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THE ROLE OF COURTS AND TRIBUNALS IN ENVIRONMENTAL PROTECTION

(The Polish experiences)

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I. Introduction

The aim of this paper is to present the assumptions and results of the research carried out from August 2013 to November 2015. It was financed by the National Science Centre in Cracow². The research was carried by the Authors' team composed of Mariusz Baran, Bartosz Draniewicz, Adam Habuda, Barbara Iwańska, Jan Jerzmański, Wojciech Radecki and Jerzy Rotko (the Project Leader). Full results were published in the study: *Rola sądów i trybunałów w ochronie środowiska (The Role of Courts and Tribunals in Environmental Protection – in Polish)* (Scientific Editor: J. Rotko), Warsaw 2016.

1. Purpose and subject matter of the research

Environmental protection is unquestionably a task of a modern state. Its implementation imposes obligations on all the public authorities which are designated in accordance with the traditionally understood principle of the tripartite division of powers, i.e. the legislative, executive and judicial powers. The manner in which this is implemented by the judicial power is determined by the arrangements of the political system of a specific state. The role of this power is the greatest in the states where the case-law of state authorities, primarily its courts, is the source of law. These are the states which have adopted the principle that courts are bound by precedents (*stare decisis*). In the European states with a civil law system, common law is not directly recognised and judges are subject to the Constitution and statutes. Nevertheless, irrespective of the organisational model of the judicial power, it is in them, too, that the case-law of courts plays a significant role³.

The Authors' team decided to investigate how this role was manifested in Poland. Such research can be carried out from different points of view. From the point of view of an individual, proceedings before the courts are obviously associated with the pursuit of justice. However, from a broader point of view the role of the courts is much more complex as a result of the functions and tasks assigned to them. This complexity is also confirmed by their differentiation: there are constitutional, general and administrative courts. For this reason when exploring the significance of the case-law of the courts and tribunals in the context of the legal protection of the environment, it was necessary to also take into account issues other

² The contract No. 2012/07/B/HS5/03962 "Ochrona środowiska w działalności trybunałów i sądów" ("Environmental protection in the activities of tribunals and courts").

³ T. Stawecki, P. Winczorek, Wstęp do prawoznawstwa (*An Introduction to Jurisprudence – in Polish*), Warsaw 2003, p. 137.

than the protection of the rights of an individual (however, without ignoring this aspect). This role can be assessed taking into the following:

- a) the impact of the case-law on the creation of environmental law,
- b) its significance for the application of environmental law, particularly, for the administrative practice,
- c) the presence of these issues in the legal education.

In Poland, the issues of rulings in environmental cases had not been covered by extensive studies, with the exception of one older monograph study⁴. The examination of this subject was also justified by a fundamental change of the political system. In 1997, a new Constitution of the Republic of Poland was adopted; in that period, too, the national government and self-government administrations were also reformed and, on 1 May 2004, the Republic of Poland became a Member State of the European Union. After 2000 new environmental law was also created⁵.

The general concept of the research project was based on two of the pillars which constitute the foundations of the political system of the state. The first pillar is the recognition of environmental protection as one of the basic objectives of the functioning of the state in Article 5 of the Constitution of the Republic of Poland of 2.04.1997⁶, to be implemented in accordance with the principle of sustainable development⁷. Article 74 of the Constitution indicates that environmental protection is to be the duty of all the public authorities (paragraph 2), which are obliged to pursue policies ensuring the environmental security of the present and future generations (paragraph 1).

The second pillar is “tribunals and courts”, which create the constitutional political system of the Republic of Poland based on the separation of and balance of the legislative, executive and judicial powers (Article 10). These powers embody the three main functions of the state and each of them has separate authorities which have different competence. Pursuant to

⁴ W. Radecki, *Ochrona środowiska w orzecznictwie Sądu najwyższego i Naczelnego Sądu Administracyjnego (Environmental Protection in the Case-law of the Supreme Court and the Supreme Administrative Court – in Polish)*, Warsaw 1995.

⁵ A number of statutes were adopted, including the Act of 27.04.2001 on Environmental Law, the consolidated text of 2017, Official Journal of the Laws, Item 519, as amended.

⁶ Official Journal of the Laws, Item 78, Item 483, as amended.

⁷ J. Jendrońska, M. Bar, *Prawo ochrony środowiska. Podręcznik (Environmental Law. A Handbook – in Polish)*, Wrocław 2005, p. 526.

Article 173 of the Constitution, the judicial power constitutes “a separate power (...) independent of the other branches of power”⁸.

Environmental protection is an extremely complex and comprehensive task the performance of which requires the involvement of all the three powers. As it is a fairly new civilisational task, it requires the creation of legal solutions which are adequate in respect of the scale and type of new threats. The key role is played by the provisions of administrative law which are complemented by the provisions of civil law and criminal law. The implementation of the most important tasks of the state is based on administrative law. It is claimed that environmental protection is one of “the great administrative tasks of our times”⁹.

On the other hand, the application of this law entails numerous problems. Their causes can be sought in both the law itself and its social environment, which is created, in particular, by the structure of authorities applying the law, the officials’ competence, the knowledge of the law among the addressees of standards, but also the processes unfolding beyond human control, e.g. the development of science and technology. As A. Lipiński has noted, the provisions of environmental protection as a whole create “a system which is exceptionally inconsistent, illegible and, in addition, characterised by numerous defects”. A consequence of such a situation is “the potential defectiveness of numerous decisions” (primarily, administrative decisions)¹⁰. M. Górski has made similar comments, pointing out the vigorous development of this branch of law. As a result of this, problems emerge which are “related to the interpretation and application of these regulations; partly because of their insufficiently precise nature caused by the frequent haste in their creation and also by the lack of experience”¹¹.

⁸ J. Boć (Ed.), *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* (*The Constitutions of the Republic of Poland and a Commentary on the 1977 Constitution of the Republic of Poland – in Polish*), Wrocław 1998, p. 34.

⁹ E. Schmidt-Aßmann, *Ogólne prawo administracyjne jako idea porządku. Założenia i zadania tworzenia systemu prawnego administracyjnego* (*General Administrative Law as a Notion of Order. The Assumptions and Tasks of the Creation of the System of Administrative Law - in Polish*), Warsaw 2011, p. 142.

¹⁰ A. Lipiński, *Prawne podstawy ochrony środowiska* (*The Legal Foundations of Environmental Protection – in Polish*), Warsaw 2007, p. 21 et seq.

¹¹ M. Górski, *Wprowadzenie. Ogólna charakterystyka ustawy - Prawo ochrony środowiska i jej miejsca w systemie przepisów o ochronie środowiska* (*An Introduction. General Characteristics of the Act on Environmental Law and Its Place in the System of Regulations on Environmental Protection – in Polish*), p. 20, [in:] M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendroška, *Prawo ochrony środowiska. Komentarz* (*Environmental Law. A Commentary – in Polish*), Warsaw 2011.

In light of these circumstances, the application of environmental law requires continuous and inherent reflections on interpretation with which public administration authorities cope with a varied success. It is no surprise then that it is the courts that become the places where “one can file claims based on the expanding legal system”¹². Given the dominant role of the regulations of administrative law in environmental protection, these are most often the administrative courts¹³.

2. Polish environmental law

The legal system in effect in Poland has the features which are characteristic of the civil law system. Just as the system in place in Germany, France and Italy, it has been shaped under the influence of two key determinants: Roman law and the doctrine of legal positivism. In its vertical representation, the civil law system (thus, Poland’s system, too) forms a pyramid-shaped structure: at its top, there is the Constitution, while at its bottom there are legal acts with a lower rank or those that apply only within the system of state authorities. The fundamental assumptions of this system include such principles as:

- a) the principle of the exclusivity or at least the overwhelming dominance of statutory law as a source of law,
- b) the primacy of statute, signifying, at the same time, the prohibition of lawmaking by the courts whose activities consist only in the application of law, including its interpretation, rather than in its creation,
- c) the minimisation of the role of the other forms of law (common law, canonical law),
- d) the rationality of law which is manifested in the postulates of consistency and completeness of regulation (the absence of gaps)¹⁴.

In light of the great complexity of this system, for practical reasons it is divided into branches, making it easier not only to teach it but also to create and apply it. In recent decades, this process substantially accelerated, mainly as a result of transformations in the field

¹² W. Postulski, P. Sadowski, J. Stelmasiak, *Rola orzecznictwa sądów i trybunałów w prawie ochrony środowiska (The Role of the Case-law of Courts and Tribunals in Environmental Law (in Polish))*, p. 71, [in:] J. Stelmasiak (Ed.), *Prawo ochrony środowiska (Environmental Protection Law - in Polish)*, Warsaw 2010.

¹³ Since 2004 the structure of the Polish system of administrative courts has had two levels and, at the same time, two instances. The Provincial Administrative Courts (PACs) issue first-instance rulings. The Supreme Administrative Court (NSA) is the second instance and the court which exercises supervision over the activities of the Provincial Administrative Courts. See J. Zimmermann, *op. cit.*, p. 372 et seq.

¹⁴ See T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa (An Introduction to Jurisprudence – in Polish)*, 4th edition, p. 119.

of legal culture and an expansion of the objective scope of public authorities' activities to meet the requirements set by the technological civilisation (they also include the need to protect the environment)¹⁵.

The national law system consists of private law (including civil and labour law, while excluding civil procedural law) and public law (including constitutional, criminal and administrative law)¹⁶. Within the administrative law, numerous sectoral regulations can be distinguished. European law has its specific character; although it is separate from international and domestic law it forms with them the so-called "multicentric" whole¹⁷.

Polish environmental law also corresponds with the general model of legal system described above. It should first be clarified that in the Polish literature two meanings are given to the term "environmental law". In its broad sense, it means the whole of regulations on the protection of the environment as a whole or its individual elements. Thus, they include regulations covering the whole range of the existing law: regulations with the constitutional rank, provisions of civil-law (both those included and not included in codes), criminal regulations (both those included and not included in codes) and administrative regulations – with dominating significance. Altogether this law consists of several dozen statutes, very numerous implementing regulations, as well as international agreements and acts of European law.

In turn, in its narrow sense "environmental law" is the name of a statute passed on 27 April 2001¹⁸. In accordance with the Polish principles of legislative technique¹⁹, a statute is called a "law" if it regulates some scope of issues in an exhaustive and comprehensive manner, but has not a uniform character since it deals with different fields of law. A statute with

¹⁵ Ibidem.

¹⁶ Ibidem, p. 120 et seq.

¹⁷ This concept was introduced by Ewa Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje* (*The Multicentricity of the Contemporary Legal System and Its Consequences – in Polish*), Państwo i Prawo 2005, No. 4, p. 7 et seq.

¹⁸ The Act of 27 April 2001 on Environmental Law, the consolidated text of 2017, Official Journal of the Laws, Item 519, as amended.

¹⁹ They were adopted in the form of the Regulation of the Prime Minister of 20 June 2002 on the principles of the legislative technique (Official Official Journal of the Laws, No. 100, Item 908). It was issued pursuant to Article 14(4)(1) of the Act of 8 August 1996 on the Council of Ministers. In Poland, the term "the principles of the legislative technique" has a traditional character and has been reserved for official legislative technique guidelines since 1939 when the first such guidelines were elaborated. The subsequent principles were adopted in 1961 and then in 1991. The present principles have been aligned with the new 1997 Constitution, in particular, with the constitutional concept of sources of law, and with the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (the consolidated text in the Official Journal of the Laws of 2007, No. 68, Item 449, as amended). See S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej* (*A Commentary on the Principles of the Legislative Technique - in Polish*), Warsaw 2004. p. 15.

a comprehensive and, at the same time, uniform character is called a code. The broadly understood environmental law also consists (in whole or in part) of other statutes called “laws”, e.g. the Act of 20 July 2017 on Water Law²⁰ and the Act of 9 June 2011 on Geological and Mining Law²¹, as well as a large number of statutes which are not given this name (for substantive reasons) e.g. the Act of 27 April 2001 on Waste²², the Act of 3 February 1995 on the Protection of Farmland and Forestland²³, the Act of 13 April 2007 on the Prevention and Remedying of Environmental Damage²⁴ or the Act of 16 April 2004 on Nature Conservation²⁵.

The Act of 31 January 1980 on the Protection and Shaping of the Environment²⁶ played a special role in the development of Polish environmental law. At the time when it was passed the contentious issues included its substantive scope and legislative form. It was debated whether it should also include preservation-oriented nature conservation and water management issues (finally, they were not covered so that they might be regulated in separate statutes). As regards the legislative concept, consideration was given to the following:

- a) the form of a code, i.e. an exhaustive, comprehensive and uniform regulation,
- b) a framework statute, laying down only the main principles of environmental policy,
- c) a comprehensive statute, combining general measures common to environmental protection as a whole with the detailed regulation of certain sectoral issues²⁷.

The last concept of those listed above won. It is important to note it as this regulatory scheme was also repeated in the present Act of 2001. Thus, it formulates all the fundamental protection principles and requirements which are by assumption common to all the elements of the environment and aspects of its protection. However, it should be noted that the Act repeatedly refers to details regulated in separate statutes. For this reason, part of obligations under the provisions of this Act have a framework character. Essentially, the Act on Environmental Law regulates exhaustively ambient air protection and the protection

²⁰ Official Journal of the Laws, Item 556, as amended.

²¹ The consolidated text of 2017, Official Journal of the Laws, Item 2126, as amended.

²² The consolidated text of 2018, Official Journal of the Laws, Item 992.

²³ The consolidated text of 2017, Official Journal of the Laws, Item 1161.

²⁴ The consolidated text of 2018, Official Journal of the Laws, Item 954.

²⁵ The consolidated text of 2018, Official Journal of the Laws, Item 142.

²⁶ The consolidated text of 1994, No. 49, Item 196, as amended.

²⁷ See J. Jendrońska, M. Bar, *Prawo ochrony środowiska. Podręcznik (Environmental Law. A Handbook – in Polish)*, Wrocław 2005, p. 502 et seq. A statute conceived in this way could be treated as a first step towards codification.

against noise and electromagnetic fields. This Act also includes provisions concerning integrated permits and major industrial accidents. However, the protection against certain other threats is implemented almost exclusively with regulations existing completely outside of this Act. Examples of these include the Act of 29 November 2000 on Atomic Law²⁸ or the Act of 15 May 2015 on Substances That Deplete the Ozone Layer and on Certain Fluorinated Greenhouse Gases^{29/30}.

