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The Problems of Social Control in the Context of Forest Management Plans

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Abstract

Obligations to protect forest land form part of the obligation to protect the environment. Planning instruments are one of the most important legal institutions for protection of forests. The public administration has been equipped with competence to undertake planning activities in the field of forest management. At the same time, planning acts are among the most controversial issues. One of these is the act of forest management planning, which is a key planning instrument for forest management. The paper presents current views on the nature of forest management plans. In connection with the growing environmental awareness, more and more attention is paid to the issue of legal regulations for instruments of social control in the field of environmental protection law. The aim of this study is therefore to analyze the legal instruments enabling the implementation of social control in the field of forest management planning.

Keywords: forest management plan, social control

JEL: K10, K19, K40, L52, Q23, R58

Introduction

The forest is considered to be the most complex terrestrial ecosystem. The rapid development of civilization caused radical changes in the natural environment, which are manifested on a global scale primarily in the reduction of forest area, environmental pollution and the phenomenon of transformation of natural ecosystems. The consequence of this state of affairs is a reduction in the number of species and an acceleration in the rate of extinction of species, and thus a worsening of the living conditions of people. For years, there has been an evolution in the subject of awareness and approach to environmental protection. This is followed by the development of philosophical doctrines related to the use and protection of natural resources. In a wide range of views we observe extremely different approaches to the role of man in the world and his right to use natural resources. The presented beliefs oscillate between philosophical views from the trend of so-called hard ecology to the completely opposite approach assuming the right of man to unlimited use of natural resources (Kwiatkowski 2014, 233). The view that forest law is not an autonomous branch of law should be accepted. It is most often perceived as a part of environmental law (Chmielewski 2015, 97). This means, therefore, that when analyzing the issue of social control in the area of forest management plans, it is impossible to avoid its systemic approach.

1 The essence of social control

In the context of the terminology referring to a control area in which society in general can participate, two "competing" terms are distinguished, namely social control and civic control. In the

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literature, however, it is assumed that this is an apparent rivalry and, in the absence of any objective and substantive distinction, both concepts can be treated interchangeably, and the concept of social control seems to be more universal, despite the roots of this name from the past. It is also worth noting that the category of social control is a doctrinal concept, and therefore its content may be defined in different ways (Jagielski 2018, 209).

Social control can be understood as a whole set of legal and factual possibilities for an individual, a group of people, as well as associations of these people to assess the correctness of public administration, formulate opinions, make postulates or motions to the administration. In the definition of social control adopted in this way, its subjective aspect is exposed by emphasizing that it is exercised by an individual, a group of persons or an association of persons or a community. It is also a criterion distinguishing social control from other types of control. On the other hand, the value of the distinguishing criterion cannot be attributed to the criterion of objectivity, as social control may refer to the activity of administration in all fields (Duniewska et al. 2004, 448). The idea of social control, as a type of external control, is based on the aspiration to create the possibility for citizens to check and evaluate public administration, and consequently to have a specific impact on its functioning and the performance of its public tasks (Hoffmann 2009, 60). Accepting the conclusions presented in the literature, the notion of social control should be understood as a whole as defined by law, but also as the actual possibilities available to an individual or a group of persons to observe the activities of the public administration apparatus and its cells and to express opinions and demands to it, in order to signal irregularities, errors and deficiencies at all levels of activity, as well as to initiate, also in a binding manner, actions aimed at their effective elimination. Such a broad approach to social control emphasizes its subjective side (Jagielski 2018, 212).

The literature highlights the measurable benefits of such a social control. First of all, it broadens the spectrum of the public administration's view. By its very nature, it can reach those links in the apparatus of public authority which, especially institutionalized forms of control, cannot fully reach. At the same time, it makes it possible to check and evaluate the actual activity of the administration, which, due to its broad scope, often escapes other forms of control. Its advantages include ensuring a more complete picture of social effects of the functioning of administration, which may be treated as a verifier of activities in terms of their reception by individuals, their groups or the environment. Finally, social control, by responding to the actions of the administration and pointing out its errors, provides signals about the degree of acceptability of these actions, which is a factor in corrective processes aimed at improving a given area of activity (Jagielski 2018, 216).

