec.1 mentioning the existence of property of territorial local commune units and Article 218 that mentions the organization and management of State Treasury property. However, lower statutory acts so called public law (or substantive law) not only allow the separation of public property as a separate category of property but also show significant tendencies favoring this particular type of property.

There are also perfunctory legal regulations of the European Union, the member of which Poland has been since 2004. In the case of public property management, the Polish state as well as the other EU Member States have almost unlimited freedom in managing their property. European Union treaties and

[30] *A. Wasilewski*, Administracja wobec prawa własności nieruchomości gruntowych: rozważania z zakresu nauki prawa administracyjnego [Administration and Ownership of Land Real Estate: Considerations in the Field of Administration of Administrative Law], Kraków 1972, p. 9.

[31] *A. Stelmachowski*, Modele własności i ich uwarunkowania społeczno-ustrojowe [Model of Ownership and their Social and Political Conditions], [in:] *T. Dybowski* (ed.) Prawo rzeczowe. System prawa prywatnego. Tom 3 [System of Private Law, Vol. 3, Law of Property], Warszawa 2007, p. 152 also see some theoretical remarks on rural property in *Korzycka-Iwanow M.*, *Prutis S.*, Własność rolnicza [Rural Property], [in:] *P. Czechowski* (ed.) , Prawo Rolne [Agricultural Law], Warszawa 2015, p. 47–50.

[32] See. *J. Szachułowicz*, Własność publiczna [Public Property], Warszawa 2000, p. 10.

EU law only marginally limit this freedom in the case of rules such as State aid and the freedom of competition[33].

In the case of public land, we deal with a number of problems in the field of legal theory. One of the basic things is the situation of the conjunction in the hands of public authority and the power of public ruling, public authority (Latin-empire) and the execution over public property, the rights of the owner (Latin-Dominium)[34]. The specific nature of public ownership lies in this structural bipolarity, which must be scrupulously distinguished by specific provisions, which in practice are not always successful[35].

The legislative solutions, which will be presented in this book, show the expanded and complex process of separating those two functions of public authorities (state and community) as a private owner and as a regulator, which restricts this public property in public law at the same time. It is precisely emphasized by F. Rutkowska that it is increasingly difficult to make a sharp distinction between what is private and what is public. This is due to the constant penetration of these two property types. For example, it happens through the cooperation of public and private entities, the financing of private entities from public funds, or the performance of public utility tasks by private entities[36]. This problem combines with issues of land resources. We have though a completely codified, publicly regulated set of legal instruments for the management of those assets, placed in two main statutory acts, which will be referred to in more detail later in this book.

Apart from traditional views analyzing the location of public property regulations in the area of two branches, i.e. civil and public law, it is also worth noting the original and extreme opinions. For example, M. Szubiakowski states that it is unreasonable to use the conceptual apparatus of civil law in relation to property intended for direct implementation of public administration tasks[37]. The author distinguishes even the notion of the so-called separate type of

[33] See. *K. Knedler*, Regulowanie systemu własności w sektorze publicznym w prawodawstwie krajowym a wymagania prawa wspólnotowego [Regulation of the Public Property System in National Legislation and the Requirements of Community Law], [in:] *S. Biernat*, (ed.), Studia z prawa Unii Europejskiej [Studies of European Union Law], Kraków 2000, pp. 457 et seq.

[34] *A. Wasilewski*, op. cit., p. 42; *P. Czechowski,* Proces dostosowania polskiego prawa rolnego i żywnościowego do prawa Unii Europejskiej [Process of Adapting Polish Agriculture Law and Food Law to the EU Law],Warszawa 2001.

[35] See also *A. Doliwa*, Dychotomiczny charakter podmiotowości prawnej państwa (dominium i imperium) [Dichotomous Character of the Legal Subjectivity of the State (Dominium and Imperium)], Studia Prawnicze 2002, z. 3, p. 37.

[36] See. *F. Rutkowska*, State and private property, and delivery of public goods, [in:] *B. Polszakiewicz*, *J. Boehlke* (ed.), Ownership and control in theory and practice, Toruń 2008, p. 90 and ff.

[37] See also. *M. Szubiakowski*, [in:] *M. Wierzbowski* (ed.), Prawo administracyjne [Administrative Law], Warszawa 2003, p. 133.