Initially, there were hopes for at least a gradual but progressive concentration of certain further regulations within the Act on Environmental Law. Soon they were dashed. We have seen a process of slow decomposition of this Act. A glaring example of this is the so-called horizontal law, i.e. the Act of 3 October 2008 on the Provision of Information on the Environment and Its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments³¹. From 2001 extensive provisions on these procedures were part of the Act on Environmental Law. In 2008, they were removed from the Act, which was a complete surprise for the lawyers' community. The most recent Act on Water Law of 2017 also broke its earlier ties with the Act on Environmental Law (and these were quite superficial anyway) and adopted, among others, its own system of charges for the use of waters. As an excuse for separating issues in this way, the legislator cited the need to fully implement the principle of the recovery of costs of water services provided for in the Water Framework Directive³².

Since the discussion in the further part of the study concerns the research results limited to the case-law on selected ranges of Polish legal regulations, at this point – by way of an introduction – their general characteristics should be presented in greater detail in the following order: the Constitution of the Republic of Poland, civil law, criminal law and administrative law.

²⁸ The consolidated text of 2018, Official Journal of the Laws, Item 792.

²⁹ The consolidated text of 2017, Official Journal of the Laws, Item 1951, as amended.

³⁰ See A. Lipiński, *Prawne podstawy ochrony środowiska (The Legal Foundations of Environmental Protection – in Polish)*, Warsaw 2007, 4th edition, p. 21.

³¹ The consolidated text of 2016, Official Journal of the Laws, Item 353, as amended.

³² There are no doubts as to the very need for an amendment; all the more so as an incomplete transposition of the provisions of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 was confirmed by the judgment of the Court of Justice of the European Union of 30 June 2016 (Case C-648/13).

a) Environmental protection in the Constitution of the Republic of Poland

The Polish Constitution of 1997 was based on the assumption that its provisions would apply directly. It is only in few cases that it additionally specifies that certain rights may be exercised within the limits laid down in a statute. This concerns, among others, those that are related to environmental protection (in particular, Article 74). The citizens' duty to take care of the environment (Article 86) is qualified by the clause that "the principles of such responsibility shall be specified by statute".

In general, environmental protection enjoys a prominent position in the Constitution of the Republic of Poland. The term "environment" can be found as many as seven times in its text. The significance of environmental protection for the functioning of the state is confirmed by the fact that already at the beginning of the Constitution its Article 5, situated in Chapter I "The Republic", there is a reference to the principle of sustainable development, which is expected to be a guideline, as it were, for the implementation of environmental protection (literally, "The Republic [...] shall ensure the protection of the natural environment pursuant to the principles of sustainable development"). For this reason it is deemed to be the supreme principle of the political system which fosters environmental protection (but not only).

The largest number of provisions concerning environmental protection can be found in Chapter II "The Freedoms, Rights and Obligations of Persons and Citizens". They confirm that environmental protection is a duty of the of public authorities (Article 74(2)). In particular, they are obliged to prevent the negative health consequences of degradation of the environment (Article 68(4)), to pursue policies ensuring the environmental security (Article 74(1)) and to support the activities of citizens to protect and improve the quality of the environment (Article 74(4)).

The Constitution of the Republic of Poland allows constraints on the exercise of the constitutional freedoms and rights (e.g. ownership rights) to be laid down by statute, among others, to protect the environment (Article 31(3)). This Article has played a significant role in the assessment of conflicts among the different public interests which have been resolved by the Constitutional Tribunal.

Moreover, everyone has the right to information on the state of the environment and its protection (Article 74(3)), but, on the other hand, everyone is obliged to take care of the

state of the environment and is held responsible for causing its deterioration (Article 86). The Polish Constitution does not provide for the subjective right to the environment or at least the right to use its values (as the previous 1952 Constitution did when such a right was incorporated into it in 1976).

b) Issues of environmental protection in civil law

In the Polish system of the legal protection of the environment the norms of administrative law are of fundamental significance. Criminal law has a lesser role, while the role of civil law is essentially symbolic³³. The basic act of civil law is the Act of 23 April 1964 on the Civil Code³⁴.

The concept of damage is of key significance for civil liability. Damage usually means any detriment which the harmed party incurs, with both a material and non-material nature. Thus, damage to property and damage to person are distinguished. Damage to the environment most often occurs at properties and their parts. However, not all damage (loss) to the environment falls within the concept of damage in the meaning of civil law. Doubts arise when damage is done to those elements of the environment that are not objects or that are nobody's objects. It might be claimed that in such a case no damage arises.

In such cases, special statutes (rather than the Civil Code itself) provide that damages may be sought e.g. by a representative of the State Treasury, a self-government unit or a non-governmental organisation. For instance, in the Act of 29 November 2000 on Atomic Law the concept of "nuclear damage" includes e.g. the damage to the environment consisting of the costs of the application of measures to restore the environment, as a common good, to the state which had existed before it was disturbed. Such a claim may be asserted by the State Treasury, represented by the Minister competent for the environment.

Such possibilities also ensue from the provisions of the Act on Environmental Law. In general, its Article 322 provides that unless this Act provides otherwise the provisions of the Civil Code apply to the liability for damage caused by an impact on the environment. In this way, the Act complements the system of the Code-based liability: indeed, it does not create a new type of civil liability, but only adds five modifications to it in successive articles.

³³ See P. Bojarski, *Odpowiedzialność cywilna (Civil Liability – in Polish)*, [in:] *Institucje prawa ochrony środowiska. Geneza - rozwój - perspektywy (The Institutions of Environmental Law. Origin – Development – Prospects – in Polish)* (W. Radecki – Ed.), Warsaw 2010, p. 424.

³⁴ The consolidated text of 2014, Official Journal of the Laws, Item 121, as amended.

Firstly, in its Article 324 the Act extends the strict liability provided for in Article 435 of the Civil Code. Article 435(1) of the Civil Code provides that he who runs on his own account an establishment which is powered “by the forces of nature” is personally liable for damage to person or property caused the operation of this establishment unless the damage has been caused by force majeure or as a result of the fault of the harmed party. In consequence of the provision of Article 324(1), the premise of the operation powered “by the forces of nature” is no longer relevant, provided that the damage has been caused by an increased-hazard or high-hazard establishment.

Secondly, a claim for the prevention of damage or the restoration of the law-compliant state of the environment (as a common good) may be filed by the entities indicated in the Act, such as the State Treasury, a territorial self-government unit and an environmental organisation (Article 323(2)).

Thirdly, the liability for damage caused by an impact on the environment is not excluded by the circumstance that the activity responsible for the damage is carried out on the basis of a decision and within its limits (Article 325).

Fourthly, environmental organisations may take legal action demanding that advertisements or other forms of promotion of a commodity or service should be stopped if they are in contradiction with the principles of environmental protection (Article 328).

Fifthly, the entity which has rectified damage to the environment may file a claim for the reimbursement of the resources expended for this purpose from the entity which has caused the damage (Article 326)³⁵.

It should be added that “the damage caused by an impact on the environment” is only related to human behaviour. Thus, it does not cover the damage caused by certain animals subject to species-specific protection (this issue is regulated by the Act on Nature Conservation).

c) Environmental protection in criminal law

The concept of criminal liability is not unambiguous. In certain countries it only includes the responsibility for crimes. As W. Radecki has noted, a peculiarity of Polish criminal law is

³⁵ See P. Bojarski, op.cit.. See also M. Bar, the commentary on Articles 323 - 328, p. 1115 et seq., [in:] M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendrośka, *Prawo ochrony środowiska . Komentarz (Environmental Law. A Commentary – in Polish)*, Warsaw 2011.

that after several historical turns it has been ultimately decided that misdemeanour law is also part of the criminal law system. This thesis is already regarded as a self-evident one³⁶. However, this gives rise to the problem of so-called administrative torts for which fines may be imposed. It is assumed rather generally³⁷ that this is a separate form of administrative liability (considered in greater detail in the next point).

The Criminal Code adopted on 6 June 1997³⁸ includes Chapter XXII entitled “Offences against the Environment”, which consists of 8 articles (Articles 181 - 188). W. Radecki has divided them into two groups:

- a) offences which have caused the pollution and other threats (including the pollution of water, air or ground with a substance or ionising radiation – Article 182, illegal handling of waste, including illegal international trade in waste – Article 183, illegal handling of radioactive waste – Article 184; subsequently, types of offences qualified by their consequences – Article 185 and offences caused by the neglect of abatement equipment – Article 186),
- b) offences against natural resources and traditional nature conservation (including e.g. those causing massive damage to flora or fauna with large dimensions, as well as illegal construction or the operation of an economic activity posing a threat to the environment in a protected area – Article 181(1) – (5)).

It should be added, however, that Polish criminal law also includes an extensive category of criminal law not included in the Code, consisting of further types of offences against the environment (such provisions can be found e.g. in the Act on Nature Conservation – Article 128, in the Act on Hunting Law – Articles 52 and 53 and in the Act on the Protection of Animals – Article 35³⁹).

In the Polish Misdemeanour Code of 20 May 1971⁴⁰, there is no separate chapter dealing with misdemeanours against the environment. Still, this does not mean that they are absent from the Code. They are present in it – and in quite a large number. They can be divided into

³⁶ See W. Radecki, *Odpowiedzialność karna (Criminal liability – in Polish)*, [in:] *Institucje prawa ochrony środowiska. Geneza - rozwój - perspektywy (The Institutions of Environmental Law. Origin – Development – Prospects – in Polish)* (W. Radecki – Ed.), Warsaw 2010, p. 425 et seq.

³⁷ Different views have been voiced, in particular by W. Radecki, *ibidem*.

³⁸ Official Journal of the Laws, No. 88, Item 553, as amended.

³⁹ See W. Radecki, *op.cit.*, p. 433.

⁴⁰ The consolidated text of 2015, Official Journal of the Laws, Item 1094, as amended.

3 groups: (1) offences related to the management of forests, fields and orchards, (2) offences related to the maintenance of cleanliness and (3) offences related to waters (e.g. the contamination of drinking water or the water to be supplied to animals – Article 109(1)). W. Radecki has noted a significant circumstance: whereas in the case of crimes the most important regulations can be found in the Criminal Code and they are only complemented with regulations in separate statutes, in the case of misdemeanours the situation is an opposite one, as the most important regulations can be found in several dozen statutes other than the Misdemeanour Code⁴¹.

d) Environmental protection in administrative law

The provisions of administrative law are of fundamental significance in environmental protection. Its richness in substantive terms is very large and this is not changed by the fact that the 2001 Act on Environmental Law discussed earlier plays a special role in Poland. A comparison of the Polish environmental law (treated as a thematic complex of statutes and acts of a lower rank which essentially make up administrative law) and e.g. German law shows many similarities. This results from both cultural and historical ties as well as – in more recent times – from the impact of European law. Its implementation requires the adoption of acts of legislation which must resemble each other in substantive terms.

However, despite the similarities there are also differences and some of them – perhaps not the most important ones in substantive terms – quite successfully conceal these similarities. This primarily results from the conceptual framework. In principle, in German law it is richer than in Polish law. For this reason the “mechanical” translation (i.e. a non-annotated one) of legal acts into the own national language induces (even when the translation is a correct one) a feeling of foreignness. It should also be pointed out that there are consequences of the differences in terms of the political system, as Poland is a unitary country; therefore, it does not have such a differentiation of legislative competence as the German *Grundgesetz* has.

There are also differences as regards the tradition of separating certain issues as the subject matter of separate statutes and also the use of certain specific instruments by the legislator. An example of the first type may be the German *Bundesimmissionschutzgesetz*. In Poland,

⁴¹ See W. Radecki, *op.cit.*, p. 434 et seq.

there is no statute which would be its faithful counterpart⁴² and an attempt to translate its title literally results in some embarrassment⁴³. Although related regulations can be found in the 2001 Act on Environmental Law, between these acts there are not so many similarities as e.g. between the German and Polish Acts on Nature Conservation or the Acts on Waste (ignoring the different solutions applied to organise the administrative apparatus and the characteristics of administrative proceedings).

As regards the specificity of legal instruments, e.g. it is possible to indicate the German *Planfeststellung* which has no counterpart in Poland. In turn, a feature of Polish environmental law is a large number of legal financial instruments, i.e. different types of charges for the use of the environment, covering both the cases of its legal use and those of the use with a violation of the requirements of law. The latter ones are sometimes collectively called “administrative fines” (at times they are called “administrative torts”). Due to terminological inconsistency, this concept should be treated here as a keyword and a shortcut. As already mentioned earlier, in Poland fines are considered to be manifestations of administrative liability, which is generically different from misdemeanours (when such concepts as the law of administrative sanctions are applied this difference is not so clear). In environmental law, the forms of administrative liability also include the withdrawal of a permit (or another decision intended to regulate the use of the environment), the stopping of the activity of an economic operator and different types of authorities’ orders (e.g. those requesting the installation of appropriate abatement equipment)⁴⁴. Still, fines play the most important role among the forms of this liability.

⁴² Perhaps this may result from the fact that environmental law in Germany has originated from industrial law, whereas in Poland it has rather arisen from nature conservation law. In turn, this may be related to the fact that in Poland in the post-war period the concept of industrial law became irrelevant because of the nationalisation of industry. The Polish literature mentions the modern idea of the Act of 1949 on Nature Conservation. It laid down the guidelines for a comprehensive state policy on the natural environment, it designated the authorities responsible for its implementation and created a procedural mechanism intended to ensure its implementation. However, it played no practical role since the policy of the then authorities – patterned on the Soviet model – focused on intensive industrialisation (this was the so-called heroic period of the construction of Socialism). See J. Jendrońska, M. Bar, *Prawo ochrony środowiska. Podręcznik (Environmental Law. A Handbook – in Polish)*, Wrocław 2005, p. 496 et seq.

⁴³ The term “imission” (written with one “m”) can only be found in the literature (the legal language) and is used to describe the legal concept of the standards for the quality of the elements of the environment. In turn, in the legal language (i.e. the language of legal acts), this term occurs in the provisions of civil law on so-called neighbourhood law, but then it is written with two “m” (i.e. “immission”).