The functions of social control include the protection of the sphere of human freedoms. In addition, the instrumental function is singled out by including social control as a means to achieve specific objectives and its impact on setting binding standards of behavior is highlighted (Burdzik 2010, 68). It is worth noting that social control can be implemented in various forms. With regard to the criterion of forms of exercising social control, institutional control and non-institutional control can be distinguished. The first one is legal control, which means that it is exercised in the forms provided for in the provisions of law of a binding nature. This type of control can then be subdivided into direct and indirect control. In this system, institutional control — direct control is a legally created entity or group that can become an independent and direct controller of public administration. The tools used to exercise this control include, in particular, petitions, complaints and citizens' applications. In the current legal status, being a form of social control, the so-called "right of petition," which includes petitions, complaints and citizens' applications, is developed in the Act on Petitions[1] and in the Code of Administrative Procedure[2] (Jagielski 2018, 218). In turn, indirect social institutional control determines the control exercised not directly by the citizens themselves, but by formalized associations or other specified entities (Jagielski 2018, 226).

Among the types of social control, one can distinguish between non-organized and organized control. Non-organized control is when a citizen or a non-organized group of citizens acts as the

1. See: Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 13 kwietnia 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy o petycjach. DzU z 2018 r. poz. 870.

2. See: Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 3 października 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy — Kodeks postępowania administracyjnego. DzU z 2018 r. poz 2096.

controlling entity, and this also includes the submission of petitions, complaints and motions under the provisions of the Code of Administrative Procedure. Organized control refers to the situation when the controlling entity are social organizations, commune councils, other local government bodies and social bodies and groups of citizens defined by law (Boć 2010, 411).

2 Nature of forest management plans

The literature indicates that planning acts are among the most controversial issues. One of these is the act of forest management planning, which is a key planning instrument for forest management. It therefore seems essential to formulate up-to-date views on the nature of forest management plans and possible conclusions.

The analysis of the essence of forest management plans should begin with the statement that the provisions of the Act on Forests[3] divide these plans into two basic types. The Act on Forests regulates the principles of preparing forest management plans, the scope of subjects, the mode of approval and modification of plans and sanctions related to failure to perform the tasks contained in the plans (Klat-Wertelecka 2015, 108).

Article 19(1) of the Act on Forests specifies forest management plans drawn up for forests owned by the State Treasury. On the other hand, Article 19(2) of the Act on Forests refers to the second category of these acts, i.e. to simplified forest management plans drawn up for forests not owned by the Treasury and for forests included in the Agricultural Property Stock of the Treasury. It should be noted, however, that for fragmented forests of up to 10 ha, which are not owned by the State Treasury, the tasks in the field of forest management are determined by the decision of the district governor[4] on the basis of the inventory of forest condition. However, for fragmented forests of up to 10 ha, included in the Agricultural Property Stock of the State Treasury, these tasks are defined by the forest inspector on the basis of the inventory of forest condition. The division of management plans thus adopted results in a different regulation of the procedure for drawing up such plans and a differentiation between the authorities competent to approve and supervise their implementation. This dichotomy is also reflected in the statutory definitions of both plans, where the legislator, it seems unintentionally, defines the forest management plan as a document and the simplified version as a plan. Article 6(1)(6) of the Act on Forests stipulates that a forest management plan shall be understood as a basic forest management document prepared for a specific object and containing a description and assessment of the forest condition, as well as objectives, tasks and methods of forest management. In accordance with Article 6(1)(7) of the Act on Forests, the simplified forest management plan shall mean a plan prepared for a forest with an area of at least 10 ha, constituting a compact forest complex containing a summary description of the forest and land intended for afforestation and the basic tasks of forest management. Therefore, it can be concluded that the way of forest management is determined by two elements — the size and ownership of the forest (Chmielewski 2016, 53). In addition, detailed regulations relating to forest management plans are set out in the Regulation of the Minister of the Environment on detailed conditions and procedures for drawing up a forest management plan, simplified forest management plan and inventory of forest condition.[5]

Taking into account the above distinction of forest management plans, the literature presents different views on their character. Under current legislation, it is up to two authorities to approve plans. The Minister of the Environment shall approve forest management plans for forests owned by the State Treasury and simplified forest management plans for forests included in the Agricultural Property Stock of the State Treasury. On the other hand, the district governor approves

3. See: Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 25 października 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy o lasach. DzU z 2018 r. poz. 2129.

4. Polish: starosta — the head of poviat (Polish: powiat) district administration (i.e., the second-level unit of local government in Poland).

5. See: Rozporządzenie Ministra Środowiska z dnia 12 listopada 2012 r. w sprawie szczegółowych warunków i trybu sporządzania planu urządzenia lasu, uproszczonego planu urządzenia lasu oraz inwentaryzacji stanu lasu. DzU z 2012 r. poz. 1302.

simplified forest management plans (except of course for simplified plans for forests included in the Agricultural Property Stock of the State Treasury). The question therefore arises as to the legal form in which the plan is approved.