"administrative property", which resembles rather the situation of entrusting a particular administration property for a strictly defined purpose than exercising the ownership known in private law. One should then agree with Szubiakowski, who recalls the old rule that the interpretation of civil law goes to the analysis of the content of freedom that the owner can use. Thinking in terms of freedom is appropriate for private law, so in terms of the rule "what is not prohibited is allowed". On the other hand, regulation in the sphere of public law is based on an opposite assumption. In public law only what is described under this law is allowed[38]. Similar opinions are found with other authors in the case of characterization of communal ownership. As already mentioned, the notion of public property includes not only the property belonging to the state, but also the property of the State Treasury, as well as communal property. Communal ownership, in particular public land, was transferred to local communities. These communities operate on three levels (communes, districts, and province). In theory, there is a problem, still controversial, whether the manner of performing the property or the purpose of the destiny of property can be a determinant of the very essence of property itself. In other words, can public property be treated as a separate category of property?

Undoubtedly communal property (also state one) of land is a material element intended to meet the needs of the local community (or all citizens in case of the state property) and in that direction is to be managed. However, we cannot decide whether it changes the essence of the property itself. Such reasoning is followed by the ruling of the Constitutional Court of 13 May 1997, in which the judges took the unequivocal position that municipal property (including land) as a public property should not be equated with private property. The Court emphasized that the design of communal property is based on a pattern of private property, but public ownership, by its very nature, has limitations on the ownership rights that are always subject to public interest. In literature P. Wagner, however, criticizes this interpretation, arguing that it is difficult to find unambiguous support for distinguishing public property as a separate category of property, both in constitutional provisions and in the rules of inference. At most, based on the socio-economic destiny of public property we can distinguish it from the private one[39]. It should be emphasized

[38] See. *M. Szubiakowski*, Rzeczy publiczne. (Wybrane zagadnienia) [Public Things (Selected Issues)], Kontrola Państwowa 1997, No. 1, pp. 58–59.

[39] See. *P. Wagner*, Public property and the notion of public property, [in:] *E. Knosala* (ed.), *A. Matan*, *G. Łaszczyca*, Prawo administracyjne w okresie transformacji ustrojowej [Administrative Law in the Period of Political Transformation], Kraków 1999, pp. 262–263; and *A. Klein*, Kilka uwag w kwestii wykonywania własności komunalnej [Some Remarks on the Exercise of Communal Ownership], Samorząd Terytorialny 1991, No. 11–12 , p. 100.

that this distinction also loses its logical value on the assumption that private property can also be used for public use. The above-mentioned theoretical problems show how complex the subject of public ownership is. Undoubtedly, the category of public property exists and, regardless of theoretical problems, it is a vast group of material and non-material objects regulated by a specific legal regime. M. Habdas rightly points out that the division into public and private property is somewhat intuitive, but the adoption of the appropriate criterion of this division is not without controversy[40]. Let us not forget that often the acceptance for necessary modifications around theoretical concepts is closely related to changes in social consciousness in Poland. In particular, it concerns a continuous, unclosed political discussion of the function of public property in general.

It is also worth noting that the difficult regulatory history of public lands in Poland, in particular during the communist period, but also in the present times in the realities of the capitalist economy, shows completely different theoretical problems. The Polish regulatory path concerning public lands is different in many ways from the issues of capture theory raised in American theory by Viscusi or Donahoe and, in general, the influence of farmers and ranchers on the legislature. It is the very lack of legislation on the subject that proves how influenced the regulators are by the regulated. In the case of American solutions and trends regarding public lands the influence of ranchers can be traced through the scanty history of public lands regulation[41]. In Poland, also the influence of farmers on the number and content of agricultural legislature has always been significant. The emanation of this is and has always been a strong representation of political rural parties in the Polish parliament. These parties have always made unfettered decisions at key historical moments for the redistribution of public and private land. These decisions, especially after 2003, were usually aimed at not minimizing the resources of public lands and protection against foreign speculative capital.

[40] *M. Habdas*, Publiczna własność nieruchomości [Public Property Ownership], Warszawa 2012, p. 141.

[41] *K. Scott*, Ranchers as Regulators: The Fight over America's Public Lands through Public Lands Council v. Babbitt, Evans School Review Vol. 2, Num. 1, Spring 2012, p. 113.