⁴⁴ See A. Lipiński, *op. cit.*, p. 351 et seq.

In principle, administrative fines had appeared in Polish environmental law earlier than charges for legal use did. In environmental protection, they were first laid down in the regulations intended to protect waters (in the pilot Act of 1961 on Water Protection and then in the Act of 1962 on Water Law). The charges for the legal use of waters appeared only later: in the Act of 1974 on Water Law. That Act also established a special target fund to collect the proceeds from charges and fines. This concept was developed in the Act of 1981 on the Protection and Shaping of the Environment and then taken over by the present Act of 2001 on Environmental Law. In light of the collection of financial resources coming from charges (ordinary and so-called increased ones) and fines in target funds⁴⁵, it can be readily understood why the resources allocated to environmental protection in the Polish state budget seem to be so slight – simply, the burden of financing environmental protection has been shifted from the state budget onto the funds for environmental protection. If the situation were different it could not be ensured that these resources are not taken over by interest groups with greater political strength when the budget is designed.

The Act on Environmental Law provides for administrative fines for excessive pollutant emissions (i.e. for a violation of the conditions of a permit for the release of pollutants)⁴⁶. The amount of an administrative fine is a multiple rate of the charge for the legal use of the environment, which is expected to provide an incentive. Fines are imposed by the Provincial Inspector for Environmental Protection. In turn, for the use of the environment without any required permit at all (for the release of pollutants, including waste storage) a sanction is provided for in the form of an “increased charge” (also called a “sanction charge” in the literature). E.g. for the release of pollutants into the air without a permit, a base charge (i.e. the one imposed in the case of legal use) is increased by 500%. Both ordinary and increased charges are determined by users of the environment on their own in a procedure resembling that applied in establishing tax liabilities.

⁴⁵ The Funds for Environmental Protection and Water Management have a legal personality and operate at the central level (as the National Fund for Environmental Protection and Water Management, which is a state legal person) and in all the provinces (as the Provincial Funds for Environmental Protection and Water Management, which are self-government legal persons).

⁴⁶ But e.g. the Act on Nature Conservation provides for fines for the removal of trees and shrubs without a permit from the local government body.

However, special statutes include different modifications of this model of liability, also as regards the key concepts⁴⁷. E.g. the new Act of 2017 on Water Law gives up the concept of a fine and uses a single term “increased charge” for both situations, i.e. the use of waters (more specifically, the use of water services) with a violation of a permit and the use without a permit. Moreover, this Act changes the procedure for determining the charges for the legal use and for the use without a permit. It provides that the principle of so-called self-charging will be abandoned, as the amount of a charge is to be calculated by a newly established water administration body (Polish Waters) in a special procedure based on a combination of information and management. In turn, the Provincial Inspector for Environmental Protection will still continue to determine by way of a decision the amount of a charge for exceeding the conditions of a permit. In principle, the proceeds from these charges are divided between Polish Waters and the Funds for Environmental Protection and Water Management.

An expansion of fines can be seen not only in environmental law (and not only in Polish law). One of the monograph studies on these issues which was published in 2004 listed 49 statutes providing for the application of instruments of this type⁴⁸. Ever since the number of legal acts using administrative sanctions has grown at a disquieting rate. An increase in the number of fines often takes the form so-called conversion, i.e. the legislator transforms an act which is qualified as an offence or a misdemeanor into an act subject to an administrative fine (an administrative tort). It consists – in principle – in that the legislator most often repeals the provision of a statute which establishes a given offence or misdemeanor, but the description of the illegal act remains the same⁴⁹. The significance of the problem of administrative fines is also demonstrated by the fact that a new Chapter IA, entitled “Administrative Fines” (Articles 189a-189k) has been added to the Polish Administrative Procedure Code⁵⁰. Finally, it is important to mention Recommendation R (91)1 of the Committee of Ministers of the Council of Europe of 13 February 1991 on the concept and character of administrative sanctions and the range of their application. Its purpose was to halt the uncontrolled phe-

⁴⁷ See e.g. *Leksykon prawa ochrony środowiska (A Lexicon of Environmental Law – in Polish)* (J. Jendroška – Scientific Editor), Warsaw 2012, p. 15 et seq.

⁴⁸ See D. Szumiło-Kulczycka, *Prawo administracyjno-karne (The Law of Administrative Sanctions – in Polish)*, Zakamycze 2004, pp. 119-136.

⁴⁹ See D. Danecka, *Konwersja odpowiedzialności karnej w odpowiedzialność administracyjną w prawie polskim (The Conversion of Criminal Liability into Administrative Liability in Polish Law – in Polish)*, Warsaw 2018, p. 175 et seq.

⁵⁰ The consolidated text of 2017, Official Journal of the Laws, Item 1257.

nomenon of the propagation of administrative sanctions by establishing the principles of their application.

II. The Courts and the Idea of Justice

3. Controversies concerning the notion of “the administration of justice”

In the Polish Constitution, the administration of justice is only entrusted to courts which are listed in a closed catalogue laid down in Article 175(1). They include: the Supreme Court (hereinafter referred to as the SC), the common courts, the administrative courts and the military courts. Only these courts are part of the system of authorities designated to rule in individual cases and “to administer justice”, whereas the Constitutional Tribunal (hereinafter referred to as the CT) and the State Tribunal (ST) constitute a separate segment of the judicial power⁵¹.

This fragmentation of the judicial power is a cause of discomfort, as it complicates the performance of research. Intuition, which draws on timeless notions of the pursuit of justice, strengthens the conviction about the inseparable bond of justice and courts. However, to some extent, this is relativised by the indications of the Constitution and these differences are emphasised even further by the provisions of statutes.

The fact remains that the two tribunals indicated above must be treated separately, since they do not administer justice within its the strict meaning. On the other hand, it should be noted that citizens are not at all deprived of access to the CT. The constitutional appeal (Article 79(1) of the Constitution of the Republic of Poland) provides everyone with the possibility of defending their constitutional freedoms or rights which have been infringed as the result of a ruling of a court or a public administration authority, based on an unconstitutional regulation of the statutory rank or another normative act. In practice, constitutional appeals against administrative fines are most often related to environmental protection. The fact that under the doctrinal approach this is not related to the administration of justice in objective terms is not of any larger practical significance. In the context of environmental protection, the rulings of the CT examining compliance of normative acts and international agreements with the Constitution turn out to be equally important; still, they are initiated in a

⁵¹ R. Hauser, K. Celińska-Grzegorzczak, *Sądy administracyjne a system sądownictwa powszechnego (Administrative Courts and the System of Common Courts – in Polish)*, p. 100, [in:] *Sądowa kontrola administracji. System Prawa Administracyjnego (The Judicial Control of the Administration. The Administrative Law System – in Polish)*, Vol. 10 (R. Hauser, Z. Niewiadomski, A. Wróbel (Eds.)), Warsaw 2014 – and the references cited there.

different procedure than in response to an individual constitutional appeal. Indeed, the problems are of a deeper nature, since – given that even among the courts which implement “the administration of justice”, i.e. the courts within the meaning of Article 175(1) – the use of this term comes across some difficulties. Namely, there is a doubt as to whether the administrative courts also administer justice. The answer depends on whether one uses the subjective or objective meaning of this concept.

In the opinion of J. Zimmermann, the subjective aspect of the norm laid down in Article 175(1) is “clear and legible and can be reduced to the statement that since the court has been called an “authority of the administration of justice” hence its activity is ‘the administration of justice’”. In turn, the assessment in subjective terms will be different if the doctrinal concept of “the administration of justice” is used. Indeed, it means an activity consisting in the resolution of situations at issue, which emerge under the applicable legal norms by an entity, which is not a party to the dispute and resolves these situations using the state coercion⁵². In the opinion of J. Zimmermann, the administrative courts do not resolve such disputes. Moreover, it follows from Article 1(1) of the Act of 25.07.2002 on the Law of the System of Administrative Courts⁵³ that the administrative courts implement the administration of justice by controlling the activities of the public administration. In light of this, the question arises as to whether such control may be considered, in general, as one of the activities, which constitute “the administration of justice”. J. Zimmermann says “no” to this question, too. He says that both of these circumstances presented here (i.e. the absence of a dispute in the strict sense and the exercise of administrative control) prevent this type of activities of the administrative court from being identified as the administration of justice in objective terms⁵⁴. Other authors have similar views. E.g. L. Leszczyński notes that if justice is understood to mean judges’ reasoning which allows for “some type of a public correction to arguments *stricti iuris*”, which bring it closer, in effect, to law-making by courts, then the court-exercised model of control over the administration, based on the legality criterion,

⁵² At this point, J. Zimmermann refers to the view put forth by J. Naleziński in *Prawo konstytucyjne RP (The Constitutional Law of the Republic of Poland – in Polish)*, P. Sarnecki (Ed.), Warsaw 2002, p. 330. Similar comments were made by S. Sagan in *Prawo konstytucyjne (The Constitutional Law – in Polish)*, Warsaw 2003, p. 192. He notes, however, that by complementing the definition of the administration of justice with conflicts relating to relationships in the scope of administrative law it is possible to understand this concept more broadly, where it assumes the form of the so-called administration of justice in a broad definition (*sensu largo*).

⁵³ The consolidated text in the Official Journal of the Laws of 2017, Item 2188.

⁵⁴ J. Zimmermann, *op. cit.*, p. 367 et seq.

will be subject to certain constraints⁵⁵. These ensue from the manner of understanding legality under the civil law system of statutory law, from a limited range of court-exercised control, which fails to include the independent determination of the facts of the case, and from the jurisdiction of the administrative type of the application of law, taking into account “the autonomy of administrative policy in terms of its content”⁵⁶.

The CT has also pointed out the doctrinal absence of a uniform definition of the concept of “the administration of justice”. In its ruling of 13.03.1996,⁵⁷ it cited the most frequently formulated view, according to which “the administration of justice is one of the essential functions of each state and consists in specifying and implementing the statutes and legal norms which have been established or recognised by the state in individual cases by way of special procedures of state authorities designated to carry out these activities (...). Therefore, the main function of the administration of justice is the application of law and its characteristics are determined by the model of the application of law by the courts which has been adopted in a given state”. In its judgment of 8.12.1998⁵⁸, it elaborated this strand : “In the doctrine, the view dominates that the notion of ‘the administration of justice’ should be understood in objective terms as an activity consisting in resolving conflicts rather than in subjective terms as an exclusive competence of judicial authorities”. However, referring to Article 175 of the Constitution, the CT noted that the resolution of disputes concerning rights might even be entrusted to non-state authorities. If the courts themselves do not resolve legal conflicts, then, at least in the sphere of the administration of justice, they exercise control over the case-law of quasi-judicial authorities. Therefore, the implementation of the judicial power by the constitutional authorities which act within the monopoly of state power and make judgments on behalf of the Republic of Poland (Article 174) is of key importance. Although in its statement the CT places emphasis on the notion of “court” rather than on the notion of “administration of justice”, nevertheless the manner in which they are considered togeth-

⁵⁵ L. Leszczyński, *Spółeczny kontekst prawa - ujęcie teoretycznoprawne a praktyka stosowania prawa i sądowej kontroli administracji (The Social Context of Law – the Theoretical Approach and the Practice of the Application of Law and the Control of the Administration Exercised by the Courts - in Polish)*, Zeszyty Naukowe Sądownictwa Administracyjnego, 2012, No. 3, p. 45 et seq.

⁵⁶ Ibidem, p. 46.

⁵⁷ File No. K. 11/95.

⁵⁸ File No. K 41/97, Official Journal of the Laws of 1998, No. 158, Item 1043.

er⁵⁹ seems to indicate that the CT does not exclude the activities of the administrative courts from the scope of the notion of “administration of justice”.

The activities of the administrative courts are not limited only to the administration of justice by controlling the activities of the public administration in individual cases (here, the resolution of disputes concerning competence and jurisdiction is of lesser importance), i.e. the situations where the key criterion of control is compliance of authorities’ action or inaction with law⁶⁰. The application of environmental law also produces specific problems, which need to be solved in other forms and procedures than those, used to resolve an individual case. In such cases, resolutions of an abstract nature may be adopted by the Supreme Administrative Court (SAC) in order to clarify legal regulations the application of which has produced discrepancies in the case-law of the administrative courts (Article 15(1)(2) of the Act of 30.08.2002 on the Law of the Proceedings Before the Administrative Courts (hereinafter referred to as the PBAC)⁶¹. However, the SAC may also adopt such resolutions which resolve legal issues giving rise to serious doubts in a specific administrative case (Article 15(1)(3)).

Another question arises as to whether such resolutions should also be considered part of ruling activities. In the opinion of J. Zimmermann, this is a non-ruling activity⁶². A. Skoczylas believes that they are not court rulings in normative terms, since Chapter 10 in Title III of the PBAC, entitled “Judicial rulings” only concerns judgments and decisions of the administrative courts. In his view, a SAC resolution “is a specific type of ruling which resolves questions of law in an incidental proceeding at the administrative court”⁶³. In turn, J. P. Tarno assigns both types of resolutions (abstract and specific) to a third type of “judicial rulings” of the administrative courts, in addition to judgments and orders⁶⁴.

Moreover, it should be noted that the previous idea of the review exercised by the administrative courts partly changed as a result of the amendments made to the Law of the Pro-

⁵⁹ Expressed in the words: “Article 175 of the Constitution confers a narrow meaning applicable to authorities which operate within the judicial power and implement the administration of justice”.

⁶⁰ J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz (The Law of the Proceedings Before the Administrative Courts. A Commentary- in Polish)*, Warsaw 2004, p. 14.

⁶¹ The consolidated text in the Official Journal of the Laws of 2017, Item 1369.

⁶² J. Zimmermann, *op. cit.*, s. 393. Similar conclusions were drawn by R. A. Stefański regarding resolutions of the Supreme Court, see *Institucja pytań prawnych do Sądu Najwyższego w sprawach karnych (The Institution of Questions of Law Addressed to the Supreme Court in Criminal Cases – in Polish)*, Kraków 2001.

⁶³ A. Skoczylas, *op. cit.*, p. 709 et seq.