The literature indicates that the current legislation does not specify in what form forest management plans and their simplified versions are approved. Grzejszczak claims that this activity is not included in the normative acts. Neither does he trample them nor the administrative decisions issued in an individual case, as indicated in Art. 24 of the Act on Forests, which states that if the owner does not perform the tasks included in the simplified forest management plan, then the district governor shall order these activities to be performed by way of a decision. If the simplified plan were to be approved by an administrative decision, it would not require a separate decision to order the fulfilment of the obligations set out in the plan, but only the execution of the decision approving the plan. He further states that, since it cannot be accepted that the legislature assumed separate forms of approval of the plan and the simplified plan, if the approval of the simplified plan by the district governor is not an administrative decision, the approval by the Minister cannot be regarded as such either. In view of the above, he considers that the approval of the plans is a separate form of administrative action, and at the same time the same legal character gives the refusal to approve both types of forest management plans.[6]

According to Rakoczy (2011), the approval of the simplified plan should take place by way of an administrative decision, because it is an individual case within the scope of public administration, in which the rights and obligations of the individual are additionally ruled on, and therefore there must be procedural guarantees to control the approval of draft plans or refusal to approve.

According to Chmielewski (2016, 58), the approval of a simplified forest management plan is not, in a material and procedural sense, an administrative decision, let alone a decision. It does not follow from the provisions of the Act. Undoubtedly, it belongs to the scope of public administration, which determines its public-law character. Of course, the approval of a simplified plan applies to an individually identifiable entity in specific situations and there is a link between the approval of a simplified plan and the forest management rights and obligations form this plan.

The literature indicates that the approval of the management plan, although regulated by law, is an internal matter for the administration. Therefore, in this case, the law does not lay down any specific procedural requirements and confers powers of approval on the Minister. At first, Radecki saw similarities between the forest management plan and the local spatial development plan, taking into account the specificity of forest plans. In his later studies he modified his position, considering that the forest management plan is a planning instrument, valid only in the forest administration system, so it is certainly not a normative act. At the same time, in the opinion of Radecki, it is also not a purely internal document, since it is binding for spatial planning (Radecki 2017).

In its original wording, the Act did not prejudge the legal form in which the plan is approved. During one of the numerous amendments to the Act on Forests the words "by way of ordinance" were introduced, which were deleted by the Act implementing the district reform. The literature indicates that the approval of a simplified forest management plan, in some cases, takes the form of an administrative decision. However, this view raises a number of controversies in science. The doctrine states that it is difficult to accept that the same action — approval of the plan — is of two-sided nature, since the fact that the Minister, when approving a (full) forest management plan, does not do so in the form of an administrative decision is, according to Radecki, undisputed. The argument is that the approval of a simplified forest management plan is not an individual case of public administration. According to Radecki, it should be assumed that this is a specific legal act (administrative act), which is not an administrative decision. In addition, the approval of the management plan by decision must be challenged because of the existing primacy and subordinity relationships (Radecki 2017).

In the opinion of Chmielewski (2016, 63), there is no doubt that forest management plans and simplified forest management plans are not only internal legal acts because they introduce obligations towards forest owners. At the same time, however, they do not constitute acts of local law binding *erga omnes* in the area covered by the plans. Therefore, they should be included in the

6. See: P. Grzejszczak: Plan urządzenia lasu. Komentarz praktyczny. LEX.

borderline between the internal and external sphere of administration; lawmaking and the application of law and the borderline between legal and actual administration.

The position of the administrative courts on the approval of forest management plans deserves particular attention. In the order of the Voivodship Administrative Court (Polish: Wojewódzki Sąd Administracyjny — WSA) in Warsaw of 14 March 2017,[7] the court stated that the activities undertaken by the Minister in charge of the environment concern the property of the State Treasury, represented by the State Forests. Therefore, the activities undertaken are not external in nature, as they do not have the addressee to whom they are addressed, they do not determine the rights or obligations of a non-existing addressee. In the opinion of the court, the activities undertaken by the Minister are of an internal nature and are related to the management of Treasury property. In the light of these circumstances, the public administration body, which is the Minister for environmental protection, does not undertake any sovereign activities of an external nature, nor does it decide on the rights and obligations of a specific entity in an individual case. The Minister shall not, therefore, approve the management plan in the form of a decision. At the same time, it was stressed that the approval of forest management plans by the Minister is an internal activity undertaken in connection with the performance of tasks of ownership nature.[8]

The above position was shared by the Supreme Administrative Court (Polish: Naczelny Sąd Administracyjny — NSA) in its order of 17 October 2019,[9] in the opinion of the court, the Minister competent for environmental issues supervises the activity of the State Forest Enterprise "Lasy Państwowe." In the light of the binding legal regulations, the superiority and organizational inferiority of the State Forests should be inferred from the relation to the Minister. With regard to the nature of the forest management plan act, the Supreme Administrative Court states that, according to the definition of a forest plan in Article 6(1)(6) of the Act on Forests, the legislator assumes that it is a basic forest management document. In the opinion of the court, there are no grounds to conclude that it is a decision or other act or action concerning rights and obligations resulting from a provision of law. It is, however, an act of management directed against a state organizational unit.[10] The reasoning thus accepted is that the approval of the management plan does not fall within the jurisdiction of the administrative courts.

