Witold Daniłowicz

HUNTING RIGHTS IN A COMPARATIVE PERSPECTIVE

Abstract

The subject of the thesis is the legal nature of hunting rights as they are structured under the Polish Hunting Law. The thesis presents them in a comparative perspective. Hunting legislation of Germany, Austria and France are analyzed in that context.

Post-war hunting legislation in Poland stopped using the term "hunting rights". This was related to the nationalization of such rights by the state and thus separating them from the ownership of land. Even though they are not named, hunting rights nevertheless exists as an institution of the the Hunting Law. This is evidenced by the historical development of Polish hunting legislation in the post-war period which shows that that the legislature never intended to eliminate the concept as such. It is further evidenced by the structure of the current legislation - certain institutions, in particular hunting preserve and hunting lease – rely upon this concept. Existence of hunting rights as an institution of the Hunting Law was confirmed by the Polish Constitutional Tribunal in 2014.

As the term is not used in the legislation, the Hunting Law does not determine whom do the hunting rights belong to in Poland. Legal analysis of the Law leads to the conclusion that they belong to the State Treasury.

Traditionally hunting rights included exclusive right to rear, hunt and appropriate game. Modern hunting regulations impose also certain obligations on the holders of the hunting rights. Such obligations relate to the protection and rearing of game, proper husbandry as well as compensation for damages caused by game. All these rights and obligations are also included in the content of the hunting rights as they are structured by the Hunting Law.

Hunting is always related to land as it cannot function without it. This relation to land – a corporeal thing from a civil law standpoint – makes it possible to consider hunting rights as real rights. Hunting rights also possess other qualities of real rights – they are patrimonial rights and are enforceable against encroachment by others. In addition, their content is determined by law. This allows to include them among the real rights.

In their content hunting rights are similar to limited real rights, in particular servitudes. There are, however, significant differences between them. Firstly, hunting rights constitute independent rights as opposed to being an element or part of the right of ownership, as is the

case with limited real rights. In addition, the landowner does not benefit from the exercise by the State Treasury of the hunting rights on his land. They are also non-transferrable.

Hunting rights do not belong to any of the three categories of real rights distinguished in Polish law – ownership, perpetual usufruct and limited real rights. Consequetnly, they should be properly described as special real rights (real rights *sui generis*).

Hunting rights are exercised by the State Treasury on hunting preserves which are leased to hunting associations. The proper object of such leases is not the preserve itself, however, but the hunting rights related to it. Under a hunting lease, the lessee acquires exclusive right to conduct hunting activity on the preserve. From a legal standpoint a hunting lease is a civil law contract with certain specific characteristics. The key one among them is a limitation of freedom of contracting, as the important stipulations of a hunting lease are prescribed by law.

When discussing hunting rights one has to address the issue of ownership of game. Under the Hunting Law game constitutes property of the State Treasury (art. 2). This stipulation should be treated as an attempt at providing legal justification for taking over hunting rights by the state. It does not determine the civil law status of game, however. Under Polish civil law game is a material object not subject to any property rights. Upon its death it becomes a thing (*res*) within the meaning of Art. 45 of the Polish Civil Code. As such it constitutes a natural fruit of a lease of hunting rights and belongs to the lessee of such rights. The lessee acquires the ownership of the carcass by way of occupation.

Hunting regulations introduce several limitations on the use of property by thelandowner. They result from the legislature's desire to create a regulatory model which ensures protection of the environment on one hand and the accessibility of hunting to all interested citizens, regardless of their financial status, on the other. As such limitations are not compensated and such aims can be accomplished by other means, this regulatory model violates the constitutional principle of proportionality *sensu stricto*. Consequently, it does not meet constitutional standards.

Hunting rights have been analyzed by the organs of the European Convention of Human Rights on several occasions. To the extent that they are attached to the ownership of land they can be considered "property" and as such enjoy protection under Art. 1 of the Additional Protocol to the Convention. The state is allowed to interfere with such rights within the limits prescribed by said Art. 1. In particular it may combine small landholdings in bigger hunting preserves. However, such regime may not result in forcing landowners who object to hunting on ethical grounds to tolerate hunting on their land.

Analysis of the evolution of hunting regulations reveals two specific trends. In several countries power to issue hunting regulations has been delegated by central government to local governments. At the same time the growing number of international agreements deals with the protection of game and thereby directly or indirectly affects hunting. Lately it has been recognized that hunting plays an important role in the proper management of environment and development of local communities.