⁶⁴ J.P. Tarno, *op. cit.*, p. 342.

ceedings Before the Administrative Courts by the Amending Act of 9.04.2015 r.⁶⁵. T. Grossmann predicts that they may result in significant strengthening of the impact of the administrative courts, also including the content of decisions adopted by administration authorities in individual cases⁶⁶.

For the purposes of the present research a broad understanding of case-law has been adopted. In accordance with it, this notion includes the whole of statements made as part of each proceedings by the courts and tribunals (thus, not only in the current instance), which exercise together the judicial power within the meaning of Article 173 of the Constitution⁶⁷.

4. The judicial power and the idea of justice

The legal characteristics of the idea of justice are not uniform. Certainly, it cannot be reduced to the mindset of a learned jurist. It cannot be obtained, either, by averaging the views of different social groups. The authors who write about it usually refer to the centuries long achievements of ethics and law theory. Anyway, justice as an ethical good is distinguished from justice conceived as a principle governing an exchange of goods or the allocation of goods and burdens⁶⁸. The other approach refers to the view of Aristotle who distinguished, *inter alia*, among legal, distributive and corrective justice, creating a conceptual scheme to which contemporary scholars also refer⁶⁹.

The differences in the ways in which the idea of justice is understood in legal terms also manifest themselves depending on whether a given process makes or applies law⁷⁰. There is no doubt that this idea (along with the idea of the rule of law) creates the foundation for axiological requirements on which statutory law must be based. In turn, when justice is

⁶⁵ Official Journal of the Laws, Item 658.

⁶⁶This concerns the introduction of limited elements of substantive ruling into the procedure of the administrative courts. See T. Grossmann, *Jak sąd administracyjny został organem ochrony środowiska (uwagi na tle art. 145 par. 3 a art. 145a p.p.s.a (How the Administrative Court Has Become an Environmental Authority (Comments Against the Background of Article 145(3) vs Article 145a of the PBAC – in Polish), [in]: Wybrane problemy prawa ochrony środowiska w orzecznictwie (Selected Problems of Environmental Law in Case-law – in Polish)* (Scientific Editor: J. Rotko), Wrocław 2015, p. 145 et seq. For obvious reasons this issue could not be addressed in the course of the research reported on here.

⁶⁷ With the content: “The courts and tribunals shall constitute a separate power and shall be independent of other branches of power”.

⁶⁸ T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa (An Introduction to Jurisprudence – in Polish)*, Warsaw 2003, s. 225 et seq.

⁶⁹ Tamże; także S. Ktacz, *Rozumienie sprawiedliwości w orzecznictwie TK (The Meaning of Justice in the CT Case-law- in Polish)*, Katowice 2003, p. 7 et seq.

⁷⁰ T. Stawecki, P. Winczorek, *op. cit.*, p. 229.

placed in the context of “the administration of justice” this primarily highlights the feature of sentencing, “consisting in the issue of rulings compliant with legal norms by the courts”. In a slightly broader context, this approach assumes the form of “procedural justice”⁷¹.

Both aspects (justice as a feature of statutory law and as the appropriateness of sentencing) can be discerned in interpretations of Article 2 of the Constitution which provides that “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”. Thus, such justice is a general objective of the rule of law and is also manifested in everyone’s right to a fair and public consideration of his/her case in a reasonable period of time by an independent and impartial court⁷².

As noted by L. Leszczyński, it is exactly the constitutional criterion of social justice that plays a key role in the legal system, since it guides all the processes of the application of law. Above all, it goes beyond the “legality-based” formula of justice (to everyone his/her due in accordance with law), as a result of which its content can be related “to some value outside the system”⁷³. This opens the way for justice to be recognised as a “super-norm”⁷⁴.

On the other hand, there are attempts to “unseal” the positivist notion of legality, e.g. with the theories of so-called moderate positivism or even non-positivism. This involves their incorporation of the criterion of “fair legality”, which, in the opinion of W. Jakimowicz, may resolve the dilemma of how the administrative courts should discharge their duty of implementing the administration of justice by controlling the public administration⁷⁵.

It seems that a similar trend can be seen in the interpretations of the idea of justice which are now present in the case-law of the Supreme Administrative Court (S AC). The judgment

⁷¹ Ibidem, p. 229.

⁷² J. Boć (Ed.), *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r. (The Constitutions of the Republic of Poland and a Commentary on the 1977 Constitution of the Republic of Poland – in Polish)*, ..., pp. 18, 275 et seq.

⁷³ L. Leszczyński, *Interpretacyjna rola kryteriów otwartych i innych decyzji stosowania prawa (The Interpretative Role of Open Criteria and Other Decisions Related to the Application of Law – in Polish)*, p. 322, [in:] L. Leszczyński, B. Wojciechowski, M. Zirk - Sadowski, *Wykładnia w prawie administracyjnym. System Prawa Administracyjnego (Interpretation in Administrative Law. The Administrative Law System – in Polish)* (R. Hauser, Z. Niewiadomski, A. Wróbel – Eds.), Vol. 4, Warsaw 2012.

⁷⁴ In the context of tax justice, this was pointed out by A. Gomułowicz. See *Aspekt prawotwórczy sądownictwa administracyjnego (The Lawmaking Aspect of the Administrative Courts – in Polish)*, Warsaw 2008, p. 121 et seq.

⁷⁵ W. Jakimowicz, *Wykładnia w prawie administracyjnym (Interpretation in Administrative Law – in Polish)*, ZAKAMYCZE 2006, pp. 24 -27.

of 20.03.2012⁷⁶ contained, *inter alia*, the following words: "The SAC also holds the position that the role of the Provincial Administrative Court (PAC), just as that of any other administrative court, is – pursuant to Article 1(1) of the Act on the System of the Administrative Courts – the implementation of the administration of justice, i.e. the resolution of disputes concerning the law, ensuring 'a fair and legitimate proceeding'". This fragment of the justification of the judgment includes a reference to the entry "sprawiedliwość" ("justice"), featured in the Internet-based edition of the PWN Dictionary of the Polish Language.

A reference to the idea of justice is also present among the grounds for rulings by the administrative courts, with particular intensity in tax cases, relating to the principle of tax justice⁷⁷. The question arises as to whether these views can be applied to the issues regulated in environmental law. Certainly, in a certain range they can, given e.g. that an extensive system of public tributes is one of the features of Polish environmental law. For this reason the issues related to fees, increased fees and administrative fines for the use of the environment are always present in the case-law.

Justice (in particular, the so-called distributive justice) should also turn out to be a basis for defining the rules of access to the environment. The idea of justice as a significant ground for sentencing may also be discerned in those cases considered by courts (including the administrative courts) that involve a strong ethical context. Here, conflicts related e.g. to the humanitarian protection of animals should be indicated.

The above characterisation of "justice" as the appropriateness of sentencing, "consisting in the pronouncement of rulings compliant with legal norms by courts" (thus, in its narrower meaning), draws one's attention to another problem related to the public perception of rulings, particularly those of the administrative courts. This is the duality of the subject matter of defence. J. Zimmermann points out that the possibility of appealing is based on other grounds than those that provide the basis for repealing or annulling an administrative act in response to that appeal. At the stage where a decision is contested the subject matter of defence is indicated in subjective terms by making use of the construction of a (subjective) "legal interest". In contrast, at the sentencing stage, it is the "objective" legal order that is protected. As a result, "this duality poses practical difficulties since appellants who base their action on subjective grounds find out at the conclusion of the court proceedings that

⁷⁶ File No. II OSK 10/11.

⁷⁷ A. Gomułowicz, *op. cit.*, p. 8 and the references cited there.

their appeal has been considered on the basis of objective criteria, which may fail to coincide with their expectations”⁷⁸.

5. The courts in the public opinion

The functioning of the state is subject to continuous control. The executive power, particularly the government and self-government administrations, is subject thereto to the widest extent and using most diversified forms. As a rule, the control functions are carried out by a specialized state apparatus, although there is also public control which is exercised directly by citizens themselves⁷⁹.

In turn, the judicial power finds itself in a special situation, given the constitutional guarantees for judges’ independence. Article 178(1) provides that when they exercise their office, judges are independent and subject only to the Constitution and statutes. Indeed, in the period covered by the research the supervision over the courts by public administration authorities was limited to their administrative activities. There was no external official control of rulings. In turn, there was and still is in place a form of internal control of rulings adopted, consisting in the possibility of contesting judgments and decisions in the current instance, but it is subject to many constraints. Against the background of the model of independence of the judicial power which has thus developed (primarily with respect to non-judicial authorities and institutions and political actors⁸⁰), public control began to play its role. For many years the judicial power in Poland enjoyed substantive public respect. In the first decade of the present century, it began to weaken and this process took at times the form of an open criticism of courts which was expressed using the mass media. Usually, such media-based attacks targeted the common courts; but e.g. the practice of the parties’ loudly commenting on the judgments pronounced (inspired by an aggressive media-based criticism) began to appear even at hearings before the SAC.

This was a relatively new phenomenon, at least on this scale, which was used in a political struggle. However, the research has confirmed that the scale of errors made by the courts is substantial. It is claimed that as many as 250 persons may be wrongfully convicted annually.

⁷⁸ J. Zimmermann, *op. cit.*, p. 377 et seq.

⁷⁹ *Ibidem*, p. 421.

⁸⁰ W. Sawczyn, *Konstytucyjne podstawy sądownictwa administracyjnego (The Constitutional Basis for the Administrative Courts - in Polish)*, p. (nb. 33) and the references cited there, [in:] *Sądowa kontrola administracji. System Prawa Administracyjnego (The Judicial Control of the Administration. The Administrative Law System – in Polish)* (R. Hauser, Z. Niewiadomski, A. Wróbel – Eds.), Vol. 10, Warsaw, 2014.

Politicians took advantage of this, calling for constraints on the sovereignty of courts. They began to call for expanding the inspection powers of the Minister of Justice, restoring the institution of extraordinary appeal and even – in the extreme version – the annulment of the constitutional guarantees, e.g. in the form of “the presidential cassation”⁸¹. The tendency to politicise the judicial power which has been induced by this public criticism poses a real threat to the idea of judges’ independence⁸².

Neglecting this political ferment, it should be said that this problem really existed and required a robust diagnosis. A professional discussion on this subject went beyond the contents of scientific publications and also entered the legal journalism. It was addressed, in particular, by E. Łętowska. Looking for the origins of the problems, she attempted to restore the legal reasoning which resulted in controversial judgments⁸³. She demonstrated primarily that the technique of seeking a justification for a court ruling was defective, meaning that in most cases “wrong” judgements (those that were not accepted by the public, either) were caused by errors committed at the stage of the interpretation of law. The whole of “About the Opera and Law”, a book she has published (as one of the co-authors) is largely such a call for rejecting the dogma which destroys the respect for courts that “the text is only the written word”. She put it in the following way: “for those dogmatists common sense, the consistency of the legal system, finally, simple logic must perish if they are contradicted by the verbal interpretation of a text”. The Polish case-law still continues to be governed by “text and literalness” rather than “meaning and context”⁸⁴.

Similar conclusions were drawn by T.T. Koncewicz, who emphasised that judges could be either “true dispensers of justice” or “thoughtless executors of the rigid letter of law”. If the mass media present critical opinions about the administration of justice, it is exactly because

⁸¹ E. Siedlecka, *Sprawiedliwość nadzwyczajna a la PiS (The Extraordinary Justice in the PiS Style – in Polish)*, *Gazeta Wyborcza* of 6.06.2015, the text at : http://wyborcza.pl/1,75968,18056591,Sprawiedliwosc_nadzwyczajna_a_la_PiS.html#ixzz3cIMSHI40.

⁸² The Act of 8.12.2017 on the Supreme Court (Official Journal of the Laws of 2018, Item 5) includes a provision allowing for an extraordinary appeal against a final ruling of a common court or a military court which concludes the proceeding in a case. It may be brought (pursuant to Article 89) by the Attorney General, the Commissioner for Human Rights and, within their competence, the President of the General Counsel to the Republic of Poland, the Ombudsman for Children, the Patients Ombudsman, the President of the Financial Supervision Authority, the Financial Ombudsman and the President of the Office of Competition and Consumer Protection.

⁸³ E. Siedlecka, *Łętowska chce zrozumieć sąd (Łętowska Wants to Understand the Court – in Polish)*, *Gazeta Wyborcza* of 24.08.2015, the text at: <http://wyborcza.pl/1,75478,18616074,letowska-chce-zrozumiecsad.html#ixzz3jjE2nFyw>.

⁸⁴ E. Łętowska, K. Pawłowski, *O operze i o prawie (About the Opera and Law – in Polish)*, Warsaw 2014, p. 19.

for the most part the Polish courts still continue to be courts of legal provisions rather than courts of law⁸⁵.

This entails the issue of the extrajudicial role of the court justification. This is a phenomenon which E. Łętowska called “democratisation” of the external function of a justification. “What the courts do becomes in a self-evident way an element of the democratic discourse. The public seeks to take part – through the media”⁸⁶. She recalled, *inter alia*, a fragment of the SC ruling of 16.02.1994⁸⁷, which discerned the importance of this aspect, emphasising that for this reason the notion of “the administration of justice” gained additional significance. Indeed, it is important to ensure that “it is clear and doubtless for everyone that a proceeding before a court has resulted in the resolution that is the most right and best complies with the law. One of the means of achieving this objective is an exhaustive and comprehensive (in both substantive and legal terms) justification of the ruling; particularly so when (...) there are divergent interests of the parties and the resolution must choose one of these interests over the other”.

The above reflections and conclusions were also important for the direction of the research which was carried out because they strengthened the Authors’ conviction that what substantively bonded the ruling activities of tribunals and courts was the idea of justice and that it was impossible to abstract from its practical implementation. This practical strand turned out to be of key importance for the public assessment of the role of the judicial power in the state and affected the assessment of the whole system of the public authorities and the citizens’ identification with the state. For this reason an analysis of the case-law related to environmental protection also had to take into account the aspect of the interpretation techniques and legal reasoning applied, since they determine to a large extent whether the Polish court will be “the court of law” or “the court of legal provisions”.

6. Initial assumptions and research questions

It was recognised that it was impossible for the analysis to cover the entire activities of the tribunals and courts which were related to environmental protection. This was determined

⁸⁵ T. T. Koncewicz, *Sądzie, sądz* (*The Court Should Judge – in Polish*), *Polityka* No. 50 (2887), p. 24 et seq.