At the same time, the case law indicates that, unlike in the case of simplified forest management plans, which are not owned by the State Treasury and are approved by the district governor, the Minister's action is not addressed to third parties. The court also emphasizes the other special procedure for drawing up a simplified management plan and the requirements laid down therein. Approval of the plan by the district governor of a simplified forest management plan shall confer on the forest owner certain rights or obligations with regard to forest management. If the owner of a forest not owned by the State Treasury does not perform the tasks included in the simplified plan, the district governor shall order the execution of these tasks by way of a decision. In the court's opinion, legal regulations allow to state that the approval of the simplified forest management plan does not take the form of an administrative decision, because the legislator has clearly indicated situations in which the district governor issues decisions, although the approval of the simplified plan by the district governor is an external act. Therefore, it is justified to qualify the approval of the simplified plan in accordance with Article 3 § 2 point 4 of the Law on Proceedings before Administrative Courts.[11]

Conclusions

It should be noted that the definition of the nature of forest management plans has a direct impact on the scope of social control in this area. This is because the possibility of their subsequent control depends on the category to which they will be classified. The adoption of a clear position

7. See: Order of the Voivodship Administrative Court in Warsaw of 2017.03.14, IV SA/Wa 2787/16.
8. See: Ibid.
9. See: Order of the Supreme Administrative Court of 2017.10.17, II OSK 2336/17.
10. See: Ibid.
11. See: Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 7 czerwca 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy — Prawo o postępowaniu przed sądami administracyjnymi. DzU z 2018 r. poz. 1302.

in the case law, which is the nature of the approval of the forest management plan by the Minister, undoubtedly affects the scope of social control.

In the context of the above, it is not appropriate to ignore the complaint of 22 September 2016 filed by the Ombudsman to the Voivodship Administrative Court in Warsaw against the "decision" of the Minister of 25 March 2016 on the approval of the annex to the forest management plan.[12] However, the Court rejected the appeal on the ground that it lacked competence to recognize it. In its justification, the court argued that the "decision" of the Minister on the approval of an annex to the forest governance plan is not an administrative decision or any other act or activity that may be subject to judicial review. The Supreme Administrative Court dismissed the cassation appeal filed against the above decision, which supported the arguments of the lower court.

As indicated above, although the approval of the forest management plan by the Minister is called a "decision," it cannot be considered an administrative decision. As a result, it limits the possibility of social control in this area.

The distinction made between the categories of forest management plans shall at the same time result in their differentiation in terms of social control. As regards the simplified forest management plan, the provisions of Article 21(4) and (5) of the Act on Forests provide for a special procedure for making the draft of this document available to the public. It is submitted for public consultation for 60 days at the municipal office, and the owners of forests covered by this plan are informed about its arrangement. Within 30 days from the date of submission of the project, interested owners may submit reservations or applications. It should be noted, however, that apart from forest owners, the Act does not grant this right to other entities. According to some authors, however, a distinction must be made between the right to object or make a request for administrative proceedings initiated by the forest owner and the right to object or make a request. In this situation, Article 31 of the Code of Administrative Procedure applies, according to which social organizations may request admission to the pending proceedings if two conditions are met jointly, namely that it is justified by the public interest and that it is justified by the statutory objectives of the organization.[13]

The literature indicates that the answer to the question of whether public participation in the preparation of a simplified forest management plan is permissible depends on whether the plan is subject to a strategic environmental assessment of the projects likely to have a significant impact on the environment (Radecki 2017). Comments are also presented on the participation of a social organization in proceedings under Article 19 (3) of the Act on Forests, in which the social organization should indicate the admissibility of the request and the legitimacy of participation in the proceedings. The participation of social organizations in such proceedings is not indifferent to the parties, especially when they represent opposing interests (Bieluk and Leśkiewicz 2017).

In the context of the above considerations, it is also worth mentioning that with regard to forest management plans, we are also dealing with a separate type of social control, namely non-institutional control, which is tantamount to the so-called public opinion and can be formulated in different ways. This type of social control could be observed in relation to the controversy surrounding forest management plans, which have become of interest to the media and the general public.

Refereces

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