⁸⁶ E. Łętowska, *Pozaprosesowe znaczenie uzasadnienia sądowego* (*The Extrajudicial Significance of the Court Justification – in Polish*), *Państwo i Prawo* 1997, No. 5, p. 8.

⁸⁷ File No. III AZP 2/94.

by the scarce resources of the research team⁸⁸ and other circumstances: the huge amounts of the materials thus collected and also difficulties with reaching the rulings of common courts in criminal and civil cases.

A selective choice of judgments, orders and resolutions was accepted. Each of the Authors decided on his/her own on the detailed scope of research within the frame of the project, accepting the consequences of the adoption of such an assumption, following the principle that the choice of rulings was the Author's right but also his/her risk⁸⁹. Taking these limitations into account, it was recognised that a factor which would unify the research should be the consistency of research objectives, motifs and criteria. They were combined in three groups of questions.

The first group included questions related to the general characteristics of the case-law and the role of courts: What was the intensity of the presence of cases of environmental protection in the activities of tribunals and courts? To what extent did the case-law contribute to the unification of the application of law? Did the effects of these activities affect the creation of new law?

The questions in the second group addressed the manner in which the contents of rulings were decided and took into account, *inter alia*, the issues of the lawmaking role of rulings. Did judges demonstrate their lawmaking role and how? To what extent had the theses formulated in the case-law in the field of environmental protection a precedent-setting character? Which types of interpretation were preferred by tribunals and courts?

The questions in the third group were concerned with the depth of the ruling activities, gauged by references to selected components of the system of environmental law⁹⁰: Did tribunals and courts recognise the role of general principles of environmental law? Did tribunals and courts take into account the provisions of European law?

⁸⁸ Initially, there were 5 persons in the team (B. Draniewicz, A. Habuda, J. Jerzmański, W. Radecki and J. Rotko), while at the end of July 2015 another two persons joined the team. They were: M. Baran and B. Iwańska.

⁸⁹ As W. Radecki did in his work: *Ochrona środowiska w orzecznictwie ... (Environmental Protection in the Case-law ... – in Polish)*, Warsaw , p. 13.

⁹⁰ The notion of the depth of the case-law is not precise. J. Zimmermann used it with a different meaning when he mentioned the need for the court to examine the whole sequence of decisions preceding the one which was contested. See J. Zimmermann, *op. cit.*, p. 403.

III. The research results

7. Environmental protection in the CT case-law

Although the Constitutional Court is not listed as part of the administration of justice in Article 175(1) of the Constitution, it plays a universal role within the judicial power⁹¹. In the context analysed here, its basic task is the consolidation of environmental law within the limits of the constitutional system of values. This role is particularly manifested in those judgments where the CT makes reference to the principles of the political system. The aspect of the implementation of traditionally conceived justice is most conspicuous in the consideration of constitutional complaints.

Analyses to determine the importance of the CT case-law for environmental protection were performed as part of the research considering a variety of aspects: at times they accompanied research on the case-law of the administrative courts (particularly when B. Draniewicz addressed the case-law on public tributes in environmental protection), but also when the role of the general principles of environmental law was examined. When undertaking this task W. Radecki selected 17 CT judgments and divided them into 3 groups. The first group consisted of rulings where the CT directly referred to the constitutional or statutory principles of environmental law. In the second group, there were those in which the CT analysed the general principles of the political system, but did it against the background of regulations considered part of environmental law. In the third group, he placed rulings which could not be qualified unambiguously.

The comments made in these judgments confirm the pragmatic approach of the CT to the importance of environmental protection. In particular, it is interesting to note its statements concerning the principle of sustainable development. Considering the CT judgment of 6.06.2006 on road investment projects (File No. K 23/05) W. Radecki highlights those strands of its justification from which it followed that environmental protection was a constitutional value, but only one of many. Thus, the CT is clearly against the absolutisation of environmental protection. Indeed, under the principle of sustainable development it is necessary to take into account and appropriately balance different constitutional values. As a result, it may

⁹¹ In this Article (but also in its other provisions), the Constitution uses the conjunction-based term “courts and tribunals”.

turn out that this balancing of interests would also justify a departure from the rules of environmental protection.

This does not change the basic assessment expressed in the CT judgment of 28.11.2013 (File No. K 17/12), which provided that the objective of the Polish state, as laid down in Article 5 of the Constitution, was to “ensure environmental protection”. This is the only constitutional provision in Chapter I of the Constitution which refers to the environment, thus conferring a special rank thereto. As a principle of the political system, it constitutes a requirement for a more comprehensive action than the directive laid down in Article 74 of the Constitution that state policy should ensure the environmental security of the present and future generations. Therefore, Article 5 of the Constitution should be regarded as a source of the duties of public authorities in the scope of environmental protection, whereas the other provisions in this field (laid down in Part II of the Constitution) have a wider range of addressees as they include both public authorities (Article 74 of the Constitution) and entities other than public authorities (Article 86 of the Constitution).

Another judgment discussed by W. Radecki is the judgment of 13.05.2009 (File No. Kp 2/09) on landscape parks. In the judgment, the CT formulated two conclusions, which also referred to the problems raised in the relevant literature: firstly, it recognised that nature conservation was part of environmental protection; secondly, it clearly rejected the concept that the subjective right to a life in an unpolluted environment could be derived from the purposive norms of Article 5 and Article 74(1)-(2) of the Constitution.

Interesting, but unequivocally assessed statements were made in the judgment of 1.07.2014 (File No. SK 6/12) on fines for the removal of trees and shrubs without the required permit. The subject matter of this case was the determination whether Articles 88(1)(2) and Article 89(1) of Act of 16.04.2004 on Nature Conservation⁹² were consistent with Article 64(1) and (3), in conjunction with Article 31(3), of the Constitution.

In general, the CT found that in the case of the charge of a violation of the proportionality principle in relation to the limitation of the ownership right, Article 31(3) of the Constitution should play a primary role, whereas Article 64(3) of the Constitution should be treated as a constitutional confirmation of the general admissibility of limitations of this right. Therefore, Article 31(3) was not *lex specialis* with respect to Article 64(3), nor *vice versa*. The exceeding

⁹² The consolidated text of 2018, Item 142, as amended.

of the proportionality limits of intervention and a violation of Article 31(3) caused, at the same time, a breach of the general guarantee of the protection of the ownership right (Article 64(1)). Addressing the basic charge of the complainants, the CT found that Article 88(1)(2) and Article 89(1) of the Act on Nature Conservation did not meet the proportionality requirement *sensu stricto*. This was so not only in light of the fact that they provided for the principle of responsibility for a violation of a basic duty as a purely objective responsibility, but also in light of the scale of repressiveness in the determination of the size of an administrative fine. This judgment was passed not unanimously. In the opinion of W. Radecki, it is not easy to assess it. Still, he emphasises that the CT did not question either the purposefulness or the necessity of enforcing the responsibility for the removal of trees and shrubs without the required permit. However, the CT was right to contest the impossibility whatsoever of taking into account the individual circumstances of each case.

The issue of the assessment of the admissibility of interference with the ownership right was also addressed in the CT judgment of the 10.07.2014 (File No. P 19/13) concerning the division of the territory of the state into hunting districts. A legal question which the Supreme Administrative Court addressed to the Constitutional Tribunal (CT) questioned the norm of Article 26 and Article 27(1) of the Act of 13.10.1995 on the Hunting Law⁹³ in the scope where these provisions permitted the establishment of a hunting district encompassing a private property contrary to the will of the property owner. Referring to the earlier case-law the CT recalled that Article 31(3) of the Constitution established three premises for the limitations of the constitutional rights and freedoms: usefulness, necessity and proportionality *sensu stricto*. In the opinion of the Tribunal, Article 26 and Article 27(1) of the Hunting Law did not meet the third premise of proportionality *sensu stricto*. Describing these arguments W. Radecki emphasises that the CT did not question the whole of the Polish hunting model, although it contested its important part, i.e. the right to hunt on someone else's land. He also notes that the CT considered that the solutions adopted in the Hunting Law implemented environmental protection.

In the context of an assessment of environmental law in terms of the fundamental principles of the political system, W. Radecki cites and comments on 7 judgments. Here, some more attention should be paid to some of them. In the context of the principle of equality

⁹³ The consolidated text of 2017, Item 1295, as amended.

(Article 32(1) of the Constitution) and the principle of equal legal protection of property rights (Article 64(2) of the Constitution), he discusses, *inter alia*, 2 judgments concerning damage done by animals covered by species-specific protection, i.e. by beavers (the CT judgment of 3.07.2013, File No. P 49/11) and by European bison, wolves, lynxes and bears (the CT judgment of 21.07.2014, File No. K 36/13). In its first judgment, the CT ruled that Article 126(1) (5) of the Act on Nature Conservation was inconsistent with Article 32(1) and Article 64(2) of the Constitution of the Republic of Poland to the extent where it limited the responsibility of the State Treasury for damage done by beavers solely to the damage arising at an agricultural holding, forest holding or fish farm. The Tribunal issued a similar ruling in its other judgment, which is not surprising, given that the constitutional problem was the same.

In evaluating these two judgments, W. Radecki notes that although the CT primarily dealt with the constitutional principles of equality and equal legal protection of ownership and other property rights for everyone, it also recognised the importance of the species-specific protection of animals for the assessment of the problem. In both of its rulings, the CT emphasised that the differentiation under Article 126(1) of the Act on Nature Conservation was not directly related to the objective and essential content of the regulations on nature conservation. The depriving of some part of entities of the right to seek damages might have an adverse effect on the implementation of species-specific protection. It reduced the level of acceptance in respect of bans under the Act and might induce actions against the protected species so as to thus prevent damage from arising. W. Radecki also recalls the CT comment that the identified defectiveness of norms did not mean that the only means of species-specific protection would have to be the payment of damages by the State Treasury. Not all the damage caused by a protected species was to be automatically compensated for by the State Treasury.

The group of judgments related to the fundamental principles of the political system also included repressive rulings on the rules of responsibility, i.e. ones referring to the principles of criminal responsibility (Article 42 of the Constitution of the Republic of Poland) and the right to a court (Article 45(1) and Article 77(2) of the Constitution). The CT judgment of 7.07.2009 (File No. K 13/08) examined in terms of conformity to the Constitution the regulations on fines envisaged in the Act on Fisheries in effect then and the executive Regulation based on the Act. In the judgment, the CT ruled that the fines under Article 63(1)-(3) of this Act were

administrative penalties which did not fall within the system of criminal law. In light of this, their imposition by way of an administrative decision could not give rise to any objections in terms of constitutional law. Since administrative sanctions did not fall within the system of criminal law, they were not subject to the constitutional rules of criminal responsibility. However, it did not follow from this that the Constitution set no requirements for the regulations on administrative sanctions. The CT also recalled its earlier rulings which had provided that as a result of the adoption of the thesis that administrative sanctions did not fall within the system of criminal law they were not subject to the constitutional rules of criminal responsibility as expressed in Article 42 of the Constitution. It was only when a specific sanction was found to solely have the character of a criminal sanction that the obligation to apply the principles laid down in Article 42 of the Constitution arose.

Here, it is important to note 2 CT judgments on ritual slaughter. In the first judgment of 27.11.2012 (File No. U 4/12), the subject matter of the examination was primarily the relations between the Act and the executive Regulation rather than the very role of the principle of the humanitarian treatment of animals in its collision with the constitutional guarantee of the freedom of conscience and religion (Article 53(1) of the Constitution) and the related freedom of worship (Article 53(2)). These issues only appeared in the second judgment of 10.12.2014 (File No. K 52/13) which reviewed the application of the Union of Jewish Communities in Poland for an examination of compliance of the regulations excluding the possibility of a ritual slaughter.

The CT ruled that Article 34(1) of the Act of 21.08.1997 on the Protection of Animals⁹⁴ to the extent where it did not permit animal slaughter in an abattoir (slaughterhouse) using special methods required by religious rites was inconsistent with Article 53(1), (2) and (5) of the Constitution, in conjunction with Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This determined ipso facto the unconstitutional nature (in the scope reviewed) of the penal provisions of Article 35(1) and (4) of the Act on the Protection of Animals. In consequence, on the date of publication of the judgment in the Official Journal of the Laws it would become permissible to slaughter animals in a slaughterhouse (an abattoir) pursuant to Article 4(4) of Council Regulation (EC) No 1099/2009. When carried

⁹⁴ The consolidated text in the Official Journal of the Laws of 2017, Item 1840.

out in compliance with the relevant regulations ritual slaughter would not be subject to a criminal sanction.

W. Radecki recalls that the CT passed the judgement with the presence of 14 judges, with 7 of them dissenting (5 of them with regard to the judgment and 2 only with regard to its justification). Although none of the dissenting judges questioned the essence of the decision giving priority to religious considerations over the protection of animal welfare, still they presented objections of a different type. The point at issue was that the CT ruled in excess of the applicant's request and did not limit the authorisation of ritual slaughter only to meet the needs of religious communities in Poland, but in fact permitted the performance of ritual slaughter with the meat thus produced intended for exports. Although the CT assumed that the freedom of religious was not unrestricted, nevertheless in fact it treated it as an absolute freedom, which met with objections.

Commenting on this judgment, W. Radecki recalls the polemic opinions voiced in the literature, particularly the withering criticism expressed by E. Łętowska, who not only charged that the CT judges unnecessarily engaged in discussions on neurobiology, on the one hand, and on morality, on the other hand, but also that they ignored the European regulations. In her view, since Poland had notified the EC before 1.01.2013 that it applied a higher standard than the one laid down in Regulation (EC) No 1099/2009, then it was bound by the text of the Regulation, including the application of its Article 26 authorising a higher standard. This meant that in light of European law – in contrast to the CT position who held the opinion that Poland was bound by the Regulation without using the option offered by its Article 26 – ritual slaughter was absolutely prohibited and it was no longer possible to withdraw from the notification made in 2012. Considering only the relationships between the constitutional principle of environmental protection and other constitutional principles, W. Radecki concludes that at any rate, in light of this judgment, the protection of animal welfare, including the livestock meant to be slaughtered, is part of environmental protection. The judgement confirmed that the constitutional principle of environmental protection was less important than other constitutional principles, in this case the principles of the freedom to manifest one's religion.

8. The influence of the case-law of the CJEU on the implementation of environmental protection in Poland

The impacts of the Court of Justice of the European Union (hereinafter referred to as the CJEU) on the implementation of environmental protection have had a complex nature, also including their influence on the interpretation of the administrative courts⁹⁵. This issue was considered by B. Iwańska and M. Baran.

It was well-advised for the research to cover the activities of the CJEU in light of the unfolding Europeanisation of environmental law. In order to ensure the efficiency and effectiveness of the implementation of EU policy in the field of environmental protection (and also the other policies), the indispensable measures were provided for in the Treaty or laid down in the case-law of the Court. They include, *inter alia*, the settlement of complaints (in cases related to the transposition of a Directive, but not only), the procedure of prejudicial questions and also the principles of the application of EU law laid down in its case-law, to which B. Iwańska and M. Baran pay most attention.

In cases related to the transposition of a Directive, the national statutory law is influenced by the enforcement of the standards of the correct (in terms of both form and “quality”) and timely transposition of Directives, which sets the limits of the freedom of legislative implementation. The group of judgments which are concerned with these matters include rulings on intertemporal issues, as well as the substantive and formal requirements for legislative implementation. It is important to highlight the rulings cited by the Authors which demonstrate special requirements for the “quality” of the effected transposition of Directives, which apply not only when the provisions of a Directive aim at granting rights to individuals, but also when the norms of a Directive are intended to protect special values that are natural resources constituting a common heritage the management of which has been entrusted to Member States in relation to their respective territory (e.g. Case C-6/04, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*; Case C-192/11, *European Commission v Republic of Poland*, may be another example of this).

⁹⁵ This has been noted in the most recent national literature. See M. Zirk-Sadowski, *Wpływ orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na wykładnię sądów administracyjnych (The Influence of the Case-law of the Court of Justice of the European Union on the Interpretation by the Administrative Courts – in Polish)*, p. 368 et seq., [in:] *Wykładnia w prawie administracyjnym. System Prawa Administracyjnego (Interpretation in Administrative Law. The Administrative Law System – in Polish)*, Vol. 4, Warsaw 2012.

From the point of view of the influence of the case-law of the CJEU on the shape of national environmental law, in addition to judgments in cases related to the transposition of a Directive, those that allow the Commission's action against a Member State in respect of infringement of the EU law are also important. More often than not they result in the obligation to amend the national law. Although in this case the source of the obligation in question is the applicable correct EU regulation in the field of environmental protection, nevertheless where it is unambiguous some space emerges for the application of the method for exerting an extra-legislative influence on the national statutory law, which has been described in the Polish literature by N. Póttorak⁹⁶.

The institution of prejudicial questions and the dialogue between the national courts and the CJEU which is held as part of it are especially important. The Authors point out the significance of this institution in the context of the principle of a decentralised model of the application of EU environmental law, emphasising the legitimacy of the view that "the fundamental place for the application and enforcement of EU environmental law is the forum of the activities of national courts", which "are obliged to ensure the protection of individuals' rights pursuant to the EU law (the subjective approach) and also must ensure the full effectiveness of the norms of the EU legal order (the objective approach)"⁹⁷. The EU law assumes that national courts (the courts of Member States) are also EU courts in functional terms; this is indirectly confirmed by the provision of Article 19(1), third sentence, of the Treaty on the European Union (hereinafter referred to as the TEU) which provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

The significance of the prejudicial procedure can be seen, *inter alia*, in that by interpreting the unclear provisions of EU environmental law in response to questions posed by national courts the CJ sets out (and more often than not expands) the (objective, subjective and temporal) scope, mechanisms and rules of its application. Examples of this are the many CJEU

⁹⁶ N. Póttorak, *Europejskie kryteria, zasady, metody i formy wpływu na ustrój i funkcjonowanie administracji państw członkowskich, prawo administracyjne materialne i proceduralne państw członkowskich (European Criteria, Principles, Methods and Forms of Exerting Influence on the System and Functioning of the Administrations of Member States, Substantive and Procedural Administrative Law of Member States – in Polish)*, [in:] (R. Hauser, Z. Niewiadomski, A. Wróbel – Eds.), *System Prawa Administracyjnego (The Administrative Law System – in Polish)*. Vol. 3, *Europeizacja prawa administracyjnego (Europeanisation of Administrative Law – in Polish)*, Warsaw 2014.

⁹⁷ M. Baran, *Stosowanie z urzędu prawa Unii Europejskiej przez sądy krajowe (The Ex Officio Application of European Union Law by National Courts – in Polish)*, Warsaw 2014, pp. 31-32.

rulings on the institutions of: strategic environmental impact assessments (Directive 2001/42), individual environmental impact assessments (Directive 2011/92) and environmental impact assessments for Natura 2000 sites (Directive 92/43), in which the CJEU applied purposive interpretation, interpreted provisions in a manner which set out a wider scope of their application and interpreted more narrowly each exception or limitation (see e.g. C-473/14, *Dimos Kropias Attikis*; C-567/10, *Inter-Environnement Bruxelles and Others*; C-244/12, *Salzburger Flughafen GmbH*; C-295/10, *Genovaitė Valčiukienė*, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus*; C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*).

In response to requests for a preliminary ruling made by national courts, the case-law of the CJ shaped the fundamental features (principles) of EU law, such as: direct effect, supremacy, pro-Union interpretation and states' liability for damages. In the field of the environment, the above "ruling-related" principles, justified and derived from the principle of sincere cooperation (solidarity) (Article 4(3) of the TEU), provide important legal tools for protecting the objective legal order and ensuring the full effectiveness of the norms of that law in the national legal orders.

The Authors point out that the principle of pro-Union interpretation is of great practical importance in light of the character of the provisions of environmental law in which more often than not mechanisms of discretion and freedom of decision-making are introduced in the form of either vague concepts or general clauses. Pro-Union interpretation requires reference not only to the contents of relevant UE norms, but also to the manner of their interpretation which has been performed by the CJEU. In this context, it is important to point out that in interpreting the provisions of EU law, including EU environmental law, too, purposive and functional as well as systemic and axiological interpretations are important, whereas linguistic interpretation has not a dominant nature, given the factors limiting the use of interpretation of this type⁹⁸. It can be seen that purposive and functional interpretation is a method that is most characteristic of the interpretation of EU law. It helps fill in gaps in regulations, which can be seen especially when the CJEU formulates general principles or specifies the open criteria applied in the Treaties. This method also makes it possible for the case-

⁹⁸ A. Kalisz, *Wykładnia prawa Unii Europejskiej (Interpretation of European Union Law – in Polish)*, [in:] J. Barcz (Ed.) *Ustrój Unii Europejskiej (The Political System of the European Union – in Polish)*, Warsaw 2010, pp. III-126-127 and 133.

law to keep pace with the dynamic character of the Union”⁹⁹. This view has been confirmed by numerous rulings cited and discussed by B. Iwańska and M. Baran.

If it is impossible to apply pro-Union interpretation of the provisions of national law the national court has to consider the direct effect of a norm of UE law. In the context of this principle, it is necessary to emphasise not only the very fact of its formulation in the case-law of the CJEU, but also the direction of the evolution of the case-law in this area which expands a given concept. The idea is for the scope of this concept to encompass, firstly, unconditional and sufficiently precise norms, irrespective of whether they confer powers to individuals (C-287/98, *Linster*; C-72/95, *Kraaijeveld*; C-435/97, *WWF*); secondly, those provisions of EU environmental law that confer certain discretionary powers (C-244/12 *Salzburger Flughafen GmbH*); and, thirdly, the situation of incidental direct effect (C-201/02, *Wells*). In the field of environmental protection, for several reasons this is particularly important. Firstly, because in this case, in contrast to other fields, the norms of law (environmental law) essentially do not protect the interests of specific entities, but protect the environment (its individual components) as a common good; secondly, because the provisions of EU environmental law impose numerous public-law obligations, primarily on Member States; and, thirdly, because the provisions of EU environmental law often set the conditions for the exercise by Member States of the discretionary powers which have been granted to them.

The practical significance of the “ruling-related” principles of the application of EU law which the Authors describe (pro-Union interpretation, direct effect and primacy), included in the procedural “right of reference”¹⁰⁰, is demonstrated in the national (Polish) legal order in their application by national courts (primarily, the administrative courts). With regard to the provisions of Polish law which implement relevant environmental Directives (though not only), it is necessary to ensure not only the formal compliance of national law with the provisions of EU law, but also such application and interpretation of them which would ensure, at the same time, the practical and effective attainment of the objectives of the Directives in question, and in case of possible doubts their elimination using compliant interpretation¹⁰¹,

⁹⁹ *Ibidem*, p. III-135.

¹⁰⁰ For the essence of the “right of reference” see S. Prechal, L. Hancher, *Individual Environmental Rights: Conceptual Pollution in EU Environmental Law?*, *Yearbook of European Environmental Law*, Oxford 2002.

¹⁰¹ B. Iwańska, *Postępowanie w przedmiocie wydania „decyzji o środowiskowych uwarunkowaniach” - dylematy interpretacyjne (The Procedure to Issue a “Decision on the Environmental Conditions” – Interpretation Dilemmas – in Polish)*, [in:] M Bar, J. Jendroška (Eds.), *Wspólnotowe prawo ochrony środowiska i jego imple-*

direct effect and the principle of primacy. As an example, it is possible to indicate those rulings of the administrative courts whose arguments were expounded with compliant interpretation (e.g. the SAC judgment of 15.2.2011, File No. II OSK 328/10) or where – although to a much lesser extent – an effective norm of a Directive was taken into account directly (e.g. the SAC judgment of 25.9.2012, File No. II OSK 444/11).

9. Environmental protection in the case-law of common courts

For the reasons presented earlier, the case-law of common courts and the Supreme Court in civil and criminal cases was analysed to a relatively limited extent. The research confirmed that the most typical (classic) forms of the administration of justice, i.e. with rulings of common courts, met in the studies on environmental law with lesser interest than the case-law of the CT or the administrative courts did. There are two reasons for this. Firstly, environmental law consists for the most part of administrative-law norms. Secondly, only judgments and orders of the administrative courts are disseminated to the full extent via teleinformation networks, which makes it obviously easier to study them, whereas the case-law of common courts, in particular, those of lower instances, is more difficult to access and, hence, it has been explored to a lesser extent.

If the impact of this case-law on lawmaking and the related theoretical reflections is considered, particularly in a longer term, the conclusions are different. In Poland, a significant impact on the shape of contemporary environmental law and the accompanying theoretical concepts has been exerted to a major extent by the ruling activity of the Supreme Court (SN). The credit should go to it for creating the basic foundations for the civil-law institutions of this law and, to a slightly lesser extent, also for the criminal-law ones.

W. Radecki launched his case-law studies in this scope. He found that the SN issued its most important rulings still in the 1970s and 1980s. The indisputable achievements of that case-law include, in particular:

- a) making the civil liability for damages independent of the issue of compliance or failure to comply with environmental norms;
- b) developing the construction of an enhanced causal relationship between an impact on the environment and an effect in the form of damage to property or person;

mentacja w Polsce trzy lata po akcesji (Community Environmental Law and Its Implementation in Poland Three Years After Accession – in Polish), Wrocław 2008, p. 208.

- c) adopting the concept of remedying damage in economic terms and confirming the possibility of using a civil-law institution of the protection of personal goods in environmental protection, too.

W. Radecki notes that the legislator drew on these case-law achievements when it introduced civil-law provisions in Articles 322-328 of the Act of 27.04.2001 on Environmental Law¹⁰² ((hereinafter referred to as the AEL). The basic advantage of the applicable provisions is the unambiguous statement that the provisions of the Act of 23.04.1964 on the Civil Code,¹⁰³ along with the modifications introduced by the AEL, apply to the liability for damage caused by an impact on the environment. It should be emphasised that these modifications were made exactly as a result of the achievements of the case-law and the legal literature, against the background of both the provisions of the civil code themselves and those brought by the first Polish Act of 31.01.1980 on the Protection and Shaping of the Environment¹⁰⁴. In the opinion of W. Radecki, this relationship can be demonstrated by indicating:

- a) the manner of formulating the preventive and liability claim in Article 323 of the AEL which meets the doctrinal requirements set on the basis of the older case-law in relation to a clear admission of a claim for the mounting of an installation or equipment to prevent damage,
- b) the authorisation of a selfish action to protect the environment as a common good in Article 323(2) of the Act, in the clear aftermath of the discussions held in relation the failure of the Supreme Court to admit a claim for the protection of the environment as a common good,
- c) the expansion of the risk-based liability for damages in Article 324 of the Act, taking into account the case-law achievements in the 1970s and 1980s,
- d) making the civil liability for damages independent of compliance or failure to comply with emission standards in Article 325 of the Act, in consequence of the direction of case-law which made it independent of compliance or failure to comply with environmental quality standards.

In his conclusion, W. Radecki emphasises that the civil-law solutions introduced by the legislator enable the courts which rule in civil cases to play some moderate role in environmen-

¹⁰² The consolidated text of 2017, Official Journal of the Laws, Item 519, as amended.

¹⁰³ The consolidated text of 2017, Item 459, as amended.

¹⁰⁴ The consolidated text of 1994, Official Journal of the Laws, No. 49, Item 196, as amended (repealed).

tal protection. However, he notes that in the published SC case-law the only civil-law provision which the courts have considered to a greater extent is Article 129 of the AEL concerning claims related to the establishment of a restricted use area¹⁰⁵. Somewhat “on the occasion” of settling such disputes the courts mention the significance of Articles 324 and 325 of the AEL, but without performing any deeper analysis thereof. It may be conjectured that perhaps such a need has not come about yet. Moreover, there are also claims under Article 328 of the AEL for the limitation of advertisements and promotion which do not comply with the principles of environmental protection, which have been noted in the case-law of the courts, but this does not change the general opinion that the civil-law problems of environmental protection have rather scarcely been considered in the case-law of the courts. It also necessary to mention several important rulings on the civil liability for hunting damage.

Exploring the role of the case-law of common courts in criminal cases related to environmental protection, W. Radecki clearly distinguished between two ranges of problems:

- a) What is the actual role of this case-law?
- b) What can be expected in theory from common courts which rule in criminal cases related to environmental protection?

The first range of problems was slightly reflected (while excluding the criminal cases in cases related to forests, hunting and fisheries) in the published case-law of the courts.

After ordering the problems of the criminal responsibility for crimes against the environment in Chapter XXII of the Criminal Code of 6.06.1997¹⁰⁶ (hereinafter referred to as the CC) not a single ruling on crimes under Articles 181-188 of the CC was found in official (or semi-official) collections of the Supreme Court rulings. In the opinion of W. Radecki, it can, therefore, be concluded that the institution of the criminal responsibility for crimes against the environment is completely “dead” in the case-law of the Supreme Court. This does not mean that it is “dead” in general, since all the studies show that cases of crimes against the environment are considered in the lower-instance courts. It can only be guessed why none them has reached the Supreme Court. He conjectures that the penalties imposed by common courts are simply so lenient that the cases end in the lower-instance courts (in a district court or, at most, in a regional court) and do not reach the Supreme Court.

¹⁰⁵ These are special areas established around certain types of installations under Article 135 of the AEL. In these areas, general environmental quality standards do not apply.

¹⁰⁶ The consolidated text of 2017, Item 2204, as amended.

In the opinion of W. Radecki, more constructive conclusions can be drawn regarding the impact of this case-law on the theoretical assumptions of the criminal responsibility for crimes and misdemeanours against the environment. However, the purpose of such considerations is not to interpret the provisions of substantive law, but to answer a more general question whether the provisions of substantive law, in particular, those of adjective law, enable the courts to play an important role in the protection of the environment. In the opinion of W. Radecki, the answer is affirmative.

He notes that the Polish regulations which have been aligned to meet the requirements set by European law essentially enable the imposition of “effective, proportionate and dissuasive penalties”, as required by Directive 2008/99/EC. At the same time, criminal sanctions are flexible enough to enable the criminal regulations to perform a compensatory function, too, through the imposition of an obligation to remedy damage or to take other measures contributing to environmental protection in relation to a conditional discontinuation of a proceeding or a conditional suspension of a punishment. Perhaps the legislator underestimated the social harmfulness of actions against the traditionally conceived nature, perhaps the sanctions laid down in Article 181(2), (3) and (5), Articles 187 and 188 of the CC are too lenient, but this does not change an essentially positive assessment of the whole of the criminal provisions in Chapter XXII of the CC; especially if consideration is given to the provisions in the general part of the CC and the procedural arrangements, including the strengthening of the procedural position of the Inspectorate for Environmental Protection.

In the opinion of W. Radecki, the regulations on the responsibility for misdemeanours in the field of environmental protection should also be appreciated. The very concept of the responsibility for misdemeanours which, in accordance with the Constitution and the applicable procedural regulations (the Misdemeanour Procedure Code of 24.08.2001¹⁰⁷) is a sui generis “replica” of the criminal responsibility for crimes, may give rise to some doubts related to the pace of proceedings and their costs. Nevertheless the entrustment of rulings in cases of misdemeanours (of course, apart from the ticket-based procedure) exclusively to the courts merits a positive assessment from the point of view of procedural guarantees to which the accused are entitled. The conferment of the powers of the public prosecutor to the Inspectorate for Environmental Protection in all the cases of misdemeanours against the

¹⁰⁷ The consolidated text in the Official Journal of the Laws of 2018, Item 475.

environment should be especially appreciated. The instruments of misdemeanour law are reasonably addressed, although the case-law of the courts provides no information whether they are used. In practice, there is a tendency for the ticket-based procedure to be used as widely as possible, which is understandable, and the introduction of a sort of schedule of ticket rates at the Inspectorate for Environmental Protection is a justified solution. Even if the ticket-based procedure fails, the regulations on the implementation of a misdemeanour proceeding before the court merit a positive assessment. Formulating this conclusion, W. Radecki admits that this is a theoretical conclusion which is neither refuted nor confirmed by the ruling practice, since it has not proved possible to determine what it really is like.

10. Environmental protection in the case-law of administrative courts

The case-law of the administrative courts in cases related to environmental protection was analysed according to the following thematic scheme: new investment projects, nature conservation, water protection and management, emissions and waste, hunting and fishing, charges and taxes, along with administrative fines.

This case-law can be characterised as remaining quite “prosaic” in a sense, since in their activities the administrative courts focus on a review of the current activities of the public administration (disputes arising in respect of them), whereas commentaries with greater theoretical importance, made either in passing with regard to the considered cases or in the resolutions of the Supreme Administrative Court, appear less frequently. Its basic importance should be primarily attributed to the aspect of unifying the decision-making practice of the public administration authorities.

Passing to an evaluation of the achievements of the administrative courts related to this scope of matters, the question needs to be posed whether it demonstrates a certain specificity against the background of the whole of rulings by these courts. It seems that it does not show such a distinctness either in technical legal terms or in axiological terms. It should also be noted that there is no correlation between the intensity of rulings issued by the courts and the importance of environmental interests which appear in the cases considered. Although certain issues appear more frequently, but their causes are of a different nature. Four of them can be indicated.

Firstly, the rulings passed reflect the occurrence of certain objective phenomena in the functioning of the state. An example of this can be the *sui generis* asymmetry of judgments

and orders in cases related to the discharge of wastewater. The largest number of judgments and orders (almost 70) were passed in the period from 2008 to 2013, referring to the discharge of wastewater (including rainwater and meltwater) into ditches and to land rather than directly into waters. This was related to two processes: the ongoing urbanisation of the country and the implementation of the government programme to build roads and motorways. The drainage of rainwater and meltwater is one of the requirements of the implementation and maintenance of such sites in good technical condition and since in the areas taken up by investment projects, as a rule, there is no (permanent or only temporary) rainwater drainage system; therefore, the available solution to the problem is to discharge them into inland surface waters or to land. In the former case (the discharge into waters), it is most often done indirectly, i.e. through ditches (these are often land amelioration ditches) which as a receiving medium are treated in regulations in the same way as land. There are distinctly fewer rulings on the direct discharge into waters. It is somewhat surprising to see the negligible presence of cases relating to the wastewater discharge into wastewater collecting systems in the case-law of the administrative courts. An analysis of the regulations on these issues demonstrates that there are many problems in this scope, originating from both a coincidence of the provisions of different statutes which are not sufficiently correlated (particularly the Act of 18.07.2001 on Water Law¹⁰⁸ and the Act of 7.06.2001 on Public Water Supply and Public Wastewater Collection¹⁰⁹) and editing errors.

Secondly, the more frequent presence of certain types of cases is related to the degree of procedural complications which can be found in regulations. Even if environmental law is not the only example which illustrates such a thesis, it certainly is the most striking example. This the case, in particular, with rulings on the environmental impact assessment procedure; also because this institution is of European origin and has had a relatively short legislative history; therefore, it can be classified to the category of a legislative novelty (see more below).

J. Jerzmański gives much consideration to the presence of problems related to environmental impact assessments in the case-law of the administrative courts. In his view, the issues of key importance which also recur in rulings on a number of administrative decisions in the field of emissions law include the problem of qualifying the parties to proceedings (or

¹⁰⁸ The consolidated text in the Official Journal of the Laws of 2017, Item 1121 (the Act was repealed and the new Act of 20.07.2017 is in effect, Official Journal of the Laws, Item 1566, as amended).

¹⁰⁹ The consolidated text of 2017, Item 2180.

entities with the rights of a party). In this scope, the courts have first of all analysed the issue of the demonstration of a legal interest in proceedings requiring public participation. In his opinion, particularly important rulings are those that emphasise the differences between an individual interest and a public interest (see e.g. File No. II SA/Gd 715/10 – the judgment of the Provincial Administrative Court in Gdańsk; File No. II OSK 3/11 – the judgment of the Supreme Administrative Court). A number of rulings consider the legal position of an environmental organisation. An example of a decision with large practical significance is the order of the Provincial Administrative Court in Rzeszów (File No. II SA/Rz 547/15) in which the Court considered the notion of a statutory activity. Quite arbitrarily, it ruled that in order to be classified as an environmental one, an organisation had to carry out its statutory activity in the field of environmental protection or nature conservation for at least 12 months before the initiation of a given proceeding requiring public participation. It is also important to consider rulings on the legal status of foundations. In this scope, there was a characteristic evolution of views which was crowned by the resolution of 12.12.2005 adopted by 7 judges of the Supreme Administrative Court.

Moreover, the environmental impact assessment procedure has also been the subject matter of a number of rulings which also involved other issues. They included the problems of: (1) consistency with other regulations on environmental protection, (2) the classification of projects, (3) the role of approving authorities, (4) the legal character of the environmental decision (which sums up in a way the results of an environmental impact assessment), (5) the grounds for its issue, (6) the specificity of an assessment for a Natura 2000 site and many others.

J. Jerzmański notes that in certain categories of cases that are related to this procedure there is in place a well-established line of the case-law, which has a stabilising effect on the administrative practice.

A. Habuda points out the importance of the environmental impact assessment procedure for the functioning of nature conservation forms. In particular, he discusses 9 rulings of the Provincial Administrative Courts and the Supreme Administrative Court concerning the principles and procedure of the impact assessment of a proposed project on a Natura 2000 site. In these rulings, the subject matter of judges' examination includes the criteria applied to classify projects as likely to potentially have a significant impact on a Natura 2000 site, in-

cluding the role which is to be played in this scope by the prevention and prudence principles. The comments made by J. Jerzmański that special consideration should be given to those rulings that directly refer to the principles of environmental protection, especially the prudence principle as one of the leading rules of environmental law, also correspond to the above observations¹¹⁰.

The phenomenon of a legislative “novelty” is the reason for higher intensity of rulings in certain thematic ranges. Essentially, each new regulation can be so called; therefore, for the sake of clarity, this category will include primarily those solutions that have had no counterpart in earlier regulations or represent a departure from the earlier legislative tradition. Important elements of this group are new institutions in the Polish environmental law system, usually originating from European law.

In this context, J. Jerzmański points out the rulings on the BAT, an institution which was modified through the adoption of Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control)¹¹¹. He also notes that the incorporation of certain institutions of EU and international law into Polish law has been quite slow and long. This is confirmed by numerous rulings on environmental impact assessments and the related procedure requiring public participation.

In turn, a characteristic example of the effect on the case-law of new solutions which had no earlier counterpart in national law were the disputes caused by a modification of the notion of the party, consisting in a departure from the solutions known in the Administrative Procedure Code¹¹² (Article 28). Such patchy amendments were made to the AEL (with respect to the emission permit), the Act on Construction Law (here a legal interest was limited to the impact area of a built site) and in the Act on Waste (permits for waste treatment). These amendments caused procedural problems. In particular, this concerned the determination of the range of the parties to proceedings in the situation where so-called extraordinary procedures were applied (i.e. in order to resume a proceeding or to invalidate a decision)¹¹³.

¹¹⁰ E.g. File No. II SA/WR 131/14 – the judgment of the Provincial Administrative Court in Wrocław; File No. II SA/Po 446/14 - the judgment of the Provincial Administrative Court in Poznań.

¹¹¹ E.g. File No. II OSK 577/12 – the judgment of the Supreme Administrative Court.

¹¹² The consolidated text in the Official Journal of 2016, Item 23, as amended.

¹¹³ E.g. File No. IV SA/Wa 2867/13 - the judgment of the Provincial Administrative Court in Warsaw; File No. II SA/Łd 171/15 - the judgment of the Provincial Administrative Court in Łódź; File No. II SA/Bk 1149/14 - the

However, sometimes legislative novelties, also including those originating from European norms, did not contribute to increasing the number of cases considered by the administrative courts. On the contrary, the situation tended to be quite different, since the case-law in some cases turned out to be very scarce, if not negligible. Paradoxically, this was the case with those legal solutions that posed the greatest interpretation difficulties. An example of this can be e.g. the provisions of the Act on Water Law concerning river basin management plans adopted under the provisions of the Water Framework Directive. Even if certain rulings contained references to these plans, they were superficial and cursory. Since the legal status had been poorly explored and was hardly clear, it could have been expected that exactly the case-law of the administrative court would have contributed to its ordering. However, this has not happened. J. Rotko has expressed his view that the legal constructions created by the European legislator have reached a degree of complexity which has deprived them of practical usefulness and caused them to rather resemble the instruments used in a scientific description of reality. The legal appraisals formulated by the administrative courts should use to a greater extent the legal constructions and the conceptual system transferred into the Act on Water Law from the Water Framework Directive. In case serious doubts persist the courts should be encouraged to submit an application to the CJEU for the issue of a ruling in the prejudicial procedure.

In this context, J. Jerzmański notes that in general the prejudicial questions of Polish courts are relatively few, although their number systematically grows¹¹⁴. Characteristically, in different data and publications there are quite substantial discrepancies in terms of their number (varying between about 70 and 17). It can be noted, however, that they practically do not include questions concerning investment project-related issues or the discharge of pollutants.

A fourth feature of the case-law of the administrative courts relating to environmental protection is the regular presence of the issues related to public tributes. Their large number can be found in Polish environmental law (at least in eleven statutes on broadly conceived environmental protection), thus conferring a distinct nature to this law against the regula-

judgment of the Provincial Administrative Court in Białystok; File No. II SA/Łd 563/14 - the judgment of the Provincial Administrative Court in Łódź; File No. II SA/Łd 312/15 - the judgment of the Provincial Administrative Court in Łódź.

¹¹⁴ J. Barcik, Pytania prejudycjalne polskich sądów (The Prejudicial Questions of Polish Courts – in Polish), *Iustitia* 2013, No. 3.

tions in other countries. The cases in this scope also show a characteristically ample CT case-law (compared with other ranges of environmental law) to which the administrative courts often make reference. This confirms its key significance, in terms of the political system, for the consolidation of environmental law within the limits set by the principle of the rule of law.

These problems have been exhaustively evaluated by B. Draniewicz, who has distinguished between the issues related to fees for the use of the environment and administrative fines. An issue which is common to both and poses a number of interpretation doubts has turned out to be, among others, the issue of references to the provisions of the tax regulations setting the tax liabilities. Another leading strand of this case-law is the legal character of fees for the use of the environment. As noted by B. Draniewicz, the view clearly dominates that such fees are a sort of a public tribute. This view is also shared by the CT, at least since the judgment of 17.12.1991, where it indicated that fees for the use of the environment were “public-law burdens”. The CT statements concerning the legal nature of administrative fines have turned out to be significant in terms of both theory and practice. In this context, B. Draniewicz points out the special role which has been played by the CT judgment of 7.07.2009 on the constitutionality of fines for violations of the regulations on fisheries. In the judgment, the Tribunal stated that such fines were administrative penalties which did not fall within the scope of criminal law. For this reason their imposition by administration authorities by way of an administrative decision may not give rise to objections in terms of constitutional law (W. Radecki also points out the significance of this judgment).

The CT upheld the case-law line described above in its judgment of 15.10.2013, too. B. Draniewicz notes the legitimacy of the argument which the CT used, according to which the nature of criminal sanction *sensu stricto* was conferred to an administrative fine by its excessive or drastic level rather than by its essentially punitive character. The admissibility of the application of administrative fines in response to a violation of statutory obligations may not be called in question. However, their every existence does not prejudge the presence of criminal responsibility *sensu stricto*. On the other hand, the CT found that, even if a fine did not constitute a criminal sanction *sensu stricto*, it might fall within the range of the notion of “criminal responsibility” within its constitutional meaning (Article 42), which must be understood autonomously. As a result, the constitutional “criminal responsibility” is any punitive responsibility with a wider range than the scope laid down in the Criminal Code, also includ-

ing other forms of legal responsibility, which not only involve the imposition of penalties on individuals¹¹⁵ or the application of any punitive measures¹¹⁶, but also any *sui generis* criminal-law mechanisms¹¹⁷.

A separate group of problems evaluated by B. Draniewicz is related to the principles of the imposition and enforcement of administrative fines which are reflected in the case-law of both the CT and the administrative courts. Finally, he analyses two ruling trends related to the possibility of examining the reason for failure to hold a relevant decision as the ground for imposing a higher fee. The rulings within the first trend refer to the resolution of 21.12.1998 adopted by seven judges of the Supreme Administrative Court (SAC). They emphasise the absolute character of the responsibility borne. In turn, the rulings within the second trend shift the emphasis towards objective responsibility. The first trend includes, *inter alia*, the SAC judgment of 17.03.2006. It was ruled that Article 276(1) of the Act on Environmental Law did not make the obligation to incur increased fees dependent on the reasons for which a user of the environment failed to hold such a permit. The judgment of 25.11.2009 was similar.

The second trend may be illustrated e.g. by the judgment of 1.06.2010 in which the SAC ruled that the determination of the meaning of the notion of “the absence of the required permit” should be based on systemic interpretation. Therefore, it is necessary to take into account the reason for failure to hold a permit for the emissions of gases and particulate matter into the air and to determine the circumstances which caused this failure (the SAC judgment of 04.2010 and the judgment of the Provincial Administrative Court in Łódź of 19.05.2008 were similar).

B. Draniewicz considers that the CT statement in the justification of its judgment of 1.7.2014 demonstrated the evolution of views from an absolute model towards objective responsibility. Its leading concept was that an entity which failed to meet its administrative obligation had to be able to free itself from the obligation by demonstrating that the failure to meet the obligation resulted from circumstances for which it was not responsible (force majeure, state of necessity, actions of third parties for which the entity was not responsible).

¹¹⁵ The CT judgment of 3 November 2004, File No. K 18/03, OTK ZU 103/10A/2004.

¹¹⁶ The CT judgment of 8 January 2008, File No. P 35/06, OTK ZU 1/1A/2008.

¹¹⁷ The CT judgment of 18 November 2010, File No. P 29/09, OTK ZU 104/9A/2010.

11. The influence of the ruling activity of courts and tribunals on environmental science and legislation

The influence of the case-law of the administrative courts as well as the Supreme Court (SN) and the Constitutional Tribunal (CT) can be primarily reduced to the identification of problems by legal theory and the ordering of reflections on these problems.

The flow of views between the ruling panels of the administrative courts and representatives of science is greatly diversified. There are fields in which this dialogue takes place, but also ones where such two-way communication is hardly present, while references to the literature are illustrative and complimentary in character (e.g. the case-law on water protection and water management). The reason for this is simply a lesser interest of science in certain fields of environmental law.

It seems that the most intensive two-way communication between the CT, SC and the administrative courts of both instances, on one side, and the representatives of the doctrine, on the other side, takes place in cases concerning public tributes; in particular, with regard to the fees for the use of the environment and administrative fines. It is manifested by arguments cited by courts and coming from the literature on the subject which appear in the justifications. They contribute to disseminating a discursive style of justification in the case-law, intended to consolidate the conviction that a resolution which has been adopted has been supported by “the specification of the grounds for choice” and “is the best possible one”¹¹⁸. This process merits a positive opinion, given the fact that it is becoming part of a democratic discourse, as already mentioned.

Irrespective of this context of two-way communication, the judgments and orders of the CT and the administrative courts will also play a specific role of source of knowledge of law (the knowledge of the manner in which it is to be understood) and, in exceptional cases, the potential role of an independent source of law. The other context is related to the lawmaking by judges and lawmaking role of rulings, which constitute one of the most important issues of legal theory relating to the administration of justice.

¹¹⁸ L. Leszczyński, *Stosowanie i wykładnia prawa administracyjnego (The Application and Interpretation of Administrative Law – in Polish)*, [in:] L. Leszczyński, B. Wojciechowski, M. Zirk - Sadowski, *Wykładnia w prawie administracyjnym. System Prawa Administracyjnego (Interpretation in Administrative Law. The Administrative Law System – in Polish)*, Vol. 4, Warsaw 2012, p. 50 et seq.

In Poland, common law is not directly recognised as a separate type of law. On the other hand, however, there is no doubt that the activities of courts, particularly, the CT and SC, have a creative character and sometimes a *de facto* lawmaking one¹¹⁹. The confusion related to this has been aptly commented on by Z. Kmiecik, who has said that “irrespective of how we call the judges’ law within the jurisdiction of the administrative courts (whether we define it as “a binding source of practice” or an unorganised source of administrative law, or whether we confer thereto the status of “secondary norms integrating” the particular components of the legal order in effect), the questioning of its legal existence would demonstrate a lack of realism”¹²⁰.

The statements of the CT, SC and SAC which verified views on contentious issues which were revealed in the case-law of lower-instance courts are important in practical and theoretical terms. Among others, it is the administrative courts that draw on these statements. On the other hand, it can be clearly seen that the views expressed in particular by the SC and SAC, but also by the CT are sometimes inconsistent; therefore, it is not always possible to say that there is a case-law in place which does not give rise to any doubts. We have already mentioned discrepant judgments concerning e.g. the legal character of the fees for the use of the environment.

In this context, it is important to mention the resolutions adopted by the SAC which are considered to be the most important institution contributing to the uniformity of the judicial case-law. It is a form of activity which is carried only by the SAC sitting in a panel of seven judges, in a panel constituting the whole chamber or in a full panel. The resolutions may have a dual character: they may be resolutions with a general character, abstracting from the facts of a specific administrative case, or ones addressing the issues which revealed themselves in a specific administrative case. The purpose of the former ones is to clarify provisions of law the application of which has involved discrepancies in the case-law of the administrative courts. In the literature, they are called “actual precedents”; although they are

¹¹⁹ T. Stawecki, P. Winczorek, *op.cit.*, p. 137.

¹²⁰ Z. Kmiecik, *Prawotwórstwo sędziowskie w sferze jurysdykcji sądów administracyjnych (Lawmaking by Judges Within the Jurisdiction of the Administrative Courts – in Polish)*, PiP 2006, No. 12, p. 34 et seq.; Z. Kmiecik, *Precedens sądowy - istota i znaczenie (A Court Precedent – The Essence and Meaning – in Polish)*, ZNSA 2011, No. 5 (38), p. 9 et seq.

not formally binding, their force is manifested in that they can be effectively cited in an appeal against a SAC ruling¹²¹.

Both types of resolutions have also appeared in environmental cases discussed in the present volume. Among others, references have been made to them by B. Draniewicz and J. Jerzmański. An example of a resolution adopted in a specific case is the resolution of 21.12.1998 by seven SAC judges, which paved the way for certain relativisation of the grounds for the application of administrative fines, which, in principle, have an objective character and do not provide for the existence of grounds for indemnity (either in view of the circumstances for which the perpetrator of a delict is not responsible, or the circumstances which relate to such an entity, in particular, its "fault"). In contrast, the SAC noted that in certain situations the absolute imposition of sanctions might be in contradiction with the general principles; in particular, with the principle of the rule of law.

Discussing the importance of resolutions of this type, B. Draniewicz emphasises that, however, the range of their impact (i.e. the interpretation applied in such resolutions) was wider and went beyond a specific case. As a rule, the interpretation presented in the justification was also taken into account when other cases were examined and the cases where the competent authority ignored it tended to be exceptions¹²². The resolutions which clarified essential legal doubts thus became a significant part of the process of unifying the judicial case-law, resulting from the authority of an extended panel and the legal arguments which were presented and meeting with the approval of the doctrine. On this occasion, B. Draniewicz also notes that it was exactly the views of the representatives of science that clearly inspired the SAC judges¹²³.

An example of an abstract resolution discussed by B. Draniewicz is the SAC resolution of SAC z 11.12.2011. He emphasises that the hypothesis formulated in the resolution was much broader than usual in the case of resolutions concerning doubts appearing in a specific ad-

¹²¹ J. Zimmermann, *op. cit.*, p. 393.

¹²² A. Kabat, *Rola Naczelnego Sądu Administracyjnego w kształtowaniu jednolitego orzecznictwa sądów administracyjnych (The Role of the Supreme Administrative Court in Shaping the Uniform Case-law of the Administrative Courts – in Polish)*, ZNSA 2010, Nos. 5-6, p. 197.

¹²³ E. Kaleta-Jagiełło [in:] J. Sommer (Ed.), *Komentarz do ustawy o ochronie i kształtowaniu środowiska (A Commentary on the Act of the Protection and Shaping of the Environment – in Polish)*, Wrocław 1995, p. 307; W. Radecki, *Prawo ochrony środowiska w praktyce (100 pytań – 100 odpowiedzi) (Environmental Law in Practice (100 Questions – 100 Answers) – in Polish)*, Wrocław 1994, pp. 41-43.

ministrative case. In this case in question, it was formulated as follows: “the reason for the absence of a permit may be of significance for the imposition of an increased fee”.

The case-law of the administrative courts has had rather a slight effect on the legislative process related to environmental protection, as confirmed by evaluations of this impact made in the literature on the subject. In particular, R. Hauser notes that “the ruling activity of the administrative courts may and should influence amendments to legislation”. The justifications of judgments repeatedly contain remarks addressed to the legislator, indicating different deficiencies and defects of regulations (the ambiguity of a provision, the absence of internal consistency and legislative failure). In spite of this, the cases where the case-law actually initiated legislative changes were incidental (most often, in the scope of tax law)¹²⁴. It should be noted, however, that the SAC case-law resulted in a significant amendment to new Act on Water Law, which was adopted on 20.07.2017. Its Article 216(1) laid down the principle that water facilities or their parts as well as built structures and their parts situated on land covered by inland flowing waters were an object of ownership which was separate from this land. This principle was an application of the SAC judgment of 16.01.2009¹²⁵ which determined the substantive-law status of water facilities. Whereas the first-instance court found that a weir on a river was part of the land covered by inland flowing water, the SAC questioned it and ruled that the Water Law provided for an exception from the rule *superficies solo cedit* – the ownership of water (in fact, the ownership of the land under water) did not translate into the ownership of water facilities.

12. Preferred types of judicial interpretation of the provisions of environmental law

In their evaluation of the preferred types of interpretation of law, practically all the authors have found that judicial rulings are dominated by linguistic interpretation which is supported by interpretation with a systemic and structural character. Systemic and axiological as well as purposive and functional interpretations are also important. In this context, B. Draniewicz notes that systemic and axiological as well as purposive and functional interpretations fall rather within the competence of the CT and SAC. In turn, the Provincial Administrative Courts mostly follow linguistic interpretation, supported by interpretation with a systemic and structural character; which does mean that this is an absolute principle. As an ex-

¹²⁴ R. Hauser, *Orzecznictwo sądowoadministracyjne a proces legislacyjny The Case-law of Administrative Law and the Legislative Process – in Polish*, ZNSA 2011, No. 6, pp. 10, 12, 17.

¹²⁵ File No. II OSK 1874/07.

ample, he cites the judgment of 20.06.2013 of the Provincial Administrative Court (PAC) in Warsaw (File No. IV SA/WA 600/13) the justification of which indicated that it was impossible to reconcile the principle of the democratic rule of law with the mechanical and rigorous regulation of the legal situation of the obliged entity and the determination of the rate of an administrative sanction irrespective of the reasons which caused the failure to meet the legal obligation.

In general, these opinions correspond with the doctrinal views, although they do not show new trends to which more and more attention has been paid in the most recent literature. Among others, M. Zirk-Sadowski discusses the changes which take place in the manner of perceiving the principle of primacy of linguistic interpretation. He emphasises that recent years have seen a clear change to the principle that the results of linguistic interpretation should be preferred and that has happened as an effect of the works by L. Morawski and M. Zieliński. At present, it is claimed that the adoption of the principle of primacy of linguistic interpretation does not mean the absence of the obligation to apply comprehensive interpretation. The preferred view is that “priority should be given to the result of linguistic interpretation, but on the condition that comprehensive interpretation of the text is carried out previously, i.e. consideration is also given to systemic and functional aspects”. This Author also underlines the substantial reduction of the view that the linguistic meaning of a legal text is the limit of interpretation which should not be exceeded. This paves the way for a new look at judges’ position in “the quickly evolving concept of the division of powers”¹²⁶.

¹²⁶ M. Zirk - Sadowski, *Problemy wykładni językowej w prawie administracyjnym (The Problems of Linguistic Interpretation in Administrative Law – in Polish)*, [in:] *Wykładowa w prawie administracyjnym. System Prawa Administracyjnego (Interpretation in Administrative Law. The Administrative Law System – in Polish)*, Vol. 4, Warsaw 2012, pp. 205, 207 et